

Minnesota Attorney General: Administrative Rules Proceedings

Copyright Notice:

This material may be protected by copyright law (U.S. Code, Title 17). Researchers are liable for any infringement. For more information, visit www.mnhs.org/copyright.

Version 3
August 20, 2018

#470 Board of Accountancy

RULES REVIEW CHECKLIST

DATE RULES RECEIVED 9-22-78 Temporary Rule _____

Resubmitted and Received 3-15-79

DUE DATE 10/12/78 3/23/79

a. Returned to Agency w/o filing w/Secy of State 10/12

b. Approved 3/26 Date Sent Back to Agency _____

- -

1. Rules as Adopted ✓
2. Rules as Proposed ✓
3. Certificate of Board's Authorizing Resolution, where applicable ✓
4. Order for Hearing ✓
5. Notice of Hearing ✓
   (i) Sufficiency ✓
6. Secretary of State's List ✓
7. Certificate of Acquisition of Secretary of State's List ✓
8. Affidavit of Mailing ✓
   (i) At least 30 days prior to hearing ✓
9. Statement of Need and Evidence ✓
10. Hearing Examiner's Report ✓
11. Agency's Findings of Fact ✓
12. Certificate of Board's Resolution Adopting Rules, where applicable ✓
13. Order Adopting ✓
14. Report of Chief Hearing Examiner ✓
    (i) Finding of No Substantial Change ✓
    (ii) Permission to Incorporate by Reference, where applicable N.A.
15. Certificate of Compliance with Rulemaking Procedures ✓
16. Copy of Notice of Intent to Solicit Outside Opinion, where applicable ✓
17. Petition by Public, where applicable N.A.

OUR FILE NO. 470

Barry R. Greller
Special Assistant
Attorney General

March 26, 1979

- Board of Accountancy Governing Professional Conduct of Certified Public Accountants

cc: Duane Harves

STATE OF MINNESOTA
BOARD OF ACCOUNTANCY

In the Matter of the Proposed Amendment of the Rules of the State Board of Accountancy Governing Professional Conduct of Certified Public Accountants.	Further Comments of the Antitrust Division H.X.EX. NO. ACCY - 78-001-SM

INTRODUCTION

Pursuant to the request of the Attorney General's Office, which has the statutory duty to review proposed agency rules as to "form and legality,"[1] the Antitrust Division hereby submits further comments in connection with the above-captioned matter. These comments are directed specifically to Proposed Rule 408 governing solicitation by Certified Public Accountants.

I. STATUS OF THE RULES

In accordance with the provisions of the Administrative Procedures Act,[2] the State Board of Accountancy has held a public hearing before a Hearing Examiner and received comments concerning the proposed rules. On June 8, 1978, the Hearing Examiner issued his Report in which he critized the provisions of Rule 408(c) governing solicitation by direct personal communication.

In response to the Hearing Examiner's Report, the Board has amended Rule 408 to clarify its meaning, but the Board has rejected the recommendations of the Hearing Examiner that Proposed Rule 408(c) not include restrictions on direct written communication with potential clients.

II. ANALYSIS OF PROPOSED RULE 408

Proposed Rule 408 defines "solicitation" to mean any "direct personal communication." "Direct personal communication" is defined as "any in-person, written, telephonic, or similar

---

1. Minn. Stat. § 15.0412 (1977 Supp.)
2. Id.

communication directed to a specific recipient or tailored in content to a specific recipient." Solicitation is thus distinguished from advertising which is considered to be "public communication" and is regulated by Rule 404.

Rule 408 prohibits three types of solicitation. Subsection (a) prohibits false, fraudulent, misleading, deceptive, or unfair statements or claims. Subsection (b) prohibits the use of coercion, duress, compulsion, intimidation, threats, overreaching or vexatious or harassing conduct. Subsection (c) prohibits solicitation of new clients in all circumstances except where the potential client has invited a communication or is seeking to secure professional services and has not yet engaged another accountant to perform them.

In analyzing whether Rule 408 is within the permissible scope of state regulation of advertising and solicitation, certain guidelines can be found in the companion cases of Ohralik v. Ohio State Bar Association, 46 L.W. 4511 (May 30, 1978), and In re Edna Smith Primus, 46 L.W. 4519 (May 30, 1978). Ohralik involved a classic case of "ambulance chasing" by an attorney, who solicited accident patients as contingent fee clients. In Ohralik, the Supreme Court held that "the Bar...acting with state authorization...constitutionally may discipline a lawyer for soliciting clients in person for pecuniary gain, under circumstances likely to pose dangers that the state has a right to prevent." 46 L.W. 4512.

In Primus, the Court was faced with a lawyer offering free legal services by letter through the American Civil Liberties Union to a woman who was sterilized as a condition of receipt of Medicaid. The Court held that the application of state disciplinary rules to solicitation by letter on behalf of a nonprofit organization violated the First Amendment right of associational activity to further political and ideological goals. The Court distinguished Ohralik because the Primus letter was not an "in-person solicitation for pecuniary gain under circumstances likely to result in adverse consequences..." 46 L.W. 4625.

A. Proposed Rule 408(a) and (b)

In reaching its decision in Ohralik, the Court carefully examined the particular state interests involved in regulating the type of conduct engaged in by the attorney:

> "The state interests implicated in this case are particularly strong. In addition to its general interest in protecting consumers and regulating commercial transactions, the state bears a special responsibility for maintaining standards among the members of the licensed professions." 46 L.W. 4514.

The Court did not discuss or evaluate the general evils to which solicitation may be subject, because it was conceded that "the state has a legitimate and indeed 'compelling' interest in preventing those aspects of solicitation that involve fraud, undue influence and intimidation, overreaching and other forms of 'vexatious conduct'." 46 L.W. 4515.

Relying on the Court's opinion in Ohralik, the Antitrust Division acknowledges that the Board has a legitimate interest in preventing those types of solicitation which are prohibited by Proposed Rule 408(a) and (b). The Board has a legitimate interest in preventing fraudulent or misleading claims or the use of coercion, or intimidation in soliciting business. As the Ohralik opinion points out, the state's interest in preventing fraudulent and vexatious conduct is "compelling"; thus, such conduct may properly be proscribed whether "public or "private" or whether it is done in person, in writing, by telephone, or through other means of communication.

However, it should be noted that Rule 408(a) and (b) are little more than a repetition of Proposed Rule 404, which deals with advertising. Since advertising is in reality a type of solicitation, the Board may want to consider deleting Proposed Rule 408(a) and (b), and rely solely on Rule 404 to regulate both public and private solicitation.

B. Proposed Rule 408(c)

In contrast to subsections (a) and (b), Rule 408(c) is not directed at the prevention of fraud, influence or overreaching; rather, it seems directed at conduct which may provide potential clients with information about the availability and terms of professional services. Rule 408(c) would limit the free flow of information to members of the consuming public, and would further limit the free exercise of competitive activity among members of the accounting profession. As such, Rule 408(c) requires further scrutiny under the recent Supreme Court standards discussed above.

Rule 408(c) prohibits direct personal communication, which is defined to include both oral and written communications. In Ohralik, the validity of the professional rules prohibiting solicitation[3/] were not subject to attack, but rather the challenge was directed to the application of those rules to Ohralik's particular conduct. Thus, the issue addressed was whether the professional licensee's conduct under those specific circumstances could constitutionally be regulated by the state.

The Court began by establishing the nature of the state's interest involved, pointing out that the rules prohibiting solicitation are prophylactic measures whose objective is prevention of harm before it occurs. The Court then discussed several potential harms which might be present under the factual circumstances involved in the Ohralik case. The Court noted a potential for overreaching when a lawyer, trained in the art of persuasion, personally solicits an unsophisticated, injured or distressed lay person, particularly noting that the lay persons involved in this case were "victims of misfortune" after an auto accident. The Court also noted the

---

3. Ohralik was disciplined under the Ohio Code of Professional Responsibility, which is modeled after the Code of Responsibility of the American Bar Association. The applicable rules provided, in pertinent part:

DR2-103(a) "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.

DR2-104(A) "A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice..."

potential for invasion of the individual's privacy where in-person solicitation is aggressively pursued, pointing out in a footnote that "unlike the reader of an advertisement who can effectively avoid further bombardment of his sensibilities simply by averting the eyes, (citation omitted) the target of the solicitation may have difficulty avoiding being importuned and distressed even if the lawyer seeking employment is entirely well-meaning." 46 L.W. 4516, Ftnt 25. The Court noted a further state need to regulate in-person solicitation: "Unlike the advertising in Bates, in-person solicitation is not visible or otherwise open to public scrutiny. Often there is no witness other than the lawyer and the lay person whom he has solicited..." 46 L.W. 4516.

Having noted the potential harm which prohibitions on solicitation might be designed to prevent, the Court went on to discuss the application of such prohibitions under the particular facts involved in the Ohralik case. The Court referred to the timing of the solicitation, wherein the victims of an auto accident were approached shortly after the accident, while they were especially incapable of making informed judgments or assessing their own interests. The manner of the solicitation was also critized. The attorney had emphasized that his fee would come from any recovery, thereby implying cost-free services. He refused to withdraw upon request by one of the minor victim's mother, and he used a concealed tape recorder to collect evidence of oral consent given by the victims. Further, the place of the solicitation was noted as potentially improper, where one victim was solicited while still in the hospital. Under these circumstances the Court concluded that "the facts in this case are a striking example of the potential overreaching that is apparent in a lawyer's in-person solicitation of professional employment." 46 L.W. 4517. Thus, it was concluded that the application of disciplinary rules to the attorney under these facts was not unconstitutional.

Analysis of Ohralik reveals that the Court did not sanction a flat prohibition of all in-person solicitation by attorneys. State disciplinary action was found appropriate because the solic-

itation involved circumstances where harm was likely to occur. Thus, in evaluating the constitutionality of Rule 408(c), a determination should be made whether the rule addresses circumstances where harm is likely to occur. Rule 408(c) would prohibit solicitation of any new client under any circumstance where the potential client had not invited a communication or was not seeking professional services. Even if solicitation occurs in-person, the circumstances likely to surround solicitation by accountants may be sufficiently different from in-person solicitation by lawyers to erode the state's concern. Whether or not accountants are considered professionals "trained in the art of persuasion", their potential clients are not usually "victims of misfortune" being approached at times of injury or distress. Further, the enticement of a "cost-free" contingent fee arrangement is not likely to be used by an accountant. Thus, it cannot be concluded that all in-person solicitation by accountants would be fraught with the particular harms discussed in Ohralik. The Rules might more appropriately focus on regulating the time, manner, and place of in-person solicitation.

The application of Rule 408(c) to written solicitations is even more suspect. The Supreme Court considered a lawyer's solicitation of a particular client by letter in the Primus case. In Primus the lawyer offerred free legal services through the ACLU to a woman who was sterilized as a condition of receipt of Medicaid. The first amendment right at issue in Primus was not characterized as purely commercial activity, but rather as associational activity to further political and ideological goals.

However, in dicta the Court does compare the manner of solicitation in Primus with that in Ohralik.

> "The transmittal of this letter...as contrasted with in-person solicitation...involved no appreciable invasion of privacy; nor did it afford any significant opportunity for overreaching or coercion. Moreover, the fact that there was written communication lessens substantially the difficulty of policing soliciting practices that do offend valid rules of professional conduct." (citing Ohralik) 46 L.W. 4625.

Thus, the Court seems to conclude in Primus that the potential harms associated with in-person solicitation are not present when solicitation takes the form of written communication.

The Primus decision further capsulizes the extent to which the state may regulate solicitation by professionals.

> "The state's special interest in regulating members of a profession it licenses ...amply justifies the application of narrowly drawn rules to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence. A state may also forbid in-person solicitation for pecuniary gain under circumstances likely to result in these evils." 46 L.W. 4526.

To the extent that Proposed Rule 408(c) forbids solicitation of a new client under circumstances where the evils of deception or improper influence are not likely, it goes beyond the limits of permissible state regulation.

III. CONCLUSION

Ohralik and Primus establish that the state is justified in applying narrowly drawn rules to proscribe solicitation under certain circumstances likely to result in the evils of deception, overreaching, or improper influence. The provisions of Rule 408(a) and (b) are addressed to these legitimate state concerns; as such, they are appropriately applied to solicitation whether in-person, written, or telephonic. However, the proscription of Rule 408(c) is not addressed to circumstances likely to result in such harms; therefore, Rule 408(c) is inappropriate whether applied to written communications or in-person solicitation. We would recommend that Rule 408(c) be stricken from the proposed rules.

Dated: November 13, 1978

Stephen P. Kilgriff
STEPHEN P. KILGRIFF
Special Assistant
Attorney General

Sue Halverson
SUE HALVERSON
Special Assistant
Attorney General

Antitrust Division
720 American Center Building
St. Paul, Minnesota 55101
Telephones: 612/296-2622
296-0151

SF-00008-01

STATE OF MINNESOTA

OFFICE INFORMATION MEMO

TO	DATE	TIME
FROM	OF	
PHONE NO.	RECEIVED BY	

☐	Was here to see you	☐	Will call again
☐	Please call	☐	Returned your call

ACTION

- ☐ Review and see me
- ☐ Review and return
- ☐ Prepare reply for my sig.
- ☐ Reply and send me copy
- ☐ For your approval
- ☐ For your information
- ☐ For signature
- ☐ As we discussed
- ☐ As you requested
- ☐ Take appropriate action
- ☐ Notify staff
- ☐ FILE ☐ DISPOSE

REMARKS/MESSAGES

☐ OVER

PHOTOCOPY:

_____ NO. OF COPIES
_____ DATE NEEDED

- ☐ ONE SIDE ONLY
- ☐ HEAD TO HEAD
- ☐ HEAD TO FOOT
- ☐ COLLATE
- ☐ STAPLE
- ☐ (Other)_____

TYPING:

_____ DATE NEEDED

- ☐ ROUGH DRAFT
- ☐ SINGLE SPACE
- ☐ DOUBLE SPACE
- ☐ RUSH
- ☐ FINAL COPY
- ☐ CARBONS_____

RECYCLED PAPER

#470

RECEIVED
NOV 27
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

ADMIN 1000 (Rev. 1/78)

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL - Commerce

Office Memorandum

TO : LEE E. SHEEHY
Special Assistant
Attorney General

DATE: March 14, 1979

FROM : BARRY R. GRELLER
Special Assistant
Attorney General

PHONE: 9412

SUBJECT: IN THE MATTER OF THE PROPOSED AMENDMENTS OF THE RULES OF THE STATE BOARD OF ACCOUNTANCY GOVERNING THE PROFESSIONAL CONDUCT OF CERTIFIED PUBLIC ACCOUNTANTS

Enclosed herein for review by the Attorney General, please find the rules adopted by the State Board of Accountancy in the above-referenced matter.

Pursuant to your request during our telephone conversation of March 2, 1979, the Board delayed resubmission of these rules in order that the ten-day period for review on re-submission prescribed by Minn. Rules Atty Gen 305 would not begin to run at an inconvenient time. The Board also agrees that the ten-day period may be extended for such additional time as is necessary to complete review of these rules.

Pursuant to your memorandum of October 12, 1978, I am also enclosing a memorandum of the State Board of Accountancy regarding the legality of Rule 408. The Attorney General has previously received comments on this matter from the Antitrust Division of the Office of the Attorney General.

All relevant documents which were returned to the Board under cover of your memorandum of October 12, 1978, are enclosed. In addition, I am enclosing a certificate of a further resolution adopted by the Board of Accountancy on January 26, 1979, affirming its prior action with respect to the adoption of these rules.

Please feel free to contact me if you have any questions in connection with the resubmission of these rules.

BRG:sjg
Encs.

cc: Duane Harves
Hearing Examiner's Office

Stephen P. Kilgriff
Special Assistant
Attorney General

HE NO. Accy-78-001-SM

STATE OF MINNESOTA

BOARD OF ACCOUNTANCY

IN THE MATTER OF THE PROPOSED AMENDMENT OF THE RULES OF THE STATE BOARD OF ACCOUNTANCY GOVERNING THE PROFESSIONAL CONDUCT OF CERTIFIED PUBLIC ACCOUNTANTS

MEMORANDUM OF THE STATE BOARD OF ACCOUNTANCY REGARDING LEGALITY OF RULE 408 GOVERNING SOLICITATION BY CERTIFIED PUBLIC ACCOUNTANTS

This memorandum is submitted to the Office of the Attorney General on behalf of the State Board of Accountancy pursuant to the Attorney General's request for additional argument concerning the legality of Minn. Rule Accy 150, Rule 408, regulating solicitation by certified public accountants licensed to practice in this state.

I. INTRODUCTION

On May 17, 1978, the State Board of Accountancy held a public hearing before a hearing examiner regarding proposed amendments to its Rules of Professional Conduct, including the rules governing advertising and solicitation by certified public accountants. On June 8, 1978, the Hearing Examiner issued his report recommending that the rules be adopted by the Board subject to suggested modifications.

Among the modifications recommended by the Hearing Examiner was that proposed Rule 408, which restricts communications for the purpose of solicitation by certified public accountants, be limited to include only "in-person" communications. The proposed rule provided:

> Solicitation. A licensee shall not by any direct personal communication solicit an engagement to perform professional services (a) if the communication would violate Rule 404 if it were a public communication; or (b) by the use of coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct; or (c) where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such a communication or is seeking to secure the performance of professional services and has not yet engaged another to perform them.

The Hearing Examiner suggested that the term "direct personal communication" be replaced by the term "in-person communication" which, in the Examiner's view, would bring the rule squarely within the holding of recent United States Supreme Court decisions. The Hearing Examiner observed, in part, that the term "direct personal communication" might be read so broadly as to include mass direct-mailings or other forms of public communication which could not constitutionally be restricted under the decision in Bates v. State Bar of Arizona, 433 U. S. 350 (1977).

On July 28, 1978, the Board adopted the above-captioned proposed rules, with modifications. In responding to the Hearing Examiner's suggestions concerning Rule 408, the Board adopted Rule 408 as originally proposed but added the following clarifying definition of "direct personal communication" to the rule:

> The term "direct personal communication" as used in this rule means any in-person, written, telephonic, or similar communication directed to a specific recipient or tailored in content to a specific recipient.

This modification to the rule acknowledged the Hearing Examiner's concern that the proposed rule might be so vague as to include impermissible regulation of "public" communications. However, the Board went beyond the Hearing Examiner's suggestion that the rule be restricted to "face to face, telephonic or similar conversational contact between a potential client and the licensee or his agent" by including written communications within the scope of the rule.

In its Findings of Fact concerning Rule 408, the Board acknowledged that the question of state regulation regarding telephonic or written solicitation had been left open by the Supreme Court but found that many of the evils inherent in unsolicited face-to-face communications were also present in unsolicited telephonic or written communications. The Board concluded that under the present state of the law, regulation with regard to telephonic and written communications under Rule 408 was appropriate

and lawful.[1]

The rules as adopted by the State Board of Accountancy were approved by the Chief Hearing Examiner on August 18, 1978,[2] whereupon the rules were submitted to the Attorney General for review in accordance with Minn. Stat. §15.0412. Pursuant to the Attorney General's request for additional legal arguments concerning the legality of Rule 408, the Antitrust Division of the Attorney General's Office filed Further Comments, a copy of which was received by counsel for the Board of Accountancy on November 27, 1978. At a regularly scheduled meeting on January 26, 1979, the Board adopted a resolution affirming its prior resolution with respect to the adoption of Rule 408 and recommending that the rule be approved as to form and legality by the Attorney General. This memorandum is intended as a written statement of the Board's position as to why Rule 408 is a lawful and proper means of regulating the conduct of certified public accountants under existing judicial decisions.

II. ARGUMENT

The question presented is whether Rule 408, as adopted by the State Board of Accountancy, should be approved or disapproved by the Attorney General pursuant to Minn. Stat. §15.0412. Specifically, the Attorney General has requested further argument concerning the legality of the rule under recent decisions of the United States Supreme Court relating to the permissible scope of state regulation of commercial speech. The Board of Accountancy submits, by this Memorandum, that proposed Rule 408 is a proper and lawful rule within the scope of the Board's authority to regulate the conduct of certified public accountants under the existing case law. The Board also submits that any doubt concerning the legality

---

1/ Findings of Fact, dated July 28, 1978, at p. 2-3.

2/ Report of Chief Hearing Examiner, dated August 18, 1978.

of Rule 408 should be resolved in favor of approval of the rule in order that the possibility of judicial review of the rule's legality not be precluded.

A. Legality Of Rule 408.

Rule 408 has been adopted by the State Board of Accountancy pursuant to its statutory authority to regulate the professional conduct of persons practicing as certified public accountants in this state.[3/] As indicated in the Further Comments of the Antitrust Division, Rule 408 regulates direct personal communication by a certified public accountant where the purpose of the communication is to solicit an engagement to perform professional services. Rule 408 is, therefore, separate and distinct from Rule 404 which regulates public communication (advertising) with respect to a licensee's professional services. Rule 404 restricts public communication by certified public accountants concerning their professional services only where the communication would be fraudulent, misleading, deceptive or unfair. Rule 408, with respect to direct personal communications, incorporates the restrictions of Rule 404 and further restricts: 1) the use of coercion, duress, compulsion, intimidation, threats, overreaching, vexatious or harassing conduct and 2) communications to persons who are not existing clients or are not seeking to secure the performance of professional services, having not already engaged another to perform them.

As is conceded by the Antitrust Division in its Further Comments, the restrictions of Rule 408 (a) with respect to false and misleading statements or claims and Rule 408 (b) with respect to coercion and overreaching are clearly proper under recent decisions of the United States Supreme Court relating to the permissible scope of state regulations restricting commercial speech.[4/] The Board is in agreement with the Antitrust Division's

---

3/ Minn. Stat. §326.18 (1978).

4/ See Ohralik v. Ohio State Bar Ass'n., 436 U. S. 447 (1978) and In re Primus, 436 U. S. 412 (1978), discussed infra.

conclusion that the state has a sufficiently compelling interest in preventing fraudulent and vexatious conduct such that such conduct may properly be proscribed whether public or private and whether it is done in person, in writing, by telephone, or through some other means of communication.[5/] The only portion of the rule which is alleged to fall outside the holdings of these cases is Rule 408 (c), which prohibits direct personal communications to solicit an engagement to perform professional services where the person to whom the communication is directed is not an existing client of the certified public accountant, has not invited such a communication, or is not seeking to secure the performance of professional services, having not already engaged another accountant to perform them.

1. United States Supreme Court Decisions Concerning Attorney Solicitation.

Unlike Rule 404 and Rule 408 (a) and (b), which specifically prohibit the use of solicitation which involves fraud, coercion and overreaching, Rule 408 (c) prohibits solicitation where there is a substantial risk of fraud, overreaching and coercion. Rule 408 (c) is, in effect, a prophylactic rule intended to prevent harmful conduct by certified public accountants before it occurs. The permissible scope of state regulation of professional conduct involving risks of this kind was recently discussed by the United States Supreme Court in its companion decisions, Ohralik v. Ohio State Bar Association, 436 U. S. 447 (1978) and In re Primus, 436 U. S. 412 (1978), which involved solicitation by attorneys.

In Ohralik, the Court considered the application to an attorney's solicitation of a state code of professional responsibility

---

5/ Further Comments of the Antitrust Division at p. 3.

which prohibits a lawyer from recommending employment of himself, as a private practitioner, to a non-lawyer who has not sought his advice regarding the employment of a lawyer.[6/] As noted by the Antitrust Division, Ohralik did not involve a direct constitutional attack on the Ohio rules prohibiting attorney solicitation but, rather, a challenge to the application of those rules to Ohralik's particular conduct. The Court observed in a footnote, however, that a frontal attack on the rules as being unconstitutionally overbroad (because they infringed on the First Amendment right to free speech) would be unsuccessful. The Court based its observation on the limited justification for application of the overbreadth doctrine to commercial speech.[7/]

There is, then, a substantial implication in Ohralik that in the context of commercial solicitation, disciplinary rules will not be struck down as overbroad even though there may be certain limited areas of speech to which the rules could not constitutionally be applied. It is, therefore, not unreasonable to infer that Rule 408 (c), which is intended to regulate professional solicitation for commercial purposes, is constitutional on its face under Ohralik. Nevertheless, as Rule 408 (c) is also intended to be enforceable, it is necessary to review the justification delineated by the Court for the application of such rules to a licensee's professional conduct.

The "solicitation" in Ohralik involved a particularly egregious case of lawyer "ambulance chasing", wherein an attorney solicited accident victims as clients, in one instance at hospital bedside. The attorney offered his services pursuant to contingent fee arrangements where fees would be payable only to the extent

---

6/ Ohio Code of Professional Responsibility, DR 2-103 (A). The Ohio Code also prohibits a lawyer who gives unsolicited advice to a layman from accepting employment resulting from that advice, except in the case of close friends, relatives, certain former clients and clients. DR 2-104 (a).

7/ 436 U. S. 447, 462-3, n. 20. See Bates v. State Bar of Arizona, 433 U. S. 350, 380 (1977).

of a percentage of any funds recovered by the attorney. The youthful potential clients were thus particularly susceptible to an offer of what appeared to be "cost-free" legal services.

In addressing the facts of the Ohralik case, the Supreme Court noted that the potential for harm to the public, which is present even in the face-to-face selling of ordinary consumer products, is substantially greater where a lawyer, who is professionally trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed layperson. The Court observed that in such circumstances an uninvited solicitation might further distress the potential client and invade the individual's privacy, even where no additional harm materializes. As such, the Court upheld the application of a prohibition against in-person solicitation by lawyers in circumstances where harm was likely to occur and in particular as applied in the conduct of Ohralik.[8/]

In contrast, solicitation by the attorney in In re Primus, 436 U. S. 412 (1978), was conducted in a manner and under circumstances that the Court found were unlikely to result in any of the dangers present in the Ohralik case. Primus involved a lawyer's written solicitation of a woman who had been sterilized as a condition of the continued receipt of medical assistance under the "Medicaid" program. The woman was offered an opportunity to have a suit brought on her behalf for money damages by the American Civil Liberties Union at no cost. The Court found that the soliciting lawyer's actions were undertaken "to express political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain."[9/] Therefore, Primus,

---

8/ Although the Court noted that the need for a prophylactic rule is especially great in the case of in-person solicitation, where proof of actual harm could be unavailable or unreliable due to the lack of witnesses or lapse of memory, it did not specifically exclude the possibility that such a rule may be proper with respect to other methods of solicitation. 436 U. S. at 464-67.

9/ 436 U. S. at 422.

involving written solicitation to express political beliefs, presented the Court with a set of facts at polar extremes from the in-person solicitation for pecuniary gain before the Court in Ohralik.

In holding that the State's disciplinary rules could not constitutionally be applied to the soliciting lawyer's conduct in Primus, the Court focused on the fact that the purpose of the solicitation was for political rather than commercial purposes. In the context of this type of solicitation, the Court found that broadly-sweeping disciplinary rules prohibiting solicitation were inappropriate:

> At bottom the case against appellant rests upon the proposition that a State may regulate in a prophylactic fashion all solicitation activities of lawyers because there may be some potential for overreaching, conflict of interest, or other substantial evils whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman. Under certain circumstances, that approach is appropriate in the case of speech that simply "propose[s] a commercial transaction," Pittsburgh Press Co. v. Human Relations Comm'n, 413 U. S. 376, 385 (1973). See Ohralik.... In the context of political expression and association, however, a state must regulate with significantly greater precision.10/

The Court also noted:

> Where political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs. The approach we adopted today in Ohralik ..., that the state may proscribe in-person solicitation for pecuniary gain under circumstances likely to result in adverse consequences, cannot be applied to appellant's activities on behalf of the ACLU. Although a showing of potential danger may suffice in the former context, appellant may not be disciplined unless her activity in fact involved the type of misconduct at which South Carolina's broad prohibition is said to be directed.11/

It is, then, clearly arguable that the overriding distinction between Primus and Ohralik is not the manner of solicitation, but that in the former case the motive of the lawyer and the character of the expressive activity related to constitutionally protected freedoms of political expression and association,

---

10/ 436 U. S. at 437-38 (footnote omitted).

11/ 436 U. S. at 434 (emphasis added).

whereas the motive for and character of the expressive activity in the latter case related solely to commercial gain. While the Court did state, in dicta, that solicitation by letter "lessens substantially the difficulty of policing solicitation practices that do offend valid rules of professional conduct",[12/] its opinion clearly implies that even written solicitation may be subject to appropriate state regulation. For example, the Court took note of the fact that the letter in this case was not facially misleading and, indeed, offered to explain what was involved in commencing the proposed litigation.[13/] The Court also implies that if the written solicitation in Primus were for pecuniary gain or if the prospective client had unambiguously communicated a decision against litigation it might be prohibited. As such, a careful reading of Primus does not compel the conclusion that state regulation of solicitation must be limited to face-to-face or in-person communications. Indeed, the highest courts of two states have recently so held.

2. Recent State Court Decisions Concerning Attorney Solicitation.

Subsequent to the Supreme Court's decisions in Ohralik and Primus, the highest courts of at least three states have had occasion to apply the constitutional principles announced in these cases to written solicitation by lawyers. In two instances, the application of disciplinary rules similar to those considered in Ohralik and Primus was upheld.

In Allison v. Louisiana State Bar Association, 362 So. 2d 489 (La. Sup. Ct. 1978), the Supreme Court of Louisiana rejected an attempt by private attorneys to enjoin the state bar association from prohibiting the solicitation, marketing and

---

12/ 436 U. S. at 435-36.

13/ 436 U. S. at 434-35.

provision of prepaid legal services to business groups. The solicitation in this case involved the writing of letters by attorneys to employers soliciting the formation of prepaid legal services for their employees. Relying on Ohralik, the Louisiana Court noted that the state's interest in maintaining high professional standards, preventing overreaching and undue influence, preventing invasions of privacy, and preventing the clouding of lawyers' judgment by pecuniary interests are substantial. However, in cases such as Primus, involving substantial claims of free speech and association, the Court pointed out that "[w]hether that interest is sufficient to justify an infringement upon First Amendment freedoms ... depends upon the nature of the First Amendment right asserted and the evils sought to be avoided by the regulation."[14/] The Court concluded, therefore, that although restrictions are not permissible where substantial claims of freedom of association and political expression are involved, such restrictions are appropriate where the purpose of solicitation is financial gain.

In discussing the manner of solicitation in Allison, the Court stated that although the mail solicitation before it was "not fraught with as many undesirable possibilities as face to face solicitation, ... it was direct solicitation, nevertheless." The Court pointed out that in the case of private offers, which are not in the public domain for all to see, it is more difficult to prevent abuses which are the legitimate subject of state regulation. Observing that Primus might have been a very different case if the solicitation had been conducted for pecuniary gain, the Court upheld the prohibition against direct solicitation, whether in writing or in person.[15/]

14/ 362 So. 2d at 495-96.

15/ A concurring opinion noted that the Court's decision was correct under the decisions in Bates, Primus and Ohralik, but suggested that the extension of First Amendment rights to restrained and dignified mail solicitation might be forthcoming. 362 So. 2d at 496-98.

In another decision following Ohralik and Primus, the Supreme Court of Pennsylvania considered telephone, mail and in-person solicitation by former associates of a law firm who contacted the firm's clients to procure business for their new law partnership. Adler, Barish, Daniels, Levin, and Creskoff v. Epstein, 393 A.2d 1175 (1978). The soliciting attorneys' former law firm had filed a complaint seeking to enjoin its former associates from interfering with the firm's existing contractual relationships with its clients. The trial court granted the requested injunction, which was dissolved by an intermediate appellate court based on the United States Supreme Court's decision in Bates. The Supreme Court of Pennsylvania reversed and reinstated the lower court injunction prohibiting further solicitation, whether in-person, by telephone or letter, or by any other means.

The Court found that the solicitations in Adler were part of an active attempt by the former associates to obtain business for their new partnership. The solicitations were directed at clients of the associates' former firm who had active cases that the associates had worked on as salaried employees of the firm. Clients were advised that they had the option of being represented by the associates' new law partnership, the former firm, or by any other attorney. They were mailed form letters that could be used to substitute the former associates' new partnership as counsel. Relying on Ohralik, the Court concluded that Pennsylvania could constitutionally impose sanctions on attorneys engaging in conduct which violates the disciplinary rule prohibiting solicitation even though the conduct involves "commercial speech." The Court concluded that in Adler, as in Ohralik, the soliciting attorneys' concern was for their own pecuniary gain through the hoped-for success of their new firm.[16/] The Court concluded therefore that "[t]o reduce the likelihood of overreaching and

---

16/ The Court also noted that the former associates had used a list of the solicited clients' cases in order to obtain a bank line of credit for their partnership.

exertion of undue influence on laypersons, to protect the privacy of individuals, and to avoid situations where the lawyer's exercise of judgment on behalf of the client would be clouded by his own pecuniary self-interest," the argument that the Constitution prohibits regulation of such conduct must be rejected.[17/]

Despite the Allison and Adler decisions, considerable doubt remains as to the permissible scope of state regulation of the professional conduct of attorneys.[18/] The Kentucky Supreme Court, in an opinion written shortly after Ohralik and Primus, held that the prohibition against solicitation could not constitutionally be applied to two letters written by an attorney to real estate agencies which merely stated the prices charged by the attorney for legal services, the attorney's qualifications, and the amount of time generally necessary to render the stated services. The Court concluded that the mailing of these letters did not constitute prohibited solicitation but, rather, fell within the zone of First Amendment protection delineated by the Court for public advertisements concerning routing legal services in the Bates decision. The Court focused on the fact the information contained in the letters was essentially identical to that contained in the advertisement in Bates and that no words of solicitation had been used by the attorney in the letters. The Court also observed that many of the dangers inherent in in-person solicitation were not present in written communication of this kind. Kentucky Bar Association v. Stewart, 568 S.W.2d 933 (1978).

17/ A dissenting judge took issue with the Court's reliance on Ohralik because no "coercive in-person solicitation" was present and suggested that the Court's decision had the effect of prohibiting an attorney from truthfully informing a client about his legal rights. 393 A.2d at 1187-88 (Manderino, J., dissenting).

18/ This doubt was expressed in Justice Marshall's concurrence in Ohralik. 436 U. S. at 476.

One response to the uncertainty concerning the permissible scope of state regulation of attorney-advertising following Bates, Ohralik, and Primus, is illustrated by the present enforcement policy of the Director of the Minnesota Lawyers Professional Responsibility Board. While the Director's position on advertising is generally that advertising which is not false or misleading is permissible, he has taken a markedly different view on the scope of permissible solicitation. The Director's present enforcement policy with respect to telephone or door-to-door solicitation is that all such communications are prohibited per se as solicitation. With respect to communications by mail, the Director notes that the rules prohibiting direct solicitation of legal work are not modified by the more liberalized advertising rules. The Director has stated, for example, that while a letter written to a particular individual to solicit legal work would constitute prohibited solicitation, a direct mail communication to a number of people which merely announces the availability of an attorney to perform services in certain areas would tend to fall within the definition of a "public communication" which is permitted under the advertising rule. The Director concludes, therefore, that the mere fact that a communication is made in writing will not necessarily assure that it will be construed as advertising rather than as solicitation.[19/]

It would appear, then, that although the scope of professional regulation of attorney solicitation is not finally settled, at least some courts and one professional bar association believe that Ohralik authorizes continued enforcement of the existing rules prohibiting direct solicitation of clients, whether the solicitation is in-person, telephonic, written, or by some other means. A limited exception to this rule would be solicitation, not for pecuniary gain, in the context of the First Amendment freedoms

---

19/ Bachman, Some Answers To Questions About Lawyer Advertising, 35 Bench & Bar 21, 21-23 (December, 1978). See Attachment 1.

of political expression and association.

The position advocated by the Antitrust Division in its Further Comments, that the Board should abandon prophylactic regulation of solicitation by accountants and should only prohibit that solicitation which can be demonstrated to be false or misleading, has not received general acceptance.[20/] Nor is it at all clear, based on the Ohralik and Primus decisions, that the Supreme Court is moving in this direction.

3. The Alleged Distinction Between Solicitation By Lawyers And Solicitation By Other Learned Professionals.

The Antitrust Division has suggested, in its Further Comments, that a state's interest in regulating the scope of professional solicitation by accountants is less substantial than its interest in regulating attorney solicitation. The distinction, according to the Division's argument, is based on the view that Ohralik only authorizes a flat prohibition against professional solicitation under circumstances where harm is likely to occur. The Division then argues that the circumstances likely to surround in-person and other solicitation by accountants may be sufficiently different from the circumstances surrounding attorney solicitation to erode the state's interest.

The Division suggests, for example, that the clients of accountants are not generally "victims of misfortune" who are approached at times of injury or distress and that the enticement of "cost-free" contingent fee arrangements are not likely to be used by accountants. Assuming, arguendo, that the Division is correct in its analysis of Ohralik and in the distinction between solicitations by attorneys and accountants, there is no judicial authority available to indicate that the courts will accept

---

20/ Justice Marshall's concurring opinion in Ohralik is illustrative of the substantial distance between the Antitrust Division's position and the more limited holdings of the Court in Ohralik and Primus. 436 U. S. at 468-77.

the invitation to draw fine distinctions between the likely circumstances under which solicitation by doctors, dentists, pharmacists, attorneys, accountants, and other professionals will occur.

Furthermore, there is a paucity of authority to suggest that solicitation by professional accountants is not likely to be harmful. For example, although the Division is generally correct in stating that many of the services rendered by certified public accountants are not offered subject to the inducement of contingent fee arrangements,[21/] such fee arrangements are not only permitted but are common in tax matters, where the fee may be based upon the results of judicial proceedings or the findings of governmental agencies.[22/] There is also a danger that permitting solicitation by certified public accountants could offer a further inducement for the accountant to compromise his objectivity in exercising professional judgment. The opportunity to solicit clients may, for example, tempt an accountant to offer to render a favorable opinion or to furnish a "clean" audit to a potential client whose financial position is marginal in order to obtain the new account. More importantly, the concerns expressed by the Court in Ohralik with respect to the privacy of individuals, overreaching, and the lack of public visibility (which makes it difficult to regulate false or misleading solicitation), are also present in the case of solicitation by certified public accountants. At bottom, it is simply unclear at the present time whether the courts will engage in the balancing of potential harms against First Amendment freedoms in the commercial speech area with respect to certified public accountants; it is also unclear how such a balance should be struck.

21/ See Minn. Rule Accy 150, Rule 302, which generally prohibits accountants from offering or rendering professional services pursuant to contingent fee arrangements.

22/ Id.

B. Attorney General Review Of Proposed Rule 408.

As has been argued, above, although it is presently uncertain whether the courts will permit the enforcement of a prophylactic rule prohibiting solicitation by certified public accountants, neither Ohralik nor Primus compel a conclusion that such a rule is invalid. There is, for example, a clear suggestion in Ohralik that although a broadly-sweeping non-solicitation rule may not be enforceable in circumstances where the solicitation is not likely to result in harm,[23/] at least in the commercial context such a rule is not likely to be struck down on its face under the "overbreadth" doctrine.[24/] Furthermore, the highest courts of two states and the present enforcement policy of the Minnesota Lawyers Professional Responsibility Board have indicated, after Ohralik and Primus, that rules prohibiting solicitation by lawyers (which are strikingly similar to Rule 408) are enforceable under the present state of the law.

As such, the Board submits that it would be inappropriate for the Attorney General to withhold approval of proposed Rule 408 in the absence of any clear authority indicating that the rule is either invalid on its face or is generally unenforceable. Even if the question of the rule's validity were perceived as very close, it is questionable whether the Attorney General, acting under Minn. Stat. §15.0412 (4) (1978), should withhold approval of a rule which is arguably lawful. Inasmuch as the statutory scheme authorizing the Attorney General to approve and disapprove administrative rules permits no direct appeal from his decision, the Board suggests that the discretion to disapprove rules should be exercised with caution and should rarely be exercised in close cases. This is particularly true in that the statutory scheme

---

23/ 436 U. S. at 462 n. 20.

24/ Id. This is not to say that a vague rule, one that fails to give reasonable notice of the conduct which it prohibits, might not be overturned on due process grounds.

does provide a specific procedure for judicial review of the validity of approved rules which permits the courts to invalidate rules which violate constitutional provisions, exceed statutory authority, or are adopted without compliance with rule-making procedures.

Therefore, the Board submits that as the opportunity for judicial review of the validity of proposed Rule 408 would, for practical purposes, be precluded if the rule is disapproved, it is preferable as a matter of policy for the Attorney General to approve Rule 408 and permit any person who believes his legal rights or privileges are impaired to seek review in the Courts. Indeed, it would appear that the need for approval is particularly compelling in the absence of adverse comment from the general public or the accounting profession concerning Rule 408.

III. CONCLUSION

For the foregoing reasons, the Board requests that the Attorney General approve the adoption of proposed Rule 408 (c) in its entirety.

Dated: March 14, 1979.

Barry R. Greller

BARRY R. GRELLER
Special Assistant Attorney General
500 Metro Square Building
St. Paul, Minnesota 55101
Telephone: (612) 296-9412

Attorney for the State Board
of Accountancy



Some Answers to Questions About Lawyer Advertising

Judging from the number of calls from attorneys to the Board's office inquiring about lawyer advertising rules, some confusion exists regarding the present rules and enforcement policies of the Board in this area. I have avoided writing about this subject in *Bench & Bar* prior to this date, since there is a risk that a short article will oversimplify the complicated issues raised by the infinite possible forms of advertising. Nonetheless, certain general propositions upon which we frequently receive questions, and upon which many misconceptions still remain afloat, are perhaps suitable for discussion here.

The following questions and answers set forth the most common inquiries and the answers that indicate the present enforcement position on lawyer advertising issues in Minnesota. Except as otherwise indicated, the answers given represent personal opinions of this writer; they do not necessarily constitute the position of the Lawyers Professional Responsibility Board or any of its members.

1. **What is the general rule in effect regarding lawyer advertising in Minnesota?**
   ANSWER: An Order of the Minnesota Supreme Court, dated April 14, 1978, amended the Code of Professional Responsibility to permit "public communications" unless they are "false, fraudulent, misleading or deceptive". That phrase is defined as follows: "A false, fraudulent, misleading or deceptive statement or claim includes a statement or claim which:

   (1) Contains a misrepresentation of fact;

   (2) Is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts;

   (3) Is intended or is likely to create false or unjustified expectations of favorable results;

   (4) Conveys the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;

   (5) Is intended or likely to result in a legal action or legal position being taken or asserted merely to harass or maliciously injure another; or

   (6) Contains other representations or implications that in reasonable probability will cause an ordinary, prudent person to misunderstand or be deceived."

   This rule will remain in effect for a one-year period, when a hearing will be held to consider proposed additions or amendments to the rule.

ATTACHMENT 1

2. **Is there any prohibition against television or radio advertising by attorneys in Minnesota?**
ANSWER: An advertisement placed by an attorney to be broadcast by the electronic media is subject to the same general rule set forth in the answer to Question No. 1 above. Such advertising is not prohibited *per se*.

3. **Does the present rule permit attorneys to advertise in the "yellow pages" of the telephone directory?**
ANSWER: Yes. The Lawyers Professional Responsibility Board considered this question and determined that yellow pages advertising was a permissible "public communication", subject to the general rules set forth in the answer to Question No. 1 above.

4. **Is attorney advertising that is "undignified" or "self-laudatory" prohibited by the present rule?**
ANSWER: No, not *per se*. Although most attorney advertising in Minnesota to date has been dignified and proper by any standards, there is no rule presently in effect which would serve as a basis for disciplining an attorney who would place an "undignified" or "self-laudatory" advertisement.

5. **May an attorney advertise that he or she is a specialist in such fields of practice as domestic relations, personal injury, probate, or the like?**
ANSWER: No. Only those fields in which there is authorized certification of specialists (e.g., patents, trademarks, or admiralty) could be advertised as specialist fields. See DR 2-105. Advertising oneself as a "specialist" in personal injury work would tend to mislead the public to believe that the advertiser has been certified as a specialist in the field. However, the prohibition against using the term "specialist" does not restrain an attorney from listing one or more fields in which the lawyer wishes to announce his or her availability.

6. **Is advertising by mail permitted?**
ANSWER: The answer to this question depends upon the content of the mailed communication and related circumstances. The rules prohibiting direct solicitation of legal work are contained in DR 2-103, and that rule is not altered by the liberalized advertising rules. A letter written to a particular individual to solicit legal work, such as a letter written to an accident victim in a hospital recommending the employment of oneself as an attorney, would constitute prohibited solicitation. In contrast, a direct mail communication to a significant number of persons merely announcing the availability of an attorney in certain areas could fall within the permitted definition of a "public communication". The distinction between permitted advertising, on the one hand, and prohibited solicitation, on the other hand, depends on all facts and circumstances. The mere fact that a communication is made in writing does not necessarily assure that it will be construed as advertising, rather than as solicitation.

7. **Would telephone solicitation or door-to-door solicitation be permitted?**
ANSWER: No. The present enforcement policy of the Board's staff is that all such communications are prohibited *per se* as solicitation.

8. Do the amendments to the advertising rules contain any changes with respect to letterheads or proper firm names?
ANSWER: No. Rules previously in effect regarding content of attorneys' letterhead and firm names are still being enforced. See DR 2-102(A)(4) and DR 2-102(B). The easing of restrictions on advertising does not permit the attorneys' letterhead to be used as a forum for advertising. Also, lawyers in private practice may not list non-lawyers on their letterheads or use a partnership or firm name to apply to a mere office-sharing arrangement.

LAWYERS CONCERNED FOR LAWYERS
is for the alcoholic/chemically dependent attorney or judge. For more information call 333-7484.

STATEWIDE TV AD CAMPAIGN ON TRIAL
Participate in a confrontation . . .

A trial on the merits of the State Bar Board of Governors' new institutional advertising plan will be held in Duluth on Saturday, January 20, Hon. Diana Murphy presiding. Counsel for the proponents, Ted Collins, will attempt to prove through expert testimony that the Board's statewide 13-week saturation schedule of TV institutional advertising beginning February 1979, is the right response to public and press. Opponents' counsel, Sheldon Karlins, will cross examine these same experts, including Roger Brosnahan, Chairman of the ABA Commission on Advertising; Ron Smith, Chairman of the MSBA Community Relations Committee and Peter Schmitz, Chairman of the Lawyer Advertising Committee.

This is a Winter Bar Conference "package" similar to the Fall Bar Conference at Brainerd, including a Kitchi Gammi Club cocktail reception and dinner Friday, January 19, breakfast and lunch on Saturday, with lodging Friday night at the magnificent new Normandy Inn, Duluth (3 hr. CLE credit applied for). By separate registration you can also attend a day-long CLE seminar Friday on "Tax Problems for the General Practitioner". For details and registration contact State Bar Office, 100 Minnesota Federal Building, Minneapolis, MN 55402 (612-335-1183).

A Spring Conference on another cataclysmic topic is planned for Rochester on March 23 and 24, 1979.

OUR FILE NO. 470

ADMIN 1000 (Rev. 1/78)

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL

Office Memorandum

TO : STEPHEN P. KILGRIFF
Special Assistant
Attorney General

DATE: October 12, 1978

FROM : LEE E. SHEEHY
Special Assistant
Attorney General

PHONE: 296-1288

SUBJECT: Request for Additional Arguments in the Matter of the Proposed Amendments of the Rules of the State Board of Accountancy Governing the Professional Conduct of Certified Public Accountants

The above-captioned rules have been submitted to the office of the Attorney General for review as to form and legality. I have attached a copy of the rules proposed for adoption hereto.

This office is requesting additional legal arguments on Rule 408 of the rules proposed for adoption. In light of the Anti-trust Division's earlier filing in this matter, it is hoped that the Division will provide further arguments to this office on the following issue.

The Hearing Examiner in his report, discussed Rule 408 in part as follows:

> If the term "direct personal communication" in the proposed rule means "in-person", the proposed rule is well within the standards set by Ohralik. If, however, the term includes mass direct-mailing to potential clients, the rule would seem to be contrary to the Bates requirements (as the Anti-trust Division implies), and not within the State's countervailing interests in protecting the public from making decisions in pressure situations. Because the term is unclear, the Examiner finds the Board has failed to demonstrate that Rule 408 is reasonable. The Examiner would suggest that the rule be modified to read:
>
> > "Solicitation. Licensee shall not, by in-person communication, solicit an engagement to perform professional services for pecuniary gain (a) if the . . . "

Such a change would bring the rule squarely within the holding of Ohralik and make it reasonable. There are other possibilities the Board may wish to consider. It might, for example, define "direct personal communication" as "face-to-face, telephonic or similar conversational contact between a potential client and a licensee or his agent." The Supreme Court avoided the finding "in-person"; the Board may wish to in order to remove some vagueness."

This office wishes additional arguments on matters raised by the Hearing Examiner's Finding and the language proposed for adoption by the Board of Accountancy, as well as any other arguments or matters which the parties may wish to raise. Finally, this office wishes further arguments specifically relating to the addition of the word "written" in the Board's rules proposed for adoption which does not appear in the Hearing Examiner's suggested language.

Your Division's assistance in this matter would be greatly appreciated. If you have any questions, please do not hesitate to call me.

LES/bw
Attachment
cc: Barry R. Greller
Special Assistant
Attorney General

ADMIN 1000

STATE OF MINNESOTA

DEPARTMENT_____

Office Memorandum

TO : Lee E. Sheehy
Special Assistant Attorney General

DATE: September 22, 1978

FROM : Barry R. Greller Barry R. Greller
Special Assistant Attorney General

PHONE: 296-9412

SUBJECT: In the matter of the proposed amendment of the rules of the State Board of Accountancy governing the professional conduct of certified public accountants.

Enclosed herein for review by the Attorney General, please find the rules adopted by the State Board of Accountancy in the above referenced matter.

ADMIN 1000 (Rev. 1/78)

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL

Office Memorandum

TO : BARRY R. GRELLER
Special Assistant
Attorney General

DATE: October 12, 1978

FROM : LEE E. SHEEHY
Special Assistant
Attorney General

PHONE: 296-1288

SUBJECT: In the Matter of the Proposed Amendments of the Rules of the State Board of Accountancy Governing the Professional Conduct of Certified Public Accountants

The above-captioned rules have not been approved by this office or filed with the Secretary of State for the following reason:

This office is requesting further argument on the legality of Rule 408. While final agency action took into account Hearing Examiner Finding No. 17, such action appears to have substantially expanded the definition of "direct personal communication" proposed by the Hearing Examiner. Such a definition was apparently the Hearing Examiner's attempt to craft language for Rule 408 which would bring it within the bounds of recent United States Supreme Court decisions. This office is asking counsel for the State Board of Accountancy and counsel for the Anti-trust Division of the Office of the Attorney General to file additional legal arguments relating to the impact of Ohralik v. Ohio State Bar Association, 46 L.W. 4511 (1978) on legality of Rule 408. In particular, this office requests that parties direct arguments to the regulation of the written communication in light of the "in-person" language of Ohralik, as well as any other arguments the parties wish to make to this office.

I have retained copies of all relevant documents relating to this matter should you wish to discuss it with me. Other than the above discussed matter, the remaining rules, or severable portions thereof, have been approved as to form and legality. Upon resubmittal to the Office of the Attorney General, please insure that the original of the Order Adopting and the original of the Adopted Rules are submitted as they are necessary for filing with the Secretary of State.

If you have any questions, do not hesitate to call me.

LES/bw
cc: Duane Harves
Hearing Examiner

Stephen P. Kilgriff
Special Assistant
Attorney General

RULES OF THE MINNESOTA STATE BOARD OF ACCOUNTANCY

AS ADOPTED

CHAPTER ONE THROUGH CHAPTER FOURTEEN.. Unchanged

CHAPTER FIFTEEN: Code of Professional Conduct.

Accy 150. Unchanged

DEFINITIONS Unchanged

APPLICABILITY OF RULES Unchanged

INDEPENDENCE, INTEGRITY AND OBJECTIVITY

Rule 101 through 103. Unchanged

COMPETENCE AND TECHNICAL STANDARDS

Rule 201 through 204. Unchanged

RESPONSIBILITIES TO CLIENTS

Rule 301 through 304. Unchanged

OTHER RESPONSIBILITIES AND PRACTICES

Rule 401 through 403. Unchanged

Rule 404 - Advertising. A licensee shall not use or participate in the use of any form of public communication having reference to his professional services which contains a false, fraudulent, misleading, deceptive or unfair statement or claim. A false, fraudulent, misleading, deceptive or unfair statment or claim includes but is not limited to a statement or claim which:

A. Contains a misrepresentation of fact; or

B. Is likely to mislead or deceive because it fails to make full disclosure of relevant facts; or

C. Contains any testimonial or laudatory statement, or

other statement or implication that the licensee's professional services are of exceptional quality that is not based on verifiable facts; or

D. Is intended or likely to create false or unjustified expectations of favorable results; or

E. Implies educational or professional attainments or licensing recognition not supported in fact; or

F. States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accountancy, if this is not the case; or

G. Represents that professional services can or will be competently performed for a stated fee when this is not the case, or makes representations with respect to fees for professional service that do not disclose all variables affecting the fees that will in fact be charged; or

H. Contains other representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.

Rule 405. Unchanged

Rule 406 - Incompatible occupations. A licensee shall not concurrently engage in the practice of public accountancy and in any other business or occupation which impairs his independence or objectivity in rendering professional services.

Rule 407. Unchanged

Rule 408 - Solicitation. A licensee shall not by any direct personal communication solicit an engagement to perform professional services (a) if the communication would violate Rule 404 if it were a public communication; or (b) by the use of coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct; or (c) where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such a communication or is seeking to secure the performance of professional services and has not yet engaged another to perform them. The term "direct personal communication" as used in this rule means any in-person, written, telephonic, or similar communication directed to a specific recipient or tailored in content to a specific recipient.

Rule 409. Unchanged

Accy 151 through 159. Unchanged

CHAPTER SIXTEEN THROUGH CHAPTER TWENTY ONE: Unchanged

APPROVED AS TO FORM AND LEGALITY

MAR. 26 1979 19___

WARREN SPANNAUS, ATTORNEY GENERAL

BY _____

SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
F I L E D
MAR 26 1979
Joan Anderson Growe
Secretary of State

10:30 AM

PROPOSED

RULES OF THE MINNESOTA STATE BOARD OF ACCOUNTANCY

CHAPTER ONE THROUGH CHAPTER FOURTEEN. Unchanged

CHAPTER FIFTEEN: Code of Professional Conduct.

Accy 150. Unchanged

DEFINITIONS Unchanged

APPLICABILITY OF RULES Unchanged

INDEPENDENCE, INTEGRITY AND OBJECTIVITY

Rule 101 through 103. Unchanged

COMPETENCE AND TECHNICAL STANDARDS

Rule 201 through 204. Unchanged

RESPONSIBILITIES TO CLIENTS

Rule 301 thorugh 30 . Unchanged

OTHER RESPONSIBILITIES AND PRACTICES

Rule 401 through 403. Unchanged

Rule 404 - ~~Solicitation and~~ Advertising. A licensee shall not ~~seek to obtain clients by solicitation. Advertising is a form of solicitation and is prohibited~~ use or participate in the use of any form of public communication having reference to his professional services which contains a false, fraudulent, misleading, deceptive or unfair statement or claim. A false, fraudulent, misleading, deceptive or unfair statement or claim includes but is not limited to a statement or claim which:

A. Contains a misrepresentation of fact; or

B. Is likely to mislead or deceive because it fails to make full disclosure of relevant facts; or

C. Contains any testimonial or laudatory statement, or

other statement or implication that the licensee's professional services are of exceptional quality; or

D. Is intended or likely to create false or unjustified expectations of favorable results; or

E. Implies educational or professional attainments or licensing recognition not supported in fact; or

F. States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accountancy, if this is not the case; or

G. Represents that professional services can or will be competently performed for a stated fee when this is not the case, or makes representations with respect to fees for professional service that do not disclose all variables affecting the fees that will in fact be charged; or

H. Contains other representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.

Rule 405 - Unchanged

Rule 406 - Incompatible occupations. A licensee ~~who is engaged in the practice of public accounting~~ shall not concurrently engage in the practice of public accountancy and in any other business or occupation which impairs his independence or objectivity in rendering professional services ~~or serves as a feeder to his practice~~.

Rul3 407. Unchanged

Rule 408. ~~Reserved for future use.~~ Solicitation. A licensee shall not by any direct personal communication solicit an engagement to perform professional services (a) if the communication would violate Rule 404 if it were a public communication; or (b) by the use of coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct; or (c) where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such a communication or is seeking to secure the performance of professional services and has not yet engaged another to perform them.

Rule 409 - Unchanged

Accy. 151 through 159. Unchanged

CHAPTER SIXTEEN THROUGH CHAPTER TWENTY ONE: Unchanged

STATE OF MINNESOTA

BOARD OF ACCOUNTANCY

IN THE MATTER OF THE PROPOSED AMENDMENT) OF THE RULES OF THE STATE BOARD OF) ACCOUNTANCY GOVERNING THE PROFESSIONAL) CONDUCT OF CERTIFIED PUBLIC ACCOUNTANTS)

ORDER FOR HEARING

IT IS HEREBY ORDERED that a public hearing on the above-captioned rules be held in the Department of Commerce Hearing Room, 500 Metro Square Building, 7th and Robert Streets, St. Paul, Minnesota 55101 on May 17, 1978, commencing at 9:30 a.m. and continuing until all persons have had an opportunity to be heard.

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.

Date February 23, 1978

Leonard A. Rapoport

Leonard A. Rapoport, Chairman
State Board of Accountancy

STATE OF MINNESOTA

BOARD OF ACCOUNTANCY

IN THE MATTER OF THE PROPOSED AMENDMENT)
OF THE RULES OF THE STATE BOARD OF)
ACCOUNTANCY GOVERNING THE PROFESSIONAL)
CONDUCT OF CERTIFIED PUBLIC ACCOUNTANTS)

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a public hearing in the above-entitled matter will be held in the Department of Commerce Hearing Room, 500 Metro Square Building, 7th and Robert Streets, St. Paul, Minnesota 55101 on May 17, 1978, commencing at 9:30 a.m. and continuing until all persons have had an opportunity to be heard.

All interested or affected persons will have an opportunity to participate. Statements may be made orally and written materials may be submitted by mail to Steve Mihalchick, Office of Hearing Examiners, 1745 University Avenue, St. Paul, Minnesota 55104 (612) 296-8118, either before the hearing or within five working days after the close of the hearing or for a longer period not to exceed 20 days if so ordered by the Hearing Examiner in the course of the hearing. Persons filing written statements or materials who desire notice of filing of the Hearing Examiner's report with respect to this matter should state their request in writing at the time of filing of their statements or materials.

The proposed rules, if adopted, would amend Minn. Rules Accy 150, Rule 404 (4MCAR §6.150, Rule 404) by abolishing the existing prohibition against advertising by certified public accountants and substituting a prohibition against the use of false, fraudulent, misleading, deceptive or unfair statements or claims. The proposed rules would further amend Minn. Rules Accy 150, Rule 404 by deleting the rule prohibiting solicitation by certified public accountants and by substituting a new rule governing and limiting the use of direct personal communications to solicit an engagement to perform professional services. In addition the proposed rules would amend Minn. Rules Accy 150, Rule 406 (4MCAR §6.150, Rule 406) by revising the language of the existing rule, which prohibits certified public accountants from engaging in certain occupations, to focus upon those occupations which impair independence or objectivity and by eliminating the existing explicit prohibition against engaging in "feeder" occupations.

Copies of the proposed rules are now available and one free copy may be obtained by writing to the State Board of Accountancy, 500 Metro Square Building, St. Paul, Minnesota 55101. Additional copies will be available at the door on the date of the hearing. The Board's authority to promulgate the proposed rules is contained in Minn. Stat. §326.18 (1976). A "Statement of Need" explaining why the board feels the proposed rules are necessary and a "Statement of Evidence" outlining the testimony that will be introduced will be filed with the Hearing Examiners Office at least 25 days prior to the hearing and will be available there for public inspection.

Please be advised that Minnesota Statutes, Chapter 10A, requires each lobbyist to register with the Ethical Practices Board within five days after he commences lobbying. Lobbying includes attempting to influence rule making by communicating or urging others to communicate with public officials. A lobbyist is generally 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 five hours per month at lobbying. The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, St. Paul, Minnesota 55155, phone (612) 296-5615.

Date February 23, 1978 Leonard A. Rapoport

Leonard A. Rapoport, Chairman
State Board of Accountancy

STATE OF MINNESOTA

BOARD OF ACCOUNTANCY

IN THE MATTER OF THE PROPOSED AMENDMENT) OF THE RULES OF THE STATE BOARD OF) CERTIFICATE OF DELIVERY ACCOUNTANCY GOVERNING THE PROFESSIONAL) SECRETARY OF STATE LIST CONDUCT OF CERTIFIED PUBLIC ACCOUNTANTS)

I hereby certify that the attached 483 labels + 3 sheets constitute the complete list of persons, associations, and other interested groups who as of 11:00 o'clock AM., this 7th day of April, 1978, have requested pursuant to M.S. 1976, Sec. 15.0412 , that their names be placed on file with the Secretary of State for the purpose of receiving notice of public hearing on proposed rules on the subject captioned above.

SECRETARY OF STATE

Joan Anderson Growe

By Cheri L. Mattson

STATE OF MINNESOTA

BOARD OF ACCOUNTANCY

IN THE MATTER OF THE PROPOSED AMENDMENT) OF THE RULES OF THE STATE BOARD OF) ACCOUNTANCY GOVERNING THE PROFESSIONAL) CONDUCT OF CERTIFIED PUBLIC ACCOUNTANTS)	AFFIDAVIT OF RECEIPT OF THE SECRETARY OF STATE'S LIST

Marian A. Flanagan, being duly sworn on oath deposes and says:

1) That she is an employee of the Board of Accountancy of the State of Minnesota.

2) That on the 7th day of April, 1978, she went to the Secretary of State's office for the State of Minnesota and requested a current list of all representatives of 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 M.S. 15.0412.

3) That on the 7th day of April, 1978, in response to the above request, the Secretary of State provided her with such a list, a copy of which is attached hereto and incorporated by reference.

Further affiant sayeth not.

Marian A. Flanagan
Executive Secretary

Subscribed and sworn to before me
this 11th day of April, 1978.

Notary Public,
Ramsey County, Minnesota.
My commission expires 2-25-81.

Norene M Carr

NORENE M. CARR
Notary Public, Ramsey Co. Mn.
MY COMMISSION EXPIRES
February 25, 1981

STATE OF MINNESOTA

BOARD OF ACCOUNTANCY

IN THE MATTER OF THE PROPOSED AMENDMENT) OF THE RULES OF THE STATE BOARD OF) ACCOUNTANCY GOVERNING THE PROFESSIONAL) CONDUCT OF CERTIFIED PUBLIC ACCOUNTANTS)

AFFIDAVIT OF MAILING

Marian A. Flanagan, Executive Secretary, being first duly sworn, deposes and says:

That on the 11th day of April, 1978, at the City of St. Paul, County of Ramsey, State of Minnesota, she served the attached Notice of Hearing by depositing in the United States mail at said City of St. Paul, a true and correct copy thereof, properly enveloped, with postage prepaid, to all persons and associations at the addresses listed on the attached Certificate of the Secretary of State as well as to all persons listed on the attached sheet as presently being members of the Minnesota Legislature.

Marian A. Flanagan
Executive Secretary

Subscribed and sworn to before me this

11th day of August, 1978.

Notary Public,

Ramsey County, Minnesota.

May commission expires 2-25-81.

Norene M Carr

NORENE M. CARR
Notary Public, Ramsey Co. Mn.
MY COMMISSION EXPIRES
Febuary 25, 1981

Board of Accountancy

Notice of Intent to Solicit Outside Opinion on Rules Regarding Solicitation and Advertising

Notice is hereby given that the State Board of Accountancy has begun consideration of proposed rules governing solicitation and advertising by certified public accountants in accordance with Minn. Stat. § 326.13 (1976). In order to adequately determine the nature and utility of such rules, the Board of Accountancy hereby requests information and comments from all interested individuals or groups concerning the subject matter of the proposed rules.

The proposed rules, rules, if adopted, would amend Minn. Rule Accy. 150, Rule 404, on existing rule of the Board which prohibits solicitation and advertising by certified public accountants. The proposed rules would permit advertising by certified public accountants in accordance with guidelines based upon the recent decision of the United States Supreme Court in *Bates v. State Bar of Arizona*. The proposed rules would also substitute a more express definition of the forms of solicitation which may not be engaged in by certified public accountants for the general prohibition contained in the existing rule.

All interested or affected persons or groups are requested to participate. Statements of information and comment may be in writing. Written statements of information and comment may be addressed to:

Marian Flanagan
Executive Secretary
Board of Accountancy
500 Metro Square Building
St. Paul, Minnesota 55101

All statements of information and comment must be received within twenty-one (21) days of the publication of this notice.

Leonard A. Rapoport
Chairman, Board of Accountancy
500 Metro Square Building
Saint Paul, Minnesota 55101

Banking Division Bulletin No. 1813

Maximum Lawful Rate of Interest for Mortgages for the Month of January, 1978

Notice is hereby given that the Banking Division, Department of Commerce, State of Minnesota, pursuant to Minn. Stat. § 47.20, the Conventional Home Loan Assistance and Protection Act, as amended by Laws of 1977, ch. 350, hereby determines that the maximum lawful rate of interest for home mortgages for the month of January, 1978, is nine and one-quarter (9.25) percent.

Robert A. Mampel
Commissioner of Banks
December 13, 1977

Energy Agency

Notice of Intent to Solicit Outside Opinion Regarding the Proposed Adoption of Minnesota Energy Agency Rules Governing Contents of Applications for Certificates of Need and Criteria for Assessment of Need for Fuel Conversion Facilities, Coal Slurry Pipelines, Nuclear Fuel Processing Facilities, and Nuclear Waste Storage or Disposal Facilities

Notice is hereby given that the Minnesota Energy Agency (hereinafter the "Agency") is extending the period for accepting information or opinions from sources outside the Agency in preparing to adopt rules governing contents of applications for certificates of need and criteria for assessment of need for fuel conversion facilities, coal slurry pipelines, nuclear fuel processing facilities, and nuclear waste storage or disposal facilities.

The Agency earlier had set the close of the comment period as December 31, 1977. Comments will now be accepted through January 31, 1978. A preliminary draft of the rules is available from the Agency.

Interested or affected persons or groups may submit statements of information and comments orally or in writing. Written statements may be addressed to:

David L. Jacobson
Minnesota Energy Agency
720 American Center Building
150 East Kellogg Boulevard
St. Paul, MN 55101

Any written material received by the Agency shall become part of the hearing record in the event that rules are proposed for adoption. Oral statements may be given, and preliminary drafts may be requested, during regular business hours over the telephone at (612) 296-7502 and in person at the above address.

STATE OF MINNESOTA

BOARD OF ACCOUNTANCY

IN THE MATTER OF THE PROPOSED AMENDMENT) OF THE RULES OF THE STATE BOARD OF ACCOUNTANCY GOVERNING THE PROFESSIONAL CONDUCT OF CERTIFIED PUBLIC ACCOUNTANTS)

STATEMENT OF NEED

H.Ex. No. ACCY-78-001-SM

The above-captioned rules are amendments to existing rules of the State Board of Accountancy. The last time the above captioned rules were amended was September 9, 1977.

The need to adopt these rules arises as follows:

I.
Authority of the State Board of Accountancy
to Promulgate and Adopt Rules

Minn. Stat. §326.18 (1976) empowers the State Board of Accountancy to promulgate and adopt, inter alia, rules of professional conduct and all other rules proper to carry into effect the purposes of Minn. Stat. §§326.17 to 326.23 (1976).

II.
Amendments Governing Advertising and Solicitation

The Board of Accountancy proposes to amend Minn. Rules ACCY 150, Rule 404 (4MCAR §6.150, Rule 404) by establishing new standards of professional conduct to govern advertising and solicitation by certified public accountants. These amendments will adopt a prohibition against the use of false, fraudulent, misleading, deceptive or unfair statements or claims, to replace the existing prohibition against advertising. The amendments will also adopt, in a separate rule, standards governing the use by certified public accountants of direct personal communications to solicit an engagement to perform professional services, in substitution for the existing prohibition regarding solicitation.

The proposed amendments regarding advertising and solicitation are needed to bring the existing rules into conformity with the requirements of the First and Fourteenth Amendments to the United States Constitution as set forth by the United States Supreme Court in its decision in Bates v. State Bar of Arizona. The amended rules are intended, for the protection of the public welfare, to establish constitutionally permissable restrictions on the use by certified public accountants of false or misleading public statements or claims and intrusive or vexatious direct personal communications. The amended rules, by conforming to the Model Code of Professional Conduct promulgated by the National Association of State Boards of Accountancy, are also intended to establish a uniform set of ethical standards and rules of conduct which will be applicable on a standard basis to standard national concepts of professional accounting practice.

III.
Amendment Governing Incompatible Occupations

The Board of Accountancy proposes to amend Minn. Rules ACCY 150, Rule 406 (4MCAR §6.150, Rule 406) by eliminating the specific prohibition concerning engaging in feeder occupations and by adopting a new standard prohibiting a certified public accountant from engaging in an occupation which impairs his independence in rendering professional services.

The proposed amendment is necessary to establish a standard of

conduct which restricts certified public accountants from engaging in those occupations which tend to impair their independence in the performance of professional services. The existing prohibition against feeder occupations is considered to be more appropriately regulated by the standards contained in the proposed amendments to the advertising and solicitation rules. Adoption of the amended rule, which conforms to the Model Rules of the National Association of State Boards of Accountancy, is also necesssary to establish a uniform set of ethical standards and rules of conduct which will be applicable on a standard basis to standard national concepts of professional accounting practice.

STATE OF MINNESOTA
BOARD OF ACCOUNTANCY

Dated: 4-18-78

Robert A. Unzen, Chairman

STATE OF MINNESOTA

BOARD OF ACCOUNTANCY

IN THE MATTER OF THE PROPOSED AMENDMENT) OF THE RULES OF THE STATE BOARD OF) ACCOUNTANCY GOVERNING THE PROFESSIONAL) CONDUCT OF CERTIFIED PUBLIC ACCOUNTANTS)	STATEMENT OF EVIDENCE H.Ex. No. ACCY-78-001-SM

In addition to the "Statement of Need" which is available for inspection or purchase at the State Office of Hearing Examiners, and in support thereof, the State Board of Accountancy will introduce the following evidence at the hearing in this matter:

I. TESTIMONY

A. Leonard A. Rapoport, a member of the State Board of Accountancy, will testify with respect to the following facts:

1. That adoption of the proposed amendments to the rules regarding advertising and solicitation are reasonable and necessary to:

a. Bring the existing rules into conformity with the requirements of the First and Fourteenth Amendments to the United States Constitution;

b. Provide a code of ethics and standards of conduct for the protection of the public welfare in connection with advertising and solicitation by certified public accountants;

2. That adoption of the proposed amendment regarding incompatible occupations is reasonable and necessary to:

a. Establish a standard which restricts certified public accountants from engaging in occupations which would impair their independence in the performance of professional auditing services;

b. Provide a consistent and coherent restriction regarding those occupations which are inconsistent with the practice of public accounting;

3. That adoption of the proposed amendments regarding advertising, solicitation, and incompatible occupations, which are identical to the model rules proposed by the National Association of State Boards of Accountancy, will foster establishment of a uniform code of ethics and uniform rules of conduct which will be applicable on a standard basis to standard national concepts of professional accounting practice.

B. It is anticipated that one or more of the following members of the State Board of Accountancy may testify on behalf of the Board in connection with the foregoing facts: Rosemary J. Biel, Karen S. Champlin, Janet B. Jasper, Leonard A. Rapoport, Thomas D. Spaeth, William A. Winterer, and Robert A. Unzen.

II. Documentary Evidence

The Board intends to introduce the following documentary evidence in this matter:

A. Model Code of Professional Conduct promulgated by the National Association of State Boards of Accountancy, together with comments to the Code.

B. Notification of Public Hearing appearing in The Footnote, volume 28, no. 8 (April, 1978) at p. 10. (The Footnote is a publication of the Minnesota Society of Certified Public Accountants.)

III. Constitutional Provisions, Statutes and Judicial Decision

The Board will be citing the following constitutional provisions, statutes and judicial decision at the hearing in this matter:

A. Constitutional Provisions

U.S. Const. amend. I and XIV;

B. Statutes

Minn. Stat. §§326.17 - 326.23 and 326.53 (1976);

C. Judicial Decision

Bates v. State Bar of Arizona, 97 S. Ct. 2691 (1977).

STATE OF MINNESOTA
BOARD OF ACCOUNTANCY

By Robert A. Unzen
Robert A. Unzen, Chairman

Dated:
4/18/78

ACCY-78-001-SM

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE BOARD OF ACCOUNTANCY

IN THE MATTER OF THE PROPOSED AMENDMENT OF THE RULES OF THE STATE BOARD OF ACCOUNTANCY GOVERNING THE PROFESSIONAL CONDUCT OF CERTIFIED PUBLIC ACCOUNTANTS. (4 MCAR § 6.150, Rules 404, 406 and 408)

REPORT OF THE CHIEF HEARING EXAMINER

WHEREAS, a hearing was held on May 17, 1978, before Steve M. Mihalchick, a Hearing Examiner of the State Office of Hearing Examiners, on the above-entitled matter in compliance with Minn. Stat. § 15.0412, Subd. 4; and

WHEREAS, the Report of Hearing Examiner made pursuant to Minn. Stat. § 15.052, Subd. 3, was issued to the Board of Accountancy on June 8, 1978; and

WHEREAS, the Board of Accountancy has now determined to adopt rules pursuant to Minn. Stat. § 15.0412, Subd. 4; and

WHEREAS, the Board of Accountancy has submitted said rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. § 15.052, Subd. 4, and Rule HE 107; and

WHEREAS, the Chief Hearing Examiner finds that the final proposed rules are not substantially different from those proposed at the public hearing and that the Board of Accountancy has met all requirements of Minn. Stat. § 15.0412, Subd. 4.

NOW, THEREFORE, upon receipt of this Report, the Board of Accountancy has the responsibility of submitting the complete hearing record and the rules as adopted by the Board to the Attorney General and to publish in the State Register, all pursuant to Minn. Stat. § 15.0412, Subd. 4.

Dated this 18th day
of August, 1978.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

STATE OF MINNESOTA)
(ss.
COUNTY OF RAMSEY)

AFFIDAVIT OF SERVICE

Eileen A. Gaiovnik, being first duly sworn, deposes and says that on the 8th day of June 1978, at the City of St. Paul, County of Ramsey, State of Minnesota, she served the attached Report of Hearing Examiner ACCY-78-001-SM

unstamped, by placing in the designated tray to be collected by messenger for delivery to the central mailing station as required by Minn. Stat., § 16.54 (1974), a true and correct copy thereof on all persons at the addresses shown on the attached mailing list.

Eileen A. Gaiovnik

Subscribed and sworn to before me
this 8th day of June, 1978.

Sandra A. Haven

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

Mr. Barry R. Greller
Special Assistant Attorney General
Department of Commerce
5th Floor, Metro Square Building
St. Paul, Minnesota - 55101

Mr. Stephen P. Kilgriff
Special Assistant Attorney General
515 Transportation Building
St. Paul, Minnesota - 55155

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE BOARD OF ACCOUNTANCY

In the Matter of the Proposed Amendment of the Rules of the State Board of Accountancy governing the professional conduct of certified public accountants. (4 MCAR § 6.150, Rules 404, 406 and 408)

REPORT OF HEARING EXAMINER

The above-entitled matter came on for hearing in St. Paul on May 17, 1978 before Steve M. Mihalchick, Hearing Examiner assigned by the Chief Hearing Examiner.

This is a rules hearing pursuant to Minn. Stat. Ch. 15 to determine whether proposed amendments to Minn. Rules Accy 150, Rule 404 and Rule 406 and new Rule 408 should be adopted.

All members of the Board of Accountancy were present at the hearing and Leonard A. Rapoport, a member of the Board, made the Board's presentation. Appearing as counsel for the Board was Barry R. Greller, Special Assistant Attorney General. Two non-agency persons attending the hearing signed the hearing register. The hearing continued until all interested persons had had an opportunity to participate. Only one statement was made at the hearing by a member of the public. That was by Patrick W. Jacobs, Chairman of the Professional Ethics Committee of the Minnesota Society of Certified Public Accountants. He supported the proposed amendments.

Pursuant to Minn. Stat. § 15.0412, subd. 4, this Report shall be available fom review to all affected individuals upon request for at least five days.

The Board shall, if it proposes to adopt the rules as originally proposed or amended, submit the complete hearing record, including its Findings and Order, to the Chief Hearing Examiner no earlier than five days subsequent to the receipt of this Report. This submission shall clearly indicate any changes made to the rules as originally proposed, preferably in the format that will be submitted to the State Register for publication. The Chief Hearing Examiner shall complete his review and submit his report to the Board on the issues of substantial changes in the rule and

compliance with Minn. Stat. § 15.0412 within ten calendar days. Thereafter, the Board shall be responsible for filing the rules with the Attorney General and for notifying persons who have indicated that they wish to be notified of such filing.

Based upon all the records and proceedings herein, the Examiner makes the following:

FINDINGS OF FACT

PROCEDURAL REQUIREMENTS

1. On March 3, 1978, the Board filed the following documents with the Chief Hearing Examiner:

(a) A proposed Order for Hearing;
(b) A proposed Notice of Hearing; and
(c) A Statement of the estimated length and number of people attending the hearing.

2. On March 7, 1978, the Board filed a copy of the proposed rules.

3. On April 10, 1978, a Notice of Hearing and a copy of the proposed rules were published at 2 State Register 1878.

4. On April 11, 1978, the Board mailed 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 notice.

5. On April 19, 1978, the Board filed the following documents:

(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 Affidavit of Mailing;
(e) A copy of a Notice of Intent to Solicit Outside Opinion published at 2 State Register 1270 (December 26, 1977). No material was received in response to that Notice.
(f) The Statement of Need;
(g) The Statement of Evidence, including the names of witnesses to be called;
(h) A copy of the Model Code of Professional Conduct as promulgated by the National Association of State Boards of Accountancy, together with comments to the Code; and
(i) A copy of a Notice of Hearing published in The Footnote, Vol. 28, No. 8 (April, 1978) at p. 10.

The documents were available for inspection at the Office of Hearing Examiners from the date of filing to the date of the hearing.

5. The record remained open through May 31, 1978, for the receipt of written comments and statements, the period having been extended by the Hearing Examiner at the request of the Board to the maximum 20 calendar days. The only comment received following the hearing were the comments of the Antitrust Division of the Office of the State Attorney General (Pub. Ex. 1).

STATUTORY AUTHORITY

6. Minn. Stat. § 326.18 (1976) provides in relevant part:

> "The board shall make . . . all other rules and regulations proper to carry into effect the purposes of §§ 326.17 to 326.23. . . . The board may make further rules and regulations, including but not limited to rules of professional conduct, pertaining to corporations practicing public accounting which it deems consistent with or required by the public welfare."

RULE 404 - ADVERTISING

7. Existing Rule 404 provides:

> "Solicitation and advertising. A licensee shall not seek to obtain clients by solicitation. Advertising is a form of solicitation and is prohibited."

The amendments proposed here divide this existing rule into two rules, Rule 404, dealing with advertising, and Rule 408 dealing with solicitation. Proposed Rule 404 states in part:

> "A licensee shall not use or participate in the use of any form of public communication having reference to his professional services which contains a false, fraudulent, misleading, deceptive or unfair statement or claim."

The rule goes on to define false, fraudulent, misleading, deceptive or unfair statements or claims by a non-inclusive list of eight examples.

8. The Board demonstrated that there are two reasons the proposed rule is needed. First, the existing rule, being a complete prohibition against advertising, is no longer enforceable under the First Amendment of the U. S. Constitution. In Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the Supreme Court made it clear that advertising of professional services is protected by the First Amendment. Secondly, the amended rule is intended and necessary for the protection of the public and to establish standards of conduct for certified public accountants that will

allow the Board to uniformly carry out its disciplinary functions under Minn. Stat. § 326.23.

9. All the proposed rules, including this one, are copied from the National Association of State Boards of Accountancy (NASBA) Model Code of Professional Conduct. NASBA is an association of state boards who are charged with regulation of the accountancy profession in the various states; it is not a trade or professional association of accountants. Adherence to the Model Code to the extent its provisions are reasonable and appropriate for regulation of the accountancy profession in Minnesota is reasonable because it fosters uniform conduct throughout the states. NASBA has advised the Board that six states have already adopted rules modeled on the advertising, solicitation and incompatible occupation rules contained in the Model Code and that several more states are considering similar rule changes. The comment to the advertising rule in the Model Code states:

> "This Rule would be a marked departure from the common pattern of existing rules, which flatly ban all advertising. It is intended to reflect the current state of the law as to constitutionally permissible restrictions on advertising, as best it can be divined from the United States Supreme Court's decision in Bates v. State Bar of Arizona." (Ex. N at 18)

10. In its comments, the Antitrust Division stated:

> "The Antitrust Division supports the basic approach taken in the introductory paragraph of proposed rule 404, which, as we understand it, would permit advertising generally subject to the restriction that it not contain false, fraudulent, misleading, [deceptive] or unfair statements or claims. However, the second sentence of the provision, which contains a list of examples of 'false, fraudulent, misleading, or deceptive statements or claims,' may be subject to interpretations that could create a chilling effect on the dissemination of useful information. In this sense, the examples may cause more problems than the mere recitation of the general rule contained in the first sentence."

11. The Examiner finds that the Board had demonstrated the reasonableness of all of Rule 404 except subsection C., the third example of an improper statement or claim, which states:

> "Contains any testimonial or laudatory statement, or other statement or implication that the licensee's professional services are of exceptional quality. . . ."

It is generally desirable in rules, especially those which create prohibitions and upon which disciplinary action may be based, to achieve a maximum degree of specificity and to avoid vagueness. For that reason, definitions and examples which help reduce vagueness and unclarity are generally desirable. In the proposed rule, all the examples other than subsection C. are, by their own terms, examples of false, fraudulent, misleading or deceptive statements or claims and are, on their face, a reasonable part of the rule. However, statements or claims of the type that would be prohibited by subsection C. are not necessarily false, fraudulent, misleading, deceptive or unfair unless it is presumed that no licensee can deliver professional services of exceptional quality. The Board presented no evidence or argument supporting such a presumption. Subsection C. must, therefore, be deleted.

RULE 406 - INCOMPATIBLE OCCUPATIONS

12. Existing Rule 406 prohibits engagement in a business or occupation which impairs the licensee's objectivity or serves as a feeder to his practice. The proposed amendments to this Rule add a standard which also prohibits engagement in any occupation which would impair the licensee's independence and delete the express prohibition against feeder occupations.

13. The Board demonstrated that the addition of the "independence" standard was necessary and reasonable in protecting the public interest. It is axiomatic that the public must rely upon the professional judgment of certified public accountants and that that judgment must be formulated from an independent and objective base. Deletion of the prohibition against feeder occupations from the rule is necessary and reasonable because this type of regulation is more appropriately and reasonably governed by the proposed advertising and solicitation rules, which more directly address the evils to be prevented.

14. The comment to this rule in the Model Code states:

> "This Rule departs from its counterpart in existing Codes in omitting the touchstone of 'feeder' occupations. Insofar as the Rule prohibits concurrent occupations which genuinely impair independence in the performance of auditing services, it still seems wholly appropriate."

RULE 408 - SOLICITATION

15. Solicitation was formerly prohibited entirely by Rule 404. The proposed rule provides:

> "Solicitation. A licensee shall not by any direct personal communication, solicit an engagement to perform professional services (a) if the communication would violate Rule 404 if it were a public communication; or (b) by the use of coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct; or (c) where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited a communication or the seeking to secure the performance of professional services and has not yet engaged another to perform them."

16. At the time of the hearing, two cases involving attorney solicitation had been argued before the Supreme Court but not yet decided, and so the Board (and NASBA in its Model Code) had before it some uncertainty as to what bounds the Court would set on regulation of solicitation. Opinions in the two cases were announced May 30, 1978. Ohralik v. Ohio State Bar Association, 46 U.S.L.W. 4511; In re Edna Smith Primus, 46 U.S.L.W. 4519. Ohralik states that states may proscribe in-person solicitation for pecuniary gain under circumstances likely to result in adverse consequences. Primus, which involved a letter from an attorney on behalf of the ACLU offering free services, held that such solicitation constitutes expressive and associational conduct entitled to First Amendment protection, as to which the government may regulate only "with narrow specificity." Ohralik spoke to the inherent dangers of face-to-face solicitation and stated that, in addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions, especially members of the Bar. Protection of the public from the aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of "vexatious conduct" is a legitimate and important state interest.

17. If the term "direct personal communication" in the proposed rule means "in-person", the proposed rule is well within the standards set by Ohralik. If, however, the term includes

mass direct-mailings to potential clients, the rule would seem to be contrary to the Bates requirements (as the Antitrust Division implies), and not within the State's countervailing interests in protecting the public from making decisions in pressure situations. Because the term is unclear, the Examiner finds that the Board has failed to demonstrate that Rule 408 is reasonable. The Examiner would suggest that the rule be modified to read:

> "Solicitation. A licensee shall not, by in-person communication, solicit an engagement to perform professional services for pecuniary gain (a) if the . . ."

Such a change would bring the rule squarely within the holding of Ohralik and make it reasonable. There are other possibilities the Board may wish to consider. It might, for example, define "direct personal communication" as "face-to-face, telephonic or similar conversational contact between a potential client and the licensee or his agent." The Supreme Court avoided defining "in-person"; the Board may wish to in order to remove some vagueness.

GENERAL COMMENTS

18. The Antitrust Division noted that two other rules not proposed for amendment here may be subject to the same analysis as the advertisement and solicitation rules. They are Rule 401, Services to Clients of Other Accountants ("Encroachment"), and Rule 402, Offers of Employment. The Antitrust Division also pointed out that the same Model Code that modified the rules on solicitation and advertising deleted the rules on encroachment and offers of employment (Ex. N, p. 1).

The Antitrust Division states in its conclusion:

> "The State Board's efforts in this proceeding are a step in the right direction, and the Board should be congratulated for its swift action in this regard. However, we believe that the Board's rules, both present and proposed, will need refinement and updating as further legal developments occur in the changing perceptions of what the public interest demands and permits in regard to the seeking of professional services. In revising its rules, we recommend to the Board that the possibility of abuse by a few should not prevent the vast majority of a profession from providing information which may be of crucial significance to consumers. The free flow of commercial information is mandated both by First Amendments guarantees and our national economic policy of free competition." (Ex. 1 at 6-7)

CONCLUSIONS

1. Timely and adequate notice of the hearing was properly served and published by the Board. All other substantive and procedural requirements have been fulfilled.

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

3. Except as noted in Findings 11 and 17, the Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts.

4. Modifications suggested by the Examiner appear to be non-substantial as that term is applied in Minn. Rule HE 108. No suggestion made by the Examiner is intended to preclude the Board in any way from making its own non-substantial changes and improvements.

RECOMMENDATION

The Hearing Examiner recommends that the proposed rules be modified as suggested in the Findings, and that so modified, they be adopted.

Dated this 8th day of June, 1978.

STEVE M. MIHALCHICK
Hearing Examiner

STATE OF MINNESOTA

BOARD OF ACCOUNTANCY

IN THE MATTER OF THE PROPOSED AMENDMENT) OF THE RULES OF THE STATE BOARD OF) ACCOUNTANCY GOVERNING THE PROFESSIONAL) CONDUCT OF CERTIFIED PUBLIC ACCOUNTANTS)

FINDINGS OF FACT

The above-entitled matter came on for hearing before Hearing Examiner Steve M. Mihalchick of the Minnesota Office of Hearing Examiners at 9:30 a.m. on Wednesday, May 17, 1978 in the Metro Square Building, St. Paul, Minnesota.

Barry R. Greller, Special Assistant Attorney General, Fifth Floor, Metro Square Building, appeared as counsel for the Board of Accountancy. The seven members of the Board were present at the hearing. The hearing continued until all interested groups or persons had an opportunity to be heard concerning the adoption of the proposed rules.

Hearing Examiner Steve M. Mihalchick prepared the Report of Hearing Examiner, dated June 8, 1978, stating his Findings of Fact, Conclusions, and Recommendations, pursuant to Minn. Stat. §15.052 (3) (1976) and Minn. Rule HE 106.

Having afforded interested persons an opportunity to present written and oral data, statements and arguments, and having considered all the testimony and other evidence adduced herein, and based upon all the records, files, transcripts, exhibits and proceedings in this matter, the Board of Accountancy hereby adopts as its Findings of Fact, with the exception of findings 11 and 17, the Findings of Fact propounded by the Hearing Examiner in his Report of June 8, 1978. The Board of Accountancy further adopts as its own Conclusions, Conclusions 1 and 2 of the Hearing Examiner in his Report of June 8, 1978, which Conclusions are hereby further adopted as a part of the Board's Findings of Fact herein. The Board further makes the following findings of fact in substitution for findings of fact 11 and 17 and conclusions 3 and 4 of the

Hearing Examiner:

1. In substitution for finding of fact 11 as propounded by the Hearing Examiner in his Report, the Board finds:

The Board has demonstrated the reasonableness of all of Rule 404 except subsection C., the third example of an improper statement or claim, which states:

> "Contains any testimonial or laudatory statement, or other statement or implication that the licensee's professional services are of exceptional quality...."

It is generally desirable in rules, especially those which create prohibitions and upon which disciplinary action may be based, to achieve a maximum degree of specificity and to avoid vagueness. For that reason, definitions and examples which help reduce vagueness and unclarity are generally desirable. In the proposed rules, all the examples other than subsection C. are, by their own terms, examples of false, fraudulent, misleading or deceptive statements or claims and are, on their face a reasonable part of the rule. However, statements or claims of the type that would be prohibited by subsection C. as it appears in the proposed rules, are not necessarily false, fraudulent, misleading, deceptive or unfair unless it is presumed that no licensee can deliver professional services of exceptional quality. Subsection C. must, therefore, be changed to read as follows, so that its application is limited to those statements which are not based on verifiable facts:

> "C. Contains any testimonial or laudatory statement or other statement or implication that the licensee's professional services are of exceptional quality that is not based on verifiable facts. . . ."

2. In substitution for finding of fact 17 as propounded by the Hearing Examiner in his report, the Board finds:

If the term "direct personal communication" in the proposed rule means "in-person", the proposed rule is well within the

standards set by Ohralik. If, however, the term includes mass direct-mailings to potential clients, the rule would seem to be contrary to the Bates requirements (as the Antitrust Division implies), and not within the State's countervailing interests in protecting the public from making decisions in pressure situations. Because the term in the proposed rule is unclear, the Board finds that Rule 408 should be modified by the addition of the following clarifying sentence at the end of the proposed rule:

> The term "direct personal communication" as used in this rule means any in-person, written, telephonic, or similar communication directed to a specific recipient or tailored in content to a specific recipient.

The Board finds that this clarifying language will limit the application of Rule 408 to those communications which are not public communications within the meaning of proposed Rule 404. While the Board is aware that the question of state regulation of telephonic or written solicitation has been left open by the Supreme Court, the Board finds that there are inherent in unsolicited telephonic or written communications which are directed at specific recipients, many of the dangers, including the potential for misrepresentation, undue influence and overreaching, that were found to be inherent in the unsolicited face-to-face communications considered by the Court in Ohralik. The Board finds, therefore, that given the present state of the law, such communications are properly regulated as solicitations under proposed Rule 408.

3. In substitution for conclusions 3 and 4 of the Hearing Examiner in his Report, the Board finds and concludes:

Subject to the modifications which the Board has found necessary with respect to proposed Rules 404 and 408, the Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts. The modifications found necessary by the Board will serve to clarify the meaning and scope of the proposed rules and are not substantial changes within

the meaning of Minn. Rule H.E. 108.

STATE OF MINNESOTA
BOARD OF ACCOUNTANCY

Dated: 7-28-18

Robert A. Unzen

Robert A. Unzen, Chairman
Board of Accountancy

STATE OF MINNESOTA

BOARD OF ACCOUNTANCY

IN THE MATTER OF THE PROPOSED AMENDMENT) OF THE RULES OF THE STATE BOARD OF) ACCOUNTANCY GOVERNING THE PROFESSIONAL) CONDUCT OF CERTIFIED PUBLIC ACCOUNTANTS)	CERTIFICATE OF BOARD'S RESOLUTION ADOPTING RULES

I, Janet B. Jasper, do hereby certify that I am Secretary of the Board of Accountancy, a board duly authorized under the laws of the State of Minnesota, and that the following is a true, complete, and correct copy of a resolution adopted at the meeting of the Board of Accountancy duly and properly called and held on the 24th day of July, 1978; that a quorum was present at said meeting, that a majority of those present voted for the resolution; that said resolution is set forth in the minutes of said meeting and has not been rescinded or modified.

"Resolved that the rules relating to the Professional Conduct of Certified Public Accountants, identified as Minn Rules Accy 404, 406 and 408, be and they are hereby approved and adopted, pursuant to the authority vested in the State Board of Accountancy by Minn. Stat. §§15.0412 and 326.18 (1976), and that Robert A. Unzen, Chairman of the State Board of Accountancy, be and hereby is authorized to sign an order adopting those rules."

IN WITNESS WHEREOF, I have hereunto subscribed my name this 24 day of July, 1978.

Janet B. Jasper, Secretary
State Board of Accountancy

ATTESTED:

Robert A. Unzen, Chairman
State Board of Accountancy

STATE OF MINNESOTA

BOARD OF ACCOUNTANCY

IN THE MATTER OF THE PROPOSED AMENDMENT) OF THE RULES OF THE STATE BOARD OF) ACCOUNTANCY GOVERNING THE PROFESSIONAL) CONDUCT OF CERTIFIED PUBLIC ACCOUNTANTS)	CERTIFICATE OF BOARD'S AUTHORIZING RESOLUTION

I, Janet B. Jasper, do hereby certify that I am acting secretary of the Board of Accountancy, a board duly authorized under the laws of the State of Minnesota, and that the following is a true, complete, and correct copy of a resolution adopted at a meeting of the Board of Accountancy duly and properly called and held on the 27th day of January, 1978; that a quorum was present at said meeting; that a majority of those present voted for the reolution; that said resolution is set forth in the minutes of said meeting and has not been rescinded or modified.

"RESOLVED, that Leonard A. Rapoport, Chairman of the Board of Accountancy, be and he hereby is granted the authority and directed to call a hearing for the purpose of promulgating rules of the Board of Accountancy with respect to amendment of the existing Code of Professional Conduct for Certified Public Accountants, including the rules governing advertising, solicitation and incompatible occupations, as well as to perform any and all acts incidental thereto, including but without being limited thereto, signing an order for hearing and notice of hearing as well as acting as presiding officer at all hearings."

IN WITNESS WHEREOF, I have hereunto subscribed my name this 24th day of February, 1978.

Janet B. Jasper
Acting Secretary
State Board of Accountancy

ATTESTED:

Leonard A. Rapoport, Chairman
State Board of Accountancy

STATE OF MINNESOTA

BOARD OF ACCOUNTANCY

IN THE MATTER OF THE PROPOSED AMENDMENT) OF THE RULES OF THE STATE BOARD OF) ACCOUNTANCY GOVERNING THE PROFESSIONAL) CONDUCT OF CERTIFIED PUBLIC ACCOUNTANTS)	ORDER ADOPTING RULES

The above-entitled matter came on for hearing before the Board of Accountancy of the State of Minnesota on the 17th day of May, 1978, at 500 Metro Square Building, 7th and Robert Streets, Saint Paul, Minnesota 55101, after proper notice required by Minn. Stat. §15.0412 (1976) was served upon all persons, associations and other interested groups registered with the Secretary of State for that purpose and after proper publication of such notice in the State Register.

After affording interested persons an opportunity to present written and oral data, statements and arguments, having heard all of the testimony, having considered all of the evidence adduced, and having confirmed the need for the above-captioned rules and the reasonableness thereof,

NOW, THEREFORE, IT IS ORDERED that these rules, identified as Minn. Rules Accy 404, 406 and 408 are adopted this 28th day of July, 1978, pursuant to the authority vested in the Board of Accountancy by Minn. Stat. §§15.0412 and 326.18 (1978).

STATE OF MINNESOTA
BOARD OF ACCOUNTANCY

Dated: 7-28-78

Robert A. Unzen

Robert A. Unzen, Chairman
Board of Accountancy

STATE OF MINNESOTA

BOARD OF ACCOUNTANCY

IN THE MATTER OF THE PROPOSED) AMENDMENT OF THE RULES OF THE) STATE BOARD OF ACCOUNTANCY) GOVERNING THE PROFESSIONAL) CONDUCT OF CERTIFIED PUBLIC) ACCOUNTANTS)	STATEMENT OF COMPLIANCE WITH MANUAL OF RULE MAKING PROCEDURES

I, Special Assistant Attorney General Barry R. Greller, 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 Rule Making Procedures has been followed without any exceptions.

Dated: September 22, 1978.

Barry R. Greller
Special Assistant Attorney General

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS
ROOM 300 — 1745 UNIVERSITY AVENUE
ST. PAUL, MINNESOTA 55104
(612) 296-6910

September 12, 1978

Mr. Kenneth L. Peatross
Executive Secretary
Minnesota Board of Teaching
607 Capitol Square Building
St. Paul, Minnesota 55101

Dear Mr. Peatross:

Enclosed with this letter are all of the files and records relating to the Board of Teaching rules which were submitted to this office for review on September 7, 1978. Also enclosed is the Report of the Chief Hearing Examiner.

Yours very truly,

DUANE R. HARVES
Chief Hearing Examiner

DRH:sh
Enc.
cc: Don Mueting

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE BOARD OF TEACHING

IN THE MATTER OF THE PROPOSED ADOPTION, AMENDMENT OR REPEAL OF RULES OF THE BOARD OF TEACHING GOVERNING REQUIREMENTS FOR ISSUANCE AND RENEWAL OF ALL LICENSES, QUALIFICATIONS, PHYSICAL EDUCATION AND HEALTH TEACHERS, SUSPENSION OR REVOCATION OF LICENSES TO TEACH, APPEAL TO THE MINNESOTA BOARD OF TEACHING, SOCIAL STUDIES IN SECONDARY SCHOOLS, SCIENCE FOR GRADES 5-9 AND GRADES 7-12, HUMAN RELATIONS COMPONENTS IN ALL PROGRAMS LEADING TO LICENSURE IN EDUCATION, ISSUANCE AND RENEWAL OF ALL LICENSES; FEES, TEACHERS OF ART, TEACHERS OF FAMILY LIFE EDUCATION, TEACHERS OF AMERICAN INDIAN LANGUAGE AND CULTURE, CODE OF ETHICS, CONTINUING EDUCATION/RELICENSURE, CAREER LICENSURE IN TEACHING, NURSERY SCHOOL TEACHERS, LICENSURE OF PREKINDERGARTEN TEACHERS AND PREKINDERGARTEN ASSISTANT TEACHERS, TEACHERS OF INDUSTRIAL ARTS, ELEMENTARY SCHOOL COUNSELORS, SECONDARY SCHOOL COUNSELORS, TEACHERS IN MIDDLE SCHOOLS.

REPORT OF THE CHIEF HEARING EXAMINER

The above-entitled matter was submitted to the Chief Hearing Examiner for review pursuant to the provisions of Minn. Stat. § 15.052, Subd. 4, and Minn. Rule HE 107, on Thursday, September 7, 1978. This review is limited to ensuring compliance with Minn. Stat. § 15.0412, Subd. 4, and to determine whether or not the rules as finally adopted are substantially different from those proposed prior to the hearing.

Based upon a review of the record, the Chief Hearing Examiner makes the following:

FINDINGS OF FACT

1. A Notice of Hearing was published in the State Register and mailed to all persons who had registered with the Secretary of State at least 30 days prior to the first day of hearing.

2. The full text of the proposed new rules and amendments to existing rules were published at least 30 days prior to the first day of hearing.

3. All documents required to be filed prior to the hearing pursuant to Minn. Rule HE 103 were filed 24 days prior to the hearing. However, no persons requested an opportunity to review the documents 25 days prior to the hearing and, therefore, no prejudice can be shown by any persons for the failure of the Board to comply with Minn. Rule HE 103 by one day.

The Hearing Examiner issued his report on January 18, 1978, and the Board of Teaching, in an undated Findings of Fact and Conclusions adopted by reference the Findings of Fact and Conclusions of the Hearing Examiner in part, and by separate Findings of Fact relating to 5 MCAR § 3.130 made its own Findings of Fact and Conclusions. On July 31, 1978, the Minnesota Board of Education approved the rules of the Board of Teaching as they were submitted to the Chief Hearing Examiner.

4. A review of the rules as proposed for final adoption indicates that the Board has used the word "may" in numerous areas granting the various boards and committees discretion without establishing sufficient standards or criteria under which this discretion will be exercised. In each instance, prior to submission of the rules to the Attorney General for final review, the Board should change the term "may" to "shall" or add appropriate standards or criteria. The following is a listing of those rules wherein the Chief Hearing Examiner has found the term used where the Board should make the change: 3.053A.1.a., 3.053A.1.d., 3.053B.1.a,c and d, 3.005C, 3.005D.2 and 3, 3.005E.2, 3.005G.5.b, and 3.074G.

5. In several areas, the rules contain an effective date of July 1, 1978. This date should either be deleted or, if the Board desires to delay effectiveness of certain of the rules, amend it to reflect that desire. The rules will be automatically effective after filing with the Secretary of State and five days after publication in the State Register, unless the Board desires to delay as indicated above.

Based upon the foregoing Findings of Fact, the Chief Hearing Examiners makes the following:

CONCLUSIONS

1. That the rules as finally adopted are not substantially different from those as proposed and that the Board has complied with the provisions of Minn. Stat. § 15.0412, Subd. 4.

While the Hearing Examiner concluded that certain items in 5 MCAR § 3.130 were unreasonable (see Hearing Examiner Report, Conclusions number 13) the Board has made its own Findings on those issues and has made a Finding of reasonableness. Both issues appear, to the Chief Hearing Examiner, to be policy decisions based upon facts presented at the hearing. State agencies must be free to exercise their discretion in determining policy questions as long as the policy is supported by facts and which facts are presented at the hearing.

2. That should the Board amend the rules as discussed in Finding 4 above and Finding 5 above, the Board need not resubmit the rules to the Chief Hearing Examiner for review for such changes would not be substantial changes.

NOW, THEREFORE, it shall be the responsibility of the Board of Teaching to submit the rules to the Attorney General for his review pursuant to Minn. Stat. § 15.0412, Subd. 4, and following his approval, to publish in the State Register.

Dated this 12th day
September, 1978.

DUANE R. HARVES
Chief Hearing Examiner

OUR FILE NO. 471

Attorney General

Donald J. Mueting
Special Assistant
Attorney General

October 13, 1978

Lee E. Sheehy
Special Assistant
Attorney General

296-1288

In the Matter of the Proposed Adoption of 5 MCAR §§ 3.130, 3.052, 3.053, 3.005-3.015, 3.005 (new), 3.020-3.031, 3.020 (new), 3.074, 3.003

The above-captioned rules have not been approved by this office or filed with the Secretary of State for the below-enumerated reasons. Following agency considerations of these reasons and appropriate action, these rules may be resubmitted to this office for approval. When resubmitting, please insure that the original of the Rules as Adopted and Order Adopting which are necessary for filing with the Secretary of State are resubmitted. Finally, I have retained copies of all relevant materials in this matter should you wish to discuss it with me.

The rules are returned for the following reasons:

1. § 3.130 B(3): Amendments to this provision deleted the reference to state and federal law governing the privacy of information relating to students. In so doing, it creates potential confusion and a possible gap in the rule which could mislead the unwary reader. Therefore, as I discussed with Mr. Peatross, the phrase "in accordance with state and federal law" must be added to the provision.

2. § 3.005 E(2): While the agency adopted the Hearing Examiner's Report by reference for this provision, it failed to implement the amendment required by Hearing Examiner Conclusion No. 11.

3. § 3.005 E(7): This office concurs with the Chief Hearing Examiner, who in Finding No. 5 held the date "July 1, 1978" to be improper. Retroactivity in rules, as in statutory law, is permitted in only limited circumstances which do not appear to exist in this case.

4. § 3.005 F(3): This provision fails to say what expenses will be reimbursed. It fails to say at what rate those expenses will be reimbursed. For example, will mileage and meals be reimbursed at the same rate it would be reimbursed for a state employee? Finally, what is the statutory authority for both the state and local committees? Is it express or implied authority under Minn. Stat. Chps. 125 or 214?

If you have any questions, do not hesitate to call me.

LES:mb

cc: Duane Harves

Enclosure

ATTORNEY GENERAL

SECRETARY OF STATE'S OFFICE

January 3, 1979

LEE E. SHEEHY
Special Assistant
Attorney General

296-1288

In the Matter of the Proposed Adoption of 5 MCAR
SS 3.005 - 3.015, 3.005 (new)

The Order Adopting the above-captioned rules was earlier filed with your office on December 14, 1978, with related rules, which the agency served at that time.

If you have any questions, do not hesitate to call me.

LES/bw

#471 Bd of Teaching -

RULES REVIEW CHECKLIST

DATE RULES RECEIVED 9-25 Temporary Rule _____

Resubmitted and Received 12/5 / 12/28/78

DUE DATE 10/13 12/15 / 1-5-78 (~~extended 12/11 for exceptions of rules~~)

a. Returned to Agency w/o filing w/Secy of State 10/13
b. Approved 12/14 Date Sent Back to Agency _____

↓ in part ↓ 3.005 eff'd 1-3

* For documents, see Omn file # 451

1. Rules as Adopted ✓
2. Rules as Proposed *
3. Certificate of Board's Authorizing Resolution, where applicable N/A
4. Order for Hearing X
5. Notice of Hearing X
   (i) Sufficiency X
6. Secretary of State's List X
7. Certificate of Acquisition of Secretary of State's List X
8. Affidavit of Mailing X
   (i) At least 30 days prior to hearing X
9. Statement of Need and Evidence X
10. Hearing Examiner's Report *
11. Agency's Findings of Fact ✓
12. Certificate of Board's Resolution Adopting Rules, where applicable ✓
13. Order Adopting ✓
14. Report of Chief Hearing Examiner ✓
    (i) Finding of No Substantial Change ✓
    (ii) Permission to Incorporate by Reference, where applicable N/A
15. Certificate of Compliance with Rulemaking Procedures ✓
16. Copy of Notice of Intent to Solicit Outside Opinion, where applicable X
17. Petition by Public, where applicable N/A.

§ 3.130

① ~~How about~~ '77 Supp ~~M.S. 214.10~~
Not Necessary to incorporate per R. Peterson

② ~~No finds for any B(7)~~

③ B(3)- confid add "in accordance with state & fed. laws.

④ ~~B(6)~~ Taken How about student teachers ?

⑤ ~~HE #16(D)(7) - HE recommends substituting "penalties" for "recoveries"~~

§ 3.052 - 3.053

Bd like "Teacher-Aides" between Levels I & II

① HE Finds #20 ← Bd ← Bd says if added, substitute possibly.
" " Concl #13 Bd in findings rejects HE findings & Conclusions

§ 3.005

① HE Finds #18
HE Concls. #11

② E (7) July 1, 1978 ← in accord w/ Chief HE Finds #5 retroactive

③ F (3) What expenses ?
What rate of reimburs ?
Purs. to what stat auth ?
pursuant to § 214.09

Repeal. [§ 3.005 - § 3.015]

§ 3.005 Continuing education/relicensure. (All new material.)

A. The provisions of this rule apply only to persons licensed by the board of teaching.

B. A continuing license, valid for five years, shall be issued to an applicant who holds a valid entrance license and who has met the requirements for the issuance of the continuing license as set forth in rules of the board of teaching. A continuing license is required for those subjects and grades where life licensure has not been granted.

C. Pursuant to procedures specified in this rule, a valid continuing license shall be renewed for a subsequent period of five years when an applicant presents evidence of having been granted 120 renewal units during the five-year period immediately preceding the date on which the requested renewal is to be made effective.

D. Applicants who do not qualify for a continuing license.

1. An applicant having teaching experience who transfers from another state and who does not hold a valid Minnesota license must obtain an entrance license.

2. An applicant holding a continuing or life license in one education area and who wishes to engage in another education area for which the applicant is not presently licensed shall be issued a continuing license for the additional area upon meeting the requirements for that license.

E. Renewal units.

1. Experiences for which renewal units may be granted are listed below. Renewal units must be earned in two or more of the following categories.

a. College courses and related work.

b. Supervision of clinical experiences.

c. Attendance at professional meetings.

d. Attendance at lectures by persons with expertise in the areas for which licensure is requested.

e. Systematic, purposeful observation during visits to schools.

f. Volunteer work in professional organizations or situations related to the areas for which licensure is requested.

g. Development of demonstrations or curriculum innovations for use with student teachers or in in-service programs.

h. Creative endeavor (art, music, writing) related to the individual's licensure.

i. Publication of professional articles in a professional journal in an appropriate field.

j. Travel related to the professional licensure areas. Prior approval of this experience shall be obtained.

k. Maintenance and evaluation of an annotated log or record of activities with a class or group.

l. Exchange situations to gain experience with students at another age, ability, socio-economic level or in another subject for which the teacher is qualified.

m. Attendance at and participation in in-service meetings with opportunity for staff members in various roles (college faculty, community persons) to work together.

n. Participation in in-service meetings to include active staff planning and involvement (demonstrations with student exhibits, explanation of special or new techniques).

o. Direct involvement, individually or within a group, to research, plan, and implement innovative educational practices.

p. Planning and production of television or other special programs for use in the schools.

q. Leadership experiences, which involve the exercise and/or development of new or broader skills and sensitivities to the school, community, and profession.

r. Membership on state and local committees involved with licensure, teacher education, or professional standards.

s. Additional kinds of experiences may be approved. These experiences shall be experiences especially appropriate for a particular school district or a particular education area.

2. The local committee shall grant renewal units and allow accumulation of renewal units according to the provisions of this rule. Maximum renewal unit allocations for specific experiences identified below are to be used as a guide for allocating renewal units for other experiences.

a. One quarter credit (when related to professional growth) equals ten renewal units.

b. One semester credit (when related to professional growth) equals fifteen renewal units.

c. Supervision of the clinical experiences of a college student for one quarter or one semester equals ten renewal units, provided that no more than thirty such renewal units may be granted in any five-year period.

d. One week of approved travel equals ten renewal units, provided that no more than thirty such renewal units may be granted in any five-year period.

e. A one-day workshop, seminar, or conference equals up to five renewal units based on type of experience, involvement, and outcome product.

3. Experiences for renewal unit credit must aid the applicant in maintaining and improving general, academic, or professional qualifications.

4. An applicant requesting renewal of a license to teach must earn a minimum of 120 renewal units during each five-year licensure period from July 1 of the year of issuance to June 30 of the year of expiration. An applicant may not bank renewal units for purposes of relicensure.

5. In cases where local school board policies require further education on a periodic basis, such education shall be evaluated in the same manner as other experiences and may apply as renewal units.

6. An applicant who seeks renewal of a continuing license for two or more areas shall allocate at least 30 renewal units to each of the licensure areas for a total of no fewer than 120 units, with priority given to work in areas where the candidate is employed during the licensure period. Those candidates possessing administrative licensure may allocate units for the renewal of teaching licensure in this same manner.

F. Local committees for continuing education/relicensure.

1. A local committee as authorized by M.S. 125.185 subd. 4 shall be established in each Minnesota public school district with membership as follows:

a. Five persons licensed by the board of teaching who hold at least a baccalaureate degree, to be elected by the licensed teaching faculty. Nominations may be by building, grade level, or other appropriate categories, provided that all eligible persons have a fair and equitable chance for selection.

b. One licensed person who holds an administrator's license, representing the elementary and secondary administration, to be elected by the licensed administrators employed by the district.

c. One resident of the district who is not an employee of the district, to be designated by the local school board. School board members are not considered to be employees of the district.

2. All members of an appropriate voting group shall be notified of the meeting at which the elections are to be held at least five days prior to the meeting. The meeting shall be held at a convenient time and place and elections shall be by secret ballot.

3. In districts where either teachers or administrators with the specified qualifications are not available for service on the local committee, the superintendent will report the situation to the board of teaching who shall make special provisions for establishing a continuing education committee.

4. Members of the local committee shall be elected in May of each year for terms to begin no later than the following September 1. The term of office of members of the local committee shall be two years.

5. The local committee shall hold its organizational meeting no later than September of each year. At the organizational meeting the local committee shall elect a chairman and secretary whose duties shall be established by the local committee.

   a. Up to three days per month may be provided by the local school district to each local committee member to attend local committee meetings.

   b. Clerical assistance and supplies as requested by the local committee may be provided by the local school district in sufficient amount to enable the local committee to comply with the record keeping and reporting required by the rule.

6. A quorum shall be more than fifty percent of the total voting membership of the committee. A majority vote of those voting members present shall be sufficient to take action. Meetings may be called by the chairman of the committee or by written request of three or more of the members. Notice of meetings shall be provided to each member of the committee at least five days prior to the date of the meeting, and shall be posted or otherwise advertised in such a manner as to provide reasonable notice to those teachers subject to the actions of the committee.

7. The duties of the local committee are as follows:

   a. Set rules for its own operation and establish such written guidelines as may be necessary to implement those duties outlined in this section. These rules and guidelines shall not be in conflict with law or other provisions of this rule.

   b. Determine the number of renewal units to be granted for experiences, in accordance with the maximum renewal unit allocations identified in this rule.

   c. Act, within a reasonable time, upon requests for recommendation for renewal of the continuing license by determining whether the applicant has met the requirements of this rule.

   d. Endorse the application for renewal of the continuing license of each qualified applicant and return the endorsed application to the applicant, who will forward it to the director of licensing.

   e. Provide supporting evidence to the board of teaching when an appeal is taken from a decision of the local committee.

   f. Provide recommendations to appropriate personnel concerning the in-service needs of the district.

   g. Evaluate procedures and criteria for granting renewal units and make recommendations for modifications to the director of licensing during February of each year.

h. Forward to the director of licensing verification of the membership of the local committee on an annual basis by November 1 of each year.

i. Forward to the director of licensing a copy of the local committee guidelines. Guidelines shall be forwarded at least every five years, and whenever substantial changes are made.

j. Verify one year of successful teaching experience for individuals on an entrance license. Successful teaching shall be determined by satisfying one or more of the following three criteria:

(1) A teacher receives an offer of a contract for the ensuing year.

(2) A teacher gains tenure or acquires a continuing contract.

(3) Supportive evidence is presented from supervisory personnel, professional colleagues, and/or administrators.

k. Hold an open hearing annually to allow the teachers in each district to review the guidelines established by the local committee.

l. Provide those services and reports that may be required from time to time by the board of teaching.

8. It shall be the responsibility of the person seeking the renewal of a continuing license to submit the application and supporting materials to the local committee of the employing school district, in accordance with procedures and due dates established by that committee.

9. If a licensed person employed by one school district becomes employed by a different district during a renewal period, units already earned and granted during that renewal period shall forthwith be transferred to the local committee for the new district. Such units shall be accepted by that committee.

10. Renewal units will be granted by the committee of the district where the applicant was employed at the time that the experience was completed. In the case of a person who has not been employed by a school district for a period of time, renewal units will be granted by the committee of the district where the applicant was once employed; or where the applicant currently resides if accepted by the local committee. Persons who have never been employed on a continuing basis by a school district shall affiliate with the local committee in the district in which they reside.

11. Each local committee shall be provided with current information regarding changes in board of teaching rules which pertain to licensure in education by the director of licensing.

12. Option for formation of joint local committees.

a. Two or more districts situated in close proximity to each other shall have the option of joining together to establish a joint local committee.

b. A plan for two or more districts to formulate a joint local committee shall be drawn up by a committee consisting of two teachers, one administrator, and one school board member or a designee, from each participating district, and be ratified by at least seventy percent of the licensed personnel employed by each participating district. The plan shall provide for fair representation of all licensed personnel and insofar as possible, shall be consistent with F.1. and other provisions of this rule.

c. The ratified plan shall be submitted by the superintendent of the district employing the largest number of licensed personnel to the director of licensing.

d. The joint local committee shall be treated as any local committee and shall comply with all provisions of this rule.

13. Nonpublic schools.

a. Licensed personnel in a nonpublic school may establish a local committee for the same purpose as local committees established by public school districts. Licensed personnel in two or more nonpublic schools may combine to form a local committee upon the agreement of seventy percent of the licensed personnel in each school. The chairman of the committee shall submit to the director of licensing, on an annual basis no later than November 1 of each year, verification of the membership of the committee and verification of the school or schools whose personnel have established the committee.

b. Licensed personnel in one or more nonpublic schools may join with an appropriate public school district in the establishment of a local committee, provided that seventy percent of the licensed personnel from each nonpublic school and seventy percent of the licensed personnel employed by the public school district agree to such a committee. The superintendent of the district shall submit to the director of licensing, verification of the membership of the committee and verification of the nonpublic schools whose personnel has joined in the establishment of the committee.

c. Insofar as possible, the committees authorized in a. and b., above, shall be established and shall function in the same manner as provided in this rule for committees of public school districts and in such way as to provide fair representation for all licensed personnel and objective evaluation of requests for renewal of licenses.

14. Vocational teachers.

a. The criteria for licensure renewal contained in the Minnesota state plan for vocational-technical education or successor rules shall replace the provisions of E.1.

b. Vocational teachers shall be subject to the continuing education structure as outlined in the Minnesota state plan for vocational-technical education or successor rules. Such licensure shall be recommended by the local vocational relicensure committee. Vocational

teachers employed in school districts or state board approved vocational or cooperative centers currently employing a combination of individuals with standard and vocational licenses shall select one of the options listed below. The selection of alternatives shall be made by a vote of these teachers currently using vocational licensure, and such election shall originally be supervised by the chairman of the local continuing education committee.

(1) Vocational teachers may be subject to the local committee, except that five vocationally-licensed vocational teachers currently teaching full-time on a valid vocational license, as elected in secret ballot by the district or state board approved vocational or cooperative center vocationally licensed teachers, shall be the teaching faculty members on the committee whenever issues of vocational licensure arise.

(2) A separate local vocational committee may be formed by the election of five vocationally-licensed teachers currently teaching full-time on a valid vocational license, along with representation from the public and administration. This option shall be limited to those school districts or state board approved vocational or cooperative centers utilizing twenty five (25) or more vocational licensees.

(3) Vocational teachers in two or more districts or state board approved vocational or cooperative centers situated in close proximity may establish a joint local committee, and may select either option (1) or (2).

(4) Vocational teachers may be subject to the local continuing education/ relicensure committee as currently established, when such teachers teach in a district which employs less than five vocational teachers or which is geographically located so it cannot feasibly cooperate with another district.

G. Colleges or universities which prepare teachers for licensure in education may, if at least twenty of its faculty members apply for teacher licensure, either form a local committee or combine with other colleges or universities to form joint committees.

H. Right of appeal.

1. When an applicant has not been granted the requested number of renewal units by a local continuing education/relicensure committee, an appeal may be made to the local committee. An applicant must appeal to the local committee within thirty days after notification of the decision of the local committee. Failure to file a written request with the local committee for an appeal within thirty days constitutes a waiver of the individual's right to appeal.

2. Decisions by a local committee for continuing education/relicensure denying the appeal may be appealed to the board of teaching by the applicant according to the provisions of 5 MCAR § 3.020.

3. In cases where the applicant has not been granted the required number of renewal units for relicensure, local committees shall not endorse the application for renewal of the continuing license.

4. In the event that the renewal units under appeal result in loss of licensure, it shall be the responsibility of the appellant to inform the director of licensing of such loss of licensure. The director of licensing shall extend the previous continuing license until all avenues of administrative appeal have been exhausted.

I. Evaluation. The functions of the local committees shall be evaluated by the board of teaching during each calendar year which is divisible by five.

APPROVED AS TO FORM AND LEGALITY

JAN. 3 1979 19

WARREN SPANNAUS, ATTORNEY GENERAL

BY Lee E. Sheehy

SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
JAN - 3 1979
Joan Anderson Growe
Secretary of State

3:10 P.M.

MINNESOTA BOARD OF TEACHING

607 CAPITOL SQUARE BUILDING
550 CEDAR STREET
ST. PAUL, MINNESOTA 55101
(612) 296-2415

KENNETH L. PEATROSS
EXECUTIVE SECRETARY

KATHRYN C. RAYBURN, Chairman
513 - 32nd Street Northeast
Rochester, Minnesota 55901

JOSEPH J. MOREN, Vice-Chairman
304 East 32nd Street
Hibbing, Minnesota 55746

MARGERY H. HARRIS, Secretary
4624 Colfax Avenue South
Minneapolis, Minnesota 55409

ROBERT J. CASANOVA
982 South Market
Shakopee, Minnesota 55379

WILLIAM E. GARDNER
104 Burton Hall
University of Minnesota
Minneapolis, Minnesota 55455

LOWELL GILLETT
St. Cloud State University
St. Cloud, Minnesota 56301

EDWARD HUDOBA
United Labor Center
312 Central Avenue - Room 356
Minneapolis, Minnesota 55414

LUCILLE L. KAINU
590 Highway 33 North
Cloquet, Minnesota 55720

JO MALMSTEN
5350 Shady Hills Circle
Shorewood, Minnesota 55331

MARIE McNEFF
Augsburg College
Minneapolis, Minnesota 55454

CARL H. NEVILS
20200 Vance Street
Elk River, Minnesota 55330

ADDIE PERL
2240 Drew Avenue South
Minneapolis, Minnesota 55416

EDWARD A. RAPP
9955 Grouse Street Northwest
Coon Rapids, Minnesota 55433

AARON RUPERT
1409 West Minnehaha Avenue
St. Paul, Minnesota 55104

SISTER MARY DENISE VILLAUME
2475 Dodd Road
St. Paul, Minnesota 55120

NOREEN WELCH
209 North Estey Avenue
LuVerne, Minnesota 56156

DOLORES WINDINGSTAD
Route #1, Box 41
Dawson, Minnesota 56232

September 25, 1978

Mr. Lee Sheehy
Special Assistant Attorney General
Room G-19K
Administration Building
St. Paul, Minnesota 55155

Dear Mr. Sheehy:

Pursuant to the rules of the Office of the Attorney General, I hereby submit for final approval by the Office of the Attorney General the remainder of the rules heard at Public Hearing on October 28-29, 1977, which have been adopted by the Minnesota Board of Teaching and approved by the Minnesota Board of Education.

The rules submitted for final approval are attached to the affidavit of Howard B. Casmey.

The rules have been amended by the Board of Teaching in compliance with the recommendations of the Chief Hearing Examiner with two exceptions:

—Since the provisions of 5 MCAR § 3.005 D.2. have been addressed in the amended 5 MCAR § 3.001 with respect to the issuance of entrance and continuing teaching licenses, the Board has determined that provision D.2. of 5 MCAR § 3.005 should be deleted rather than amended as recommended by the Chief Hearing Examiner.

—The Board finds that it has no statutory authority to require school districts to provide assistance and supplies to local committees. Therefore, the Board is unable to comply with the amendment to 5 MCAR § 3.005 G.5.b. as recommended by the Chief Hearing Examiner to change "may" to "shall."

The complete hearing record is also enclosed pursuant to the requirements of the Office of the Attorney General.

Sincerely,

Kenneth L. Peatross

Kenneth L. Peatross, Executive Secretary
MINNESOTA BOARD OF TEACHING

KLP/pac
Enclosures

cc: Donald J. Mueting
Special Assistant Attorney General

Duane Harves
Chief Hearing Examiner

AFFIDAVIT OF
HOWARD B. CASMEY

Howard B. Casmey, being first duly sworn on oath, deposes and says that:

1. He is the Minnesota Commissioner of Education and the Executive Officer and Secretary of the Minnesota Board of Education and he held this position on July 31, 1978.

2. On July 31, 1978, the Minnesota Board of Education approved the proposals of the Minnesota Board of Teaching to adopt, amend, or repeal the rules entitled:

5 MCAR § 3.130

5 MCAR § 3.052

5 MCAR § 3.053

5 MCAR § 3.005 - 3.015

5 MCAR § 3.005

5 MCAR § 3.020 - 3.031

5 MCAR § 3.020

5 MCAR § 3.074

5 MCAR § 3.003

(Copy attached I).

FURTHER AFFIANT SAYETH NOT.

HOWARD B. CASMEY

Subscribed and sworn to
before me this 25 day of
August, 1978.

Luana Vadnais
Notary Public

LUANA VADNAIS
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires June 16, 1984

COPY I.

Chapter Nine: Code of Ethics

§ 3.130 Code of ethics for Minnesota teachers. (All new material.)

A. Each teacher upon entering the teaching profession, assumes a number of obligations, one of which is to adhere to a set of principles which defines professional conduct. These principles are reflected in the following code of ethics, which sets forth to the education profession and the public it serves standards of professional conduct and procedures for implementation.

This code shall apply to all persons licensed according to rules established by the Minnesota board of teaching.

B. Standards of professional conduct.

1. A teacher shall provide professional educational services in a non-discriminatory manner.

2. A teacher shall make reasonable effort to protect the student from conditions harmful to health and safety.

3. A teacher shall disclose confidential information about individuals only when a compelling professional purpose is served or when required by law.

4. A teacher shall take reasonable disciplinary action in exercising the authority to provide an atmosphere conducive to learning.

5. A teacher shall not use professional relationships with students, parents, and colleagues to private advantage.

6. A teacher shall delegate authority for teaching responsibilities only to licensed personnel.

7. A teacher shall not deliberately suppress or distort subject matter.

8. A teacher shall not knowingly falsify or misrepresent records or facts relating to that teacher's own qualifications or to other teachers' qualifications.

9. A teacher shall not knowingly make false or malicious statements about students or colleagues.

10. A teacher shall accept a contract for a teaching position that requires licensing only if properly or provisionally licensed for that position.

C. Complaints, investigation and hearing.

1. The enforcement of the provisions of the code of ethics for Minnesota teachers shall be in accord with M.S. 214.10.

M.S. 214.10 Complaints; investigation and hearing.

Subd. 1. Receipt of complaint. The executive secretary of a board, a board member or any other person who performs services for the board who receives a complaint or other communication, whether oral or written, which complaint or communication alleges or implies a violation of a statute or rule which the board is empowered to enforce, shall promptly forward the substance of the communication on a form prepared by the attorney general to the designee of the attorney general responsible for providing legal services to the board. Before proceeding further with the communication, the designee of the attorney general may require the complaining party to state his complaint in writing on a form prepared by the attorney general. Complaints which relate to matters within the jurisdiction of another governmental agency shall be forwarded to that agency by the executive secretary. An officer of that agency shall advise the executive secretary of the disposition of that complaint. A complaint received by another agency which relates to a statute or rule which a licensing board is empowered to enforce shall be forwarded to the executive secretary of the board to be processed in accordance with this section.

Subd. 2. Investigation and hearing. The designee of the attorney general providing legal services to a board shall evaluate the communications forwarded to him by the board or its members or staff. If the communication alleges a violation of statute or rule which the board is to enforce, the designee is empowered to investigate the facts alleged in the communication. In the process of evaluation and investigation, he shall consult with or seek the assistance of the executive secretary or, if the board determines, a member of the board who has been designated by the board to assist the designee. He may also consult with or seek the assistance of any other qualified persons who are not members of the board who the designee believes will materially aid in the process of evaluation or investigation. The executive secretary or the consulted board member may attempt to correct improper activities and redress grievances through education, conference, conciliation and persuasion, and in these attempts he may be assisted by the designee of the attorney general. If the attempts at correction or redress do not produce satisfactory results in the opinion of the executive secretary or the consulted board member, or if after investigation the designee providing legal services to the board, the executive secretary or the consulted board member believes that the communication and the investigation suggest illegal or unauthorized activities warranting board action, he shall inform the executive secretary of the board who shall schedule a disciplinary hearing in accordance with Minnesota statutes, chapter 15. Before the designee of the attorney general or the executive secretary may direct the holding of a disciplinary hearing, he shall have considered the recommendations of the consulted board member. Before scheduling a disciplinary hearing, the executive secretary must have received a verified written complaint from the complaining party. A board member who was consulted during the course of an investigation may participate at the hearing but may not vote on any matter pertaining to the case. The executive secretary of the board shall promptly inform the complaining party of the final disposition of the complaint. Nothing in this section shall preclude the board from scheduling, on its own motion, a disciplinary hearing based upon the findings or report of the board's executive secretary, a board member or the designee of the attorney general assigned to the board. Nothing in this section shall preclude a member of the board or its executive secretary from initiating a complaint.

Subd. 3. Discovery; subpoenas. In all matters pending before it relating to its lawful regulation activities, a board may issue subpoenas and compel the attendance of witnesses and the production of all necessary papers, books, records, documents, and other evidentiary material. Any person failing or refusing to appear or testify regarding any matter about which he may be lawfully questioned or produce any papers, books, records, documents, or other evidentiary materials in the matter to be heard, after having been required by order of the board or by a subpoena of the board to do so may, upon application to the district court in any district, be ordered to comply therewith. The chairman of the board acting on behalf of the board may issue subpoenas and any board member may administer oaths to witnesses, or take their affirmation. Depositions may be taken within or without the state in the manner provided by law for the taking of depositions in civil actions. A subpoena or other process or paper may be served upon any person named therein, anywhere within the state by any officer authorized to serve subpoenas or other process or paper in civil actions, with the same fees and mileage and in the same manner as prescribed by law for service of process issued out of the district court of this state. Fees and mileage and other costs shall be paid as the board directs.

2. When oral complaints alleging violations of the code of ethics are received, the executive secretary of the Minnesota board of teaching shall request the complaining party to submit the complaint in writing within 10 days.

3. Upon the receipt of a complaint in writing alleging violations of the code of ethics, the teacher named in the complaint shall be notified in writing within 10 days of the receipt of the complaint.

4. The teacher shall be entitled to be represented by the teacher's own counsel or representative at each stage of the investigation and hearing.

D. Enforcement procedures. The Minnesota board of teaching may impose one or more of the following penalties when it has found a violation of the code of ethics. These actions shall be taken only after all previous efforts at remediation have been exhausted.

1. The board of teaching may enter into agreements with teachers accused of violating the code of ethics which would suspend or terminate proceedings against the teacher on conditions agreeable to both parties.

2. A letter of censure from the board of teaching may be sent to the person determined to be in violation of the standards of the code of ethics. A copy of the letter shall be filed with the Minnesota board of teaching. Such letters shall be kept on file for a period of time not to exceed one calendar year.

3. A teacher who has been found to have violated the code of ethics may be placed on probationary licensure status for a period of time to be determined by the board of teaching. The board may impose conditions on the teacher during the probationary period which are to be directed toward improving the teacher's performance in the area of the violation. During this period, the teacher's performance or conduct will be subject to review by the board of teaching or its designee. Such review will be directed toward monitoring the teacher's activities or performance with regard to whatever conditions may be placed on the teacher during the probationary period. Before the end of the probationary period the board of teaching shall decide to extend or terminate the probationary licensure status or to take further disciplinary actions as are consistent with this rule.

4. The license to teach of the person determined to be in violation of the standards of the code of ethics may be suspended for a period of time determined by the Minnesota board of teaching.

5. The license to teach of the person determined to be in violation of the standards of the code of ethics may be revoked by the Minnesota board of teaching.

§ 3.052 Nursery school teachers.

Repeal.

[A.3. Licensed kindergarten and elementary school teachers who have not prepared to teach in nursery school but who wish to do so, shall take one course in nursery school education either as a part of, or in excess of, the requirements for kindergarten and/or elementary education. In addition, they must have 2 semester (3 quarter) hours of credit in student teaching in nursery school.]

Repeal. [A.4.] A.3.

Repeal.

[C. Temporary (limited) permit. A temporary (limited) permit may be issued to a person not fully meeting the requirements for a provisional license upon the written request of the director of the nursery school or the chairman of the sponsoring board certifying that a qualified person is not available and requesting permission to employ said applicant. This permit may be renewed annually for not more than five years provided the applicant shall meet in-service training requirements of the state board of education (8 quarter hours of credit earned during the period of the temporary (limited) permit).]

C. The provisions of this rule shall remain in effect until July 1, 1984, at which time this rule shall be repealed without further action by the board of teaching.

§ 3.053 Licensure of prekindergarten teachers and prekindergarten associates. (All new material.)

A. Prekindergarten teacher.

1. The prekindergarten teacher is licensed to teach a group of children on a daily basis as well as plan and coordinate the instructional program which addresses the intellectual, emotional, social, cultural, and physical needs of the children in the prekindergarten classroom.

a. Prekindergarten teacher licensure shall be issued to an applicant who has completed the following:

(1) A baccalaureate degree (B.A. or B.S.) from an accredited college or university, and

(2) The requirements of a prekindergarten teacher preparation program approved by the Minnesota board of teaching. The prekindergarten teacher preparation program shall include 18 semester or 27 quarter hours of the course work which is listed below. These courses may be taken as a part of, or in addition to, the baccalaureate degree.

b. The prekindergarten teacher preparation program shall include the following:

(1) Prekindergarten education, early childhood, preschool, or nursery school education course work. A minimum of 10 semester or 15 quarter hours shall be in prekindergarten education and shall include course work in:

(a) Theory

(b) Curriculum

(c) Classroom management

(d) Teacher - child relations

(e) Home - school relations

(f) A minimum of 2 semester or 3 quarter hours shall be in student teaching at the prekindergarten level.

(2) Child development/child psychology and parent-child relations. A minimum of 6 semester or 9 quarter hours shall be course work in:

(a) Child development/child psychology which shall include the study of infants and young children with emphasis on

(i) Stages of development

(ii) Individual differences in rates and styles of learning

(iii) Assessment, record keeping, and observation skills.

(b) Parent-child relations shall include

(i) The study of the child in the family

(ii) The family as a social/cultural unit.

(3) Guided electives. A minimum of 2 semester or 3 quarter hours shall be course work in one of the following:

(a) Child health, nutrition, and safety

(b) Infant development

(c) Young children with special needs.

c. Prekindergarten teacher licensure requirements for kindergarten/elementary teachers are as follows:

(1) Licensed kindergarten and elementary teachers who desire prekindergarten licensure shall complete a program of 14 semester or 21 quarter hours of prekindergarten teacher preparation, as part of, or in addition to previous teaching preparation.

(2) The program requirements shall include:

(a) A minimum of 6 semester or 9 quarter hours in prekindergarten education, including not fewer than 2 semester or 3 quarter hours of credit in student teaching at the prekindergarten level. Course work shall be selected from theory, curriculum, classroom management, teacher-child relations, or home-school relations.

(b) A minimum of 6 semester or 9 quarter hours of course work in child development/child psychology and parent-child relations.

(i) Child development/child psychology shall include the study of infants and young children with emphasis on stages of development, individual differences in rates and styles of learning, and assessment, record keeping, and observation skills.

(ii) Parent-child relations shall include the study of the child in the family and the family as a social/cultural unit.

(c) A minimum of 2 semester or 3 quarter hours of credit in one of the following:

(i) Child health, nutrition, and safety

(ii) Infant development

(iii) Young children with special needs.

d. Continuing licensure shall be granted to a candidate who:

(1) Possesses a previously issued valid and appropriate entrance license and

(2) Has completed the equivalent of one school year of full-time teaching experience at the prekindergarten level.

e. The continuing license shall be renewed according to the rules of the board of teaching pertaining to continuing education.

f. All persons licensed under this rule shall meet the human relations requirements as outlined in rules of the board of teaching.

g. This rule shall become effective July 1, 1984, for all entrance licenses.

B. Prekindergarten associate.

1. The prekindergarten associate is licensed to teach a group of children on a daily basis under the direct supervision of a licensed prekindergarten teacher in the classroom. The prekindergarten associate takes an active part in planning and implementing the instructional program, but does not assume overall responsibility for the program.

a. Prekindergarten associate licensure shall be issued to an applicant who has completed the following:

(1) 60 semester or 90 quarter hours or an associate of arts or associate of science degree from an accredited college or university, and

(2) The requirements of a prekindergarten associate preparation program approved by the Minnesota board of teaching. The prekindergarten associate preparation program shall include 12 semester or 18 quarter hours of the course work or its equivalent which is listed below. These courses may be taken as part of, or in addition to, the 60 semester or 90 quarter hours or associate of arts or associate of science degree.

b. The prekindergarten associate preparation program shall include the following:

(1) Prekindergarten education including early childhood, preschool, or nursery school education course work. A minimum of 6 semester or 9 quarter hours shall be in prekindergarten education and shall include course work in:

(a) Theory

(b) Curriculum

(c) Classroom management

(d) Teacher - child relations

(e) Home - school relations

(f) A minimum of 2 semester or 3 quarter hours shall be in student teaching at the prekindergarten level.

(2) Child development/child psychology and parent-child relations. A minimum of 4 semester or 6 quarter hours shall be course work in:

(a) Child development/child psychology which shall be course work in study of developmental characteristics of infants and young children with emphasis on:

(i) Stages of development

(ii) Individual differences in rates of styles and learning

(iii) Assessment, record keeping, and observation skills.

(b) Parent-child relations shall include:

(i) The study of the child in the family

(ii) The family as a social/cultural unit.

(3) Guided electives. A minimum of 2 semester or 3 quarter hours shall be course work in one of the following:

(a) Child health, nutrition, and safety

(b) Infant development

(c) Young children with special needs.

c. Continuing licensure shall be granted to a candidate who:

(1) Possesses a previously issued valid and appropriate entrance license, and

(2) Has completed the equivalent of one school year of full-time teaching experience at the prekindergarten level.

d. The continuing license shall be renewed according to the rules of the board of teaching pertaining to continuing education.

e. All persons licensed under this rule shall meet the human relations requirements as outlined in rules of the board of teaching.

f. This rule shall become effective July 1, 1984, for all entrance licenses.

Repeal. [§ 3.005 - § 3.015]

§ 3.005 Continuing education/relicensure. (All new material.)

A. The provisions of this rule apply only to persons licensed by the board of teaching.

B. A continuing license, valid for five years, shall be issued to an applicant who holds a valid entrance license and who has met the requirements for the issuance of the continuing license as set forth in rules of the board of teaching. A continuing license is required for those subjects and grades where life licensure has not been granted.

C. Pursuant to procedures specified in this rule, a valid continuing license shall be renewed for a subsequent period of five years when an applicant presents evidence of having been granted 120 renewal units during the five-year period immediately preceding the date on which the requested renewal is to be made effective.

D. Applicants who do not qualify for a continuing license.

1. An applicant having teaching experience who transfers from another state and who does not hold a valid Minnesota license must obtain an entrance license.

2. An applicant holding a continuing or life license in one education area and who wishes to engage in another education area for which the applicant is not presently licensed shall be issued a continuing license for the additional area upon meeting the requirements for that license.

E. Renewal units.

1. Experiences for which renewal units may be granted are listed below. Renewal units must be earned in two or more of the following categories.

a. College courses and related work.

b. Supervision of clinical experiences.

c. Attendance at professional meetings.

d. Attendance at lectures by persons with expertise in the areas for which licensure is requested.

e. Systematic, purposeful observation during visits to schools.

f. Volunteer work in professional organizations or situations related to the areas for which licensure is requested.

g. Development of demonstrations or curriculum innovations for use with student teachers or in in-service programs.

h. Creative endeavor (art, music, writing) related to the individual's licensure.

i. Publication of professional articles in a professional journal in an appropriate field.

j. Travel related to the professional licensure areas. Prior approval of this experience shall be obtained.

k. Maintenance and evaluation of an annotated log or record of activities with a class or group.

l. Exchange situations to gain experience with students at another age, ability, socio-economic level or in another subject for which the teacher is qualified.

m. Attendance at and participation in in-service meetings with opportunity for staff members in various roles (college faculty, community persons) to work together.

n. Participation in in-service meetings to include active staff planning and involvement (demonstrations with student exhibits, explanation of special or new techniques).

o. Direct involvement, individually or within a group, to research, plan, and implement innovative educational practices.

p. Planning and production of television or other special programs for use in the schools.

q. Leadership experiences, which involve the exercise and/or development of new or broader skills and sensitivities to the school, community, and profession.

r. Membership on state and local committees involved with licensure, teacher education, or professional standards.

s. Additional kinds of experiences may be approved. These experiences shall be experiences especially appropriate for a particular school district or a particular education area.

2. The local committee shall grant renewal units and allow accumulation of renewal units according to the provisions of this rule. Maximum renewal unit allocations for specific experiences identified below are to be used as a guide for allocating renewal units for other experiences.

a. One quarter credit (when related to professional growth) equals ten renewal units.

b. One semester credit (when related to professional growth) equals fifteen renewal units.

c. Supervision of the clinical experiences of a college student for one quarter or one semester equals ten renewal units, provided that no more than thirty such renewal units may be granted in any five-year period.

d. One week of approved travel equals ten renewal units, provided that no more than thirty such renewal units may be granted in any five-year period.

e. A one-day workshop, seminar, or conference equals up to five renewal units based on type of experience, involvement, and outcome product.

3. Experiences for renewal unit credit must aid the applicant in maintaining and improving general, academic, or professional qualifications.

4. An applicant requesting renewal of a license to teach must earn a minimum of 120 renewal units during each five-year licensure period from July 1 of the year of issuance to June 30 of the year of expiration. An applicant may not bank renewal units for purposes of relicensure.

5. In cases where local school board policies require further education on a periodic basis, such education shall be evaluated in the same manner as other experiences and may apply as renewal units.

6. An applicant who seeks renewal of a continuing license for two or more areas shall allocate at least 30 renewal units to each of the licensure areas for a total of no fewer than 120 units, with priority given to work in areas where the candidate is employed during the licensure period. Those candidates possessing administrative licensure may allocate units for the renewal of teaching licensure in this same manner.

7. One hundred twenty units for renewal shall be required for licenses expiring July 1, 1978, and thereafter.

F. The state committee for continuing education/relicensure.

1. The state committee shall be selected and constituted by the board of teaching as follows:

a. Four full-time licensed classroom teachers.

b. One full-time vocationally-licensed classroom teacher.

c. One person currently serving on a local school board or having previously served on a local school board.

d. One licensed school administrator.

e. One teacher educator.

f. One member of the lay public.

g. A department of education staff member selected by the board of teaching shall be an ex officio, non-voting member.

2. The terms of office of voting members of the state committee shall be three calendar years.

3. The state department of education shall provide clerical and staff assistance for the state committee. Expenses incurred by the state committee shall be paid by the board of teaching.

4. At the first meeting in each calendar year, the state committee shall elect a chairman and secretary whose duties shall be established by the state committee.

5. Meetings may be called by the chairman of the committee, by the board of teaching, or by written request of four or more of the members. Written notice of each meeting shall be sent to each member of the committee and shall be mailed at least five days prior to the date of the meeting.

6. A quorum shall be more than fifty percent of the total voting membership of the committee. A majority vote of those voting members present shall be sufficient to take action.

7. The duties of the state committee are as follows:

   a. Establish rules for its own operation in accordance with law.

   b. Review annually the criteria for granting renewal units identified in this rule.

   c. Review decisions and interpretations on guidelines at request of local continuing education committees.

   d. Review statewide in-service education needs.

   e. Perform such other duties as the board of teaching may direct.

8. All rules, interpretations and decisions promulgated by the state committee shall be subject to the final authority of the board of teaching.

G. Local committees for continuing education/relicensure.

1. A local committee shall be established in each Minnesota public school district with membership as follows:

   a. Five persons licensed by the board of teaching who hold at least a baccalaureate degree, to be elected by the licensed teaching faculty. Nominations may be by building, grade level, or other appropriate categories, provided that all eligible persons have a fair and equitable chance for selection.

   b. One licensed person who holds an administrator's license, representing the elementary and secondary administration, to be elected by the licensed administrators employed by the district.

   c. One resident of the district who is not an employee of the district, to be designated by the local school board. School board members are not considered to be employees of the district.

2. All members of an appropriate voting group shall be notified of the meeting at which the elections are to be held at least five days prior to the meeting. The meeting shall be held at a convenient time and place and elections shall be by secret ballot.

3. In districts where either teachers or administrators with the specified qualifications are not available for service on the local committee, the superintendent will report the situation to the board of teaching who shall make special provisions for establishing a continuing education committee.

4. Members of the local committee shall be elected in May of each year for terms to begin no later than the following September 1. The term of office of members of the local committee shall be two years.

5. The local committee shall hold its organizational meeting no later than September of each year. At the organizational meeting the local committee shall elect a chairman and secretary whose duties shall be established by the local committee.

   a. Up to three days per month may be provided by the local school district to each local committee member to attend local committee meetings.

   b. Clerical assistance and supplies as requested by the local committee may be provided by the local school district in sufficient amount to enable the local committee to comply with the record keeping and reporting required by the rule.

6. A quorum shall be more than fifty percent of the total voting membership of the committee. A majority vote of those voting members present shall be sufficient to take action. Meetings may be called by the chairman of the committee or by written request of three or more of the members. Notice of meetings shall be provided to each member of the committee at least five days prior to the date of the meeting, and shall be posted or otherwise advertised in such a manner as to provide reasonable notice to those teachers subject to the actions of the committee.

7. The duties of the local committee are as follows:

   a. Set rules for its own operation and establish such written guidelines as may be necessary to implement those duties outlined in this section. These rules and guidelines shall not be in conflict with law or other provisions of this rule.

   b. Determine the number of renewal units to be granted for experiences, in accordance with the maximum renewal unit allocations identified in this rule.

   c. Act, within a reasonable time, upon requests for recommendation for renewal of the continuing license by determining whether the applicant has met the requirements of this rule.

   d. Endorse the application for renewal of the continuing license of each qualified applicant and return the endorsed application to the applicant, who will forward it to the director of licensing.

   e. Provide supporting evidence to the board of teaching when an appeal is taken from a decision of the local committee.

   f. Provide recommendations to appropriate personnel concerning the in-service needs of the district.

g. Evaluate procedures and criteria for granting renewal units and make recommendations for modifications to the director of licensing during February of each year. Recommendations will be referred to the state committee.

h. Forward to the director of licensing verification of the membership of the local committee on an annual basis by November 1 of each year.

i. Forward to the director of licensing a copy of the local committee guidelines. Guidelines shall be forwarded at least every five years, and whenever substantial changes are made.

j. Verify one year of successful teaching experience for individuals on an entrance license. Successful teaching shall be determined by satisfying one or more of the following three criteria:

(1) A teacher receives an offer of a contract for the ensuing year.

(2) A teacher gains tenure or acquires a continuing contract.

(3) Supportive evidence is presented from supervisory personnel, professional colleagues, and/or administrators.

k. Hold an open hearing annually to allow the teachers in each district to review the guidelines established by the local committee.

l. Provide those services and reports that may be required from time to time by the board of teaching.

8. It shall be the responsibility of the person seeking the renewal of a continuing license to submit the application and supporting materials to the local committee of the employing school district, in accordance with procedures and due dates established by that committee.

9. If a licensed person employed by one school district becomes employed by a different district during a renewal period, units already earned and granted during that renewal period shall forthwith be transferred to the local committee for the new district. Such units shall be accepted by that committee.

10. Renewal units will be granted by the committee of the district where the applicant was employed at the time that the experience was completed. In the case of a person who has not been employed by a school district for a period of time, renewal units will be granted by the committee of the district where the applicant was once employed; or where the applicant currently resides if accepted by the local committee. Persons who have never been employed on a continuing basis by a school district shall affiliate with the local committee in the district in which they reside.

11. Each local committee shall be provided with current information regarding changes in board of teaching rules which pertain to licensure in education by the director of licensing.

12. Option for formation of joint local committees.

a. Two or more districts situated in close proximity to each other shall have the option of joining together to establish a joint local committee.

b. A plan for two or more districts to formulate a joint local committee shall be drawn up by a committee consisting of two teachers, one administrator, and one school board member or a designee, from each participating district, and be ratified by at least seventy percent of the licensed personnel employed by each participating district. The plan shall provide for fair representation of all licensed personnel and insofar as possible, shall be consistent with G.1. and other provisions of this rule.

c. The ratified plan shall be submitted by the superintendent of the district employing the largest number of licensed personnel to the director of licensing.

d. The joint local committee, if approved by the state committee, shall be treated as any local committee and shall comply with all provisions of this rule.

13. Nonpublic schools.

a. Licensed personnel in a nonpublic school may establish a local committee for the same purpose as local committees established by public school districts. Licensed personnel in two or more nonpublic schools may combine to form a local committee upon the agreement of seventy percent of the licensed personnel in each school. The chairman of the committee shall submit to the director of licensing, on an annual basis no later than November 1 of each year, verification of the membership of the committee and verification of the school or schools whose personnel have established the committee.

b. Licensed personnel in one or more nonpublic schools may join with an appropriate public school district in the establishment of a local committee, provided that seventy percent of the licensed personnel from each nonpublic school and seventy percent of the licensed personnel employed by the public school district agree to such a committee. The superintendent of the district shall submit to the director of licensing, verification of the membership of the committee and verification of the nonpublic schools whose personnel has joined in the establishment of the committee.

c. Insofar as possible, the committees authorized in a. and b., above, shall be established and shall function in the same manner as provided in this rule for committees of public school districts and in such way as to provide fair representation for all licensed personnel and objective evaluation of requests for renewal of licenses.

14. Vocational teachers.

a. The criteria for licensure renewal contained in the Minnesota state plan for vocational-technical education or successor rules shall replace the provisions of E.1.

b. Vocational teachers shall be subject to the continuing education structure as outlined in the Minnesota state plan for vocational-technical education or successor rules. Such licensure shall be recommended by the local vocational relicensure committee. Vocational teachers employed in school districts or state board approved vocational or cooperative centers currently employing a combination of individuals with standard and vocational licenses shall select one of the options listed below. The selection of alternatives shall be made by a vote of these teachers currently using vocational licensure, and such election shall originally be supervised by the chairman of the local continuing education committee.

(1) Vocational teachers may be subject to the local committee, except that five vocationally-licensed vocational teachers currently teaching full-time on a valid vocational license, as elected in secret ballot by the district or state board approved vocational or cooperative center vocationally licensed teachers, shall be the teaching faculty members on the committee whenever issues of vocational licensure arise.

(2) A separate local vocational committee may be formed by the election of five vocationally-licensed teachers currently teaching full-time on a valid vocational license, along with representation from the public and administration. This option shall be limited to those school districts or state board approved vocational or cooperative centers utilizing twenty five (25) or more vocational licensees.

(3) Vocational teachers in two or more districts or state board approved vocational or cooperative centers situated in close proximity may establish a joint local committee, and may select either option (1) or (2).

(4) Vocational teachers may be subject to the local continuing education/relicensure committee as currently established, when such teachers teach in a district which employs less than five vocational teachers or which is geographically located so it cannot feasibly cooperate with another district.

H. Colleges or universities which prepare teachers for licensure in education may, if at least twenty of its faculty members apply for teacher licensure, either form a local committee or combine with other colleges or universities to form joint committees. The structure and guidelines of such committees shall be subject to the approval of the state committee.

I. Right of appeal.

1. When an applicant has not been granted the requested number of renewal units by a local continuing education/relicensure committee, an appeal may be made to the local committee. An applicant must appeal to the local

committee within thirty days after notification of the decision of the local committee. Failure to file a written request with the local committee for an appeal within thirty days constitutes a waiver of the individual's right to appeal.

2. Decisions by a local committee for continuing education/relicensure denying the appeal may be appealed to the board of teaching by the applicant according to the provisions of 5 MCAR § 3.020.

3. In cases where the applicant has not been granted the required number of renewal units for relicensure, local committees shall not endorse the application for renewal of the continuing license.

4. In the event that the renewal units under appeal result in loss of licensure, it shall be the responsibility of the appellant to inform the director of licensing of such loss of licensure. The director of licensing shall extend the previous continuing license until all avenues of administrative appeal have been exhausted.

J. Evaluation. The functions of the state committee and the local committees shall be evaluated by the board of teaching during each calendar year which is divisible by five.

Repeal. [Chapter Two: Licenses; Suspension or Revocation of License to Teach § 3.020 - § 3.031]

Chapter Two: Appeals. (All new material.)

§ 3.020 Appeal to the Minnesota board of teaching.

A. All persons denied issuance or renewal of teaching licenses, and all Minnesota teacher preparing institutions denied program or college approval, and all persons licensed by the Minnesota board of teaching whose appeals are denied by the local committee for continuing education/relicensure, are hereby entitled to a hearing pursuant to Minnesota Statutes chapter 15 on such denial and to a final decision by the Minnesota board of teaching.

B. A person or an institution entitled to a hearing under the provisions of this rule shall file a written request for such hearing with the executive secretary of the board of teaching within thirty (30) days from the date of the denial. Failure to file a written request for a hearing within thirty (30) days constitutes a waiver of the individual's right to a hearing.

§ 3.074 Teachers of art. (All new material.)

A. For the purpose of this rule, art education shall consist of:

1. The visual arts which are ideas, experiences, and processes which lead to the creation of two-dimensional and three-dimensional objects. and

2. Instructional programs in art in which learners perceive and respond to sensory qualities of visual art; recognize and accept art as a basic realm of human experience; produce original and imaginative works of art; develop an understanding of art heritage; and form sensitive, reasoned, critical judgments about the significance and aesthetic quality of art.

B. All candidates recommended for licensure to teach art shall hold a baccalaureate degree and have satisfactorily completed a program in art education which has been approved by the Minnesota board of teaching and is appropriate to their teaching assignment (kindergarten-grade 12, pre-kindergarten-grade 6, grade 7-grade 12).

C. Intent. It is the intent of this rule to preclude the teaching of art by persons with a minor in art or less than the preparation specified in this rule.

1. An exception to this rule shall be the teaching of art by a licensed elementary school teacher employed in pre-kindergarten-grade 6 working in a team or other cooperative arrangement whose teaching assignment in art is not more than 33% of a full-time teaching assignment.

D. To be eligible for approval in art education, a program shall include:

1. A written rationale which sets forth the view of the preparing institution with respect to the role of teachers of art.

2. Evidence that the programs in art education submitted for approval have been developed with participation from the college departments involved with the proposed art education program; from pre-kindergarten, kindergarten, elementary, and secondary school teachers; from school administrators; as well as from art education candidates and interested citizens.

3. An enumeration of specific knowledge, skills, and understandings for teachers of art to be developed in a proposed art education program. The program components shall be designed to effectively provide candidates recommended for licensure with knowledge, skills, and understandings in the following:

a. Art studio.

(1) A proficiency in a diversity of media and material skills with major studio emphasis as defined for each licensure program in E.1., 2., 3., of this rule.

(2) The skill to communicate and use both two-dimensional and three-dimensional visual art elements and principles.

b. Art history, aesthetics, criticism.

(1) A working knowledge of past and contemporary theories of art.

(2) A broad knowledge of art history and criticism with research skills in at least one period of art history.

(3) The skill to instill an awareness of cultural heritages.

(4) An understanding of the philosophic positions of leading art philosophers and artists.

c. Art education.

(1) A working knowledge of past and contemporary theories of art education.

(2) A commitment to a role as advocate of creativity.

(3) The skills to recognize and provide for individual differences among students, including the broad spectrum of the exceptional student.

(4) A knowledge of visual, emotional, and physical growth patterns of students.

(5) The skills to effectively budget for an art program and manage art classroom procedures.

(6) The ability and skills to understand and promote the interdisciplinary relationship of art to other curricular areas.

(7) The skill to develop evaluation techniques related to art education.

(8) A knowledge of appropriate behavior and art product expectancies for identified stages of student development.

(9) The ability to utilize effective public relations skills with administrators, other professional staff, school support staff, and community.

(10) The ability to effectively utilize human and community resources such as practicing professional artists and designers.

(11) The ability to develop a variety of art curricula appropriate to various instructional levels and settings.

(12) A knowledge of state and federal safety regulations and laws as applied to the use of art media, tools, and equipment.

(13) The skill to use audio-visual techniques as applied to the teaching of art at all instructional levels.

(14) The skill to effectively utilize research procedures in art education.

(15) The ability to relate art education to the total life experience of all students.

(16) The ability to effectively relate to students and demonstrate concern for the learning needs of students.

4. A written description of program components which includes statements which relate individual program components to the knowledge, skills, and understandings to be developed by candidates for licensure in art education.

5. A written plan for assessing the level of performance of each candidate recommended for licensure in art education which ascertains the development of all the specified knowledge, skills, and understandings.

6. Programs may be approved which vary in curricular design provided that program components meet the requirements in D.1., 2., 3., 4., and 5., above, and that these components are designed to provide candidates who are recommended for licensure in art education with the knowledge, skills, and understandings for each licensure program as specified in E.1., 2., and 3., of this rule.

E. Licenses for the teaching of art are issued for one or more of the following school levels: kindergarten through grade 12, pre-kindergarten through grade 6, grade 7 through grade 12.

1. All candidates recommended for licensure as teachers of art for kindergarten through grade 12 shall have satisfactorily completed approved programs which include all of the following:

a. Learning experiences in art studio, art history, aesthetics, criticism, and art education which are equivalent to not less than 40% of the baccalaureate degree program.

b. Experience in six or more diverse art studio areas with emphasis in at least two.

c. Learning experiences in the professional education sequence including all of the following:

(1) Child growth and development

(2) Adolescent growth and development

(3) Information media

(4) School organization

(5) Alternative education.

d. Field experiences including:

(1) Pre-student teaching field experiences in art education in kindergarten, elementary school, middle school or junior high school, and high school.

(2) Student teaching experience shall consist of full school day experiences under the supervision of a licensed teacher of art. Such experiences shall be at both the kindergarten through grade 6 level and the grade 7 through grade 12 level for a minimum total of one academic quarter or the equivalent thereof.

2. All candidates recommended for licensure as teachers of art for pre-kindergarten through grade 6 shall have satisfactorily completed approved programs which include all of the following:

a. Learning experiences in art studio, art history, aesthetics, criticism, and art education which are equivalent to not less than 33% of the baccalaureate degree program.

b. Experience in six or more diverse art studio areas with emphasis in at least one.

c. Learning experiences in the professional education sequence including all of the following:

(1) Early childhood development

(2) Child growth and development

(3) Information media

(4) School organization

(5) Alternative education.

d. Field experiences including:

(1) Pre-student teaching field experiences in art education in pre-kindergarten, kindergarten, primary grades (grades 1-2-3), and upper elementary grades (grades 4-5-6).

(2) Student teaching experience shall consist of full school day experiences under the supervision of a licensed teacher of art at the pre-kindergarten, primary grades (grades 1-2-3), and upper elementary grades (grades 4-5-6) levels for a minimum total of one academic quarter or the equivalent thereof. However, a candidate for licensure as a teacher of art who has completed student teaching requirements for another elementary teaching license may, upon satisfying all other requirements of this rule, student teach for a minimum of one half of one academic quarter or the equivalent thereof under the supervision of a licensed teacher of art.

3. All candidates recommended for licensure as teachers of art for grade 7 through grade 12 shall have satisfactorily completed approved programs which include all of the following:

a. Learning experiences in art studio, art history, aesthetics, criticism, and art education which are equivalent to not less than 33% of the baccalaurate degree program.

b. Experience in six or more diverse art studio areas with emphasis in at least two.

c. Learning experiences in the professional education sequence including all of the following:

(1) Adolescent growth and development

(2) Information media

(3) School organization

(4) Alternative education.

d. Field experiences including:

(1) Pre-student teaching field experiences in art education in junior high school and high school.

(2) Student teaching experience shall consist of full school day experiences under the supervision of a licensed teacher of art at the junior high school and/or the high school level for a minimum total of one academic quarter or the equivalent thereof.

F. The issuance of the first continuing license is contingent upon:

1. Possession by the candidate of a valid and appropriate entrance license, and

2. One year of teaching experience in art.

G. The continuing license shall be renewed according to general rules of the board of teaching pertaining to continuing licensure.

H. This rule is effective July 1, 1983, for all applicants for entrance licenses. All persons holding a license as a teacher of art prior to July 1, 1983, based on less than major preparation who have not acquired necessary credits for a major in art prior to July 1, 1983, shall meet the requirements of this rule at the time of the first renewal after July 1, 1983.

§ 3.003 Issuance and renewal of all licenses; fees.

A. All licenses to teach shall be issued and/or renewed in accordance with Minnesota Statute 125.05 and criteria established in rules of the board of teaching and shall be valid for the period of time specified in rules of the board of teaching:

1. Limited license - valid for 1 year.

2. Entrance license - valid for 2 years.

3. Continuing license - valid for 5 years.

B. All licenses to teach shall bear the date of issue and the date of expiration and may be renewed on or before July 1 in the year of expiration.

C. After July 1 in the year of expiration, all licenses to teach not renewed shall be deemed expired and no longer valid for teaching.

D. Each application for the issuance and/or renewal of a license to teach shall be accompanied by a processing fee in the amount of twenty dollars ($20.00). Such fees shall be paid to the commissioner of education who shall deposit them with the state treasurer, as provided by law, and report each month to the commissioner of finance the amount of fees collected.

E. The fee shall be nonrefundable for applicants not qualifying for a license, except the fee is refundable when the applicant for a license already holds the license for which application is made and that license does not expire in the year the application is submitted.

F. This rule shall become effective on July 1, 1977.

MINNESOTA BOARD OF TEACHING

607 CAPITOL SQUARE BUILDING
550 CEDAR STREET
ST. PAUL, MINNESOTA 55101
(612) 296-2415

KENNETH L. PEATROSS
EXECUTIVE SECRETARY

KATHRYN C. RAYBURN, Chairman
513 - 32nd Street Northeast
Rochester, Minnesota 55901

JOSEPH J. MOREN, Vice-Chairman
304 East 32nd Street
Hibbing, Minnesota 55746

MARGERY H. HARRIS, Secretary
4624 Colfax Avenue South
Minneapolis, Minnesota 55409

ROBERT J. CASANOVA
982 South Market
Shakopee, Minnesota 55379

WILLIAM E. GARDNER
104 Burton Hall
University of Minnesota
Minneapolis, Minnesota 55455

LOWELL GILLETT
St. Cloud State University
St. Cloud, Minnesota 56301

EDWARD HUDOBA
United Labor Center
312 Central Avenue - Room 356
Minneapolis, Minnesota 55414

LUCILLE L. KAINU
590 Highway 33 North
Cloquet, Minnesota 55720

JO MALMSTEN
5350 Shady Hills Circle
Shorewood, Minnesota 55331

MARIE McNEFF
Augsburg College
Minneapolis, Minnesota 55454

CARL H. NEVILS
20200 Vance Street
Elk River, Minnesota 55330

ADDIE PERL
2240 Drew Avenue South
Minneapolis, Minnesota 55416

EDWARD A. RAPP
9955 Grouse Street Northwest
Coon Rapids, Minnesota 55433

AARON RUPERT
1409 West Minnehaha Avenue
St. Paul, Minnesota 55104

SISTER MARY DENISE VILLAUME
2475 Dodd Road
St. Paul, Minnesota 55120

NOREEN WELCH
209 North Estey Avenue
LuVerne, Minnesota 56156

DOLORES WINDINGSTAD
Route #1, Box 41
Dawson, Minnesota 56232

TO : Lee Sheehy
Special Assistant Attorney General

FROM : Kenneth L. Peatross, Executive Secretary
MINNNESOTA BOARD OF TEACHING

K Beatross

DATE : December 27, 1978

SUBJECT: In the matter of the proposed adoption of
5 MCAR §§ 3.005 - 3.015, 3.005 (new)

Pursuant to the rules of the Office of the Attorney General, I hereby request for final approval by the Office of the Attorney General the above captioned rules of the Board of Teaching heard at public hearing on October 28-29, 1977.

The rules have been amended by the Board of Teaching in compliance with the recommendations contained in correspondence dated December 14, 1978. Attached for your review and approval are five (5) copies of the proposed repeal of 5 MCAR § 3.005 - 3.015 and proposed 5 MCAR § 3.005.

Following your review of the above captioned rules, I shall appreciate notification from you of the approval status. If you have any questions with respect to the rules herewith re-submitted for approval, please do not hesitate to call me.

KLP/nad

Attachments

cc: Donald J. Mueting
Special Assistant Attorney General

§ 3.003 Issuance and renewal of all licenses; fees.

A. All licenses to teach shall be issued and/or renewed in accordance with Minnesota Statute 125.05 and criteria established in rules of the board of teaching and shall be valid for the period of time specified in rules of the board of teaching:

1. Limited license - valid for 1 year.

2. Entrance license - valid for 2 years.

3. Continuing license - valid for 5 years.

B. All licenses to teach shall bear the date of issue and the date of expiration and may be renewed on or before July 1 in the year of expiration.

C. After July 1 in the year of expiration, all licenses to teach not renewed shall be deemed expired and no longer valid for teaching.

D. Each application for the issuance and/or renewal of a license to teach shall be accompanied by a processing fee in the amount of twenty dollars ($20.00). Such fees shall be paid to the commissioner of education who shall deposit them with the state treasurer, as provided by law, and report each month to the commissioner of finance the amount of fees collected.

E. The fee shall be nonrefundable for applicants not qualifying for a license, except the fee is refundable when the applicant for a license already holds the license for which application is made and that license does not expire in the year the application is submitted.

F. This rule shall become effective on July 1, 1977.

Repeal. [Chapter Two: Licenses; Suspension or Revocation of License to Teach § 3.020 - § 3.031]

Chapter Two: Appeals. (All new material.)

§ 3.020 Appeal to the Minnesota board of teaching.

A. All persons denied issuance or renewal of teaching licenses, and all Minnesota teacher preparing institutions denied program or college approval, and all persons licensed by the Minnesota board of teaching whose appeals are denied by the local committee for continuing education/relicensure, are hereby entitled to a hearing pursuant to Minnesota Statutes chapter 15 on such denial and to a final decision by the Minnesota board of teaching.

B. A person or an institution entitled to a hearing under the provisions of this rule shall file a written request for such hearing with the executive secretary of the board of teaching within thirty (30) days from the date of the denial. Failure to file a written request for a hearing within thirty (30) days constitutes a waiver of the individual's right to a hearing.

§ 3.074 Teachers of art. (All new material.)

A. For the purpose of this rule, art education shall consist of:

1. The visual arts which are ideas, experiences, and processes which lead to the creation of two-dimensional and three-dimensional objects. and

2. Instructional programs in art in which learners perceive and respond to sensory qualities of visual art; recognize and accept art as a basic realm of human experience; produce original and imaginative works of art; develop an understanding of art heritage; and form sensitive, reasoned, critical judgments about the significance and aesthetic quality of art.

B. All candidates recommended for licensure to teach art shall hold a baccalaureate degree and have satisfactorily completed a program in art education which has been approved by the Minnesota board of teaching and is appropriate to their teaching assignment (kindergarten-grade 12, pre-kindergarten-grade 6, grade 7-grade 12).

C. Intent. It is the intent of this rule to preclude the teaching of art by persons with a minor in art or less than the preparation specified in this rule.

1. An exception to this rule shall be the teaching of art by a licensed elementary school teacher employed in pre-kindergarten-grade 6 working in a team or other cooperative arrangement whose teaching assignment in art is not more than 33% of a full-time teaching assignment.

D. To be eligible for approval in art education, a program shall include:

1. A written rationale which sets forth the view of the preparing institution with respect to the role of teachers of art.

2. Evidence that the programs in art education submitted for approval have been developed with participation from the college departments involved with the proposed art education program; from pre-kindergarten, kindergarten, elementary, and secondary school teachers; from school administrators; as well as from art education candidates and interested citizens.

3. An enumeration of specific knowledge, skills, and understandings for teachers of art to be developed in a proposed art education program. The program components shall be designed to effectively provide candidates recommended for licensure with knowledge, skills, and understandings in the following:

a. Art studio.

(1) A proficiency in a diversity of media and material skills with major studio emphasis as defined for each licensure program in E.1., 2., 3., of this rule.

(2) The skill to communicate and use both two-dimensional and three-dimensional visual art elements and principles.

b. Art history, aesthetics, criticism.

(1) A working knowledge of past and contemporary theories of art.

(2) A broad knowledge of art history and criticism with research skills in at least one period of art history.

(3) The skill to instill an awareness of cultural heritages.

(4) An understanding of the philosophic positions of leading art philosophers and artists.

c. Art education.

(1) A working knowledge of past and contemporary theories of art education.

(2) A commitment to a role as advocate of creativity.

(3) The skills to recognize and provide for individual differences among students, including the broad spectrum of the exceptional student.

(4) A knowledge of visual, emotional, and physical growth patterns of students.

(5) The skills to effectively budget for an art program and manage art classroom procedures.

(6) The ability and skills to understand and promote the interdisciplinary relationship of art to other curricular areas.

(7) The skill to develop evaluation techniques related to art education.

(8) A knowledge of appropriate behavior and art product expectancies for identified stages of student development.

(9) The ability to utilize effective public relations skills with administrators, other professional staff, school support staff, and community.

(10) The ability to effectively utilize human and community resources such as practicing professional artists and designers.

(11) The ability to develop a variety of art curricula appropriate to various instructional levels and settings.

(12) A knowledge of state and federal safety regulations and laws as applied to the use of art media, tools, and equipment.

(13) The skill to use audio-visual techniques as applied to the teaching of art at all instructional levels.

(14) The skill to effectively utilize research procedures in art education.

(15) The ability to relate art education to the total life experience of all students.

(16) The ability to effectively relate to students and demonstrate concern for the learning needs of students.

4. A written description of program components which includes statements which relate individual program components to the knowledge, skills, and understandings to be developed by candidates for licensure in art education.

5. A written plan for assessing the level of performance of each candidate recommended for licensure in art education which ascertains the development of all the specified knowledge, skills, and understandings.

6. Programs may be approved which vary in curricular design provided that program components meet the requirements in D.1., 2., 3., 4., and 5., above, and that these components are designed to provide candidates who are recommended for licensure in art education with the knowledge, skills, and understandings for each licensure program as specified in E.1., 2., and 3., of this rule.

E. Licenses for the teaching of art are issued for one or more of the following school levels: kindergarten through grade 12, pre-kindergarten through grade 6, grade 7 through grade 12.

1. All candidates recommended for licensure as teachers of art for kindergarten through grade 12 shall have satisfactorily completed approved programs which include all of the following:

a. Learning experiences in art studio, art history, aesthetics, criticism, and art education which are equivalent to not less than 40% of the baccalaureate degree program.

b. Experience in six or more diverse art studio areas with emphasis in at least two.

c. Learning experiences in the professional education sequence including all of the following:

(1) Child growth and development

(2) Adolescent growth and development

(3) Information media

(4) School organization

(5) Alternative education.

d. Field experiences including:

(1) Pre-student teaching field experiences in art education in kindergarten, elementary school, middle school or junior high school, and high school.

(2) Student teaching experience shall consist of full school day experiences under the supervision of a licensed teacher of art. Such experiences shall be at both the kindergarten through grade 6 level and the grade 7 through grade 12 level for a minimum total of one academic quarter or the equivalent thereof.

2. All candidates recommended for licensure as teachers of art for pre-kindergarten through grade 6 shall have satisfactorily completed approved programs which include all of the following:

a. Learning experiences in art studio, art history, aesthetics, criticism, and art education which are equivalent to not less than 33% of the baccalaureate degree program.

b. Experience in six or more diverse art studio areas with emphasis in at least one.

c. Learning experiences in the professional education sequence including all of the following:

(1) Early childhood development

(2) Child growth and development

(3) Information media

(4) School organization

(5) Alternative education.

d. Field experiences including:

(1) Pre-student teaching field experiences in art education in pre-kindergarten, kindergarten, primary grades (grades 1-2-3), and ~~upper elementary~~ grades (grades 4-5-6).

(2) Student teaching experience shall consist of full school day experiences under the supervision of a licensed teacher of art at the pre-kindergarten, primary grades (grades 1-2-3), and upper elementary grades (grades 4-5-6) levels for a minimum total of one academic quarter or the equivalent thereof. However, a candidate for licensure as a teacher of art who has completed student teaching requirements for another elementary teaching license may, upon satisfying all other requirements of this rule, student teach for a minimum of one half of one academic quarter or the equivalent thereof under the supervision of a licensed teacher of art.

3. All candidates recommended for licensure as teachers of art for grade 7 through grade 12 shall have satisfactorily completed approved programs which include all of the following:

a. Learning experiences in art studio, art history, aesthetics, criticism, and art education which are equivalent to not less than 33% of the baccalaurate degree program.

b. Experience in six or more diverse art studio areas with emphasis in at least two.

c. Learning experiences in the professional education sequence including all of the following:

(1) Adolescent growth and development

(2) Information media

(3) School organization

(4) Alternative education.

d. Field experiences including:

(1) Pre-student teaching field experiences in art education in junior high school and high school.

(2) Student teaching experience shall consist of full school day experiences under the supervision of a licensed teacher of art at the junior high school and/or the high school level for a minimum total of one academic quarter or the equivalent thereof.

F. The issuance of the first continuing license is contingent upon:

1. Possession by the candidate of a valid and appropriate entrance license, and

2. One year of teaching experience in art.

G. The continuing license shall be renewed according to general rules of the board of teaching pertaining to continuing licensure.

H. This rule is effective July 1, 1983, for all applicants for entrance licenses. All persons holding a license as a teacher of art prior to July 1, 1983, based on less than major preparation who have not acquired necessary credits for a major in art prior to July 1, 1983, shall meet the requirements of this rule at the time of the first renewal after July 1, 1983.

§ 3.053 Licensure of prekindergarten teachers and prekindergarten associates. (All new material.)

A. Prekindergarten teacher.

1. The prekindergarten teacher is licensed to teach a group of children on a daily basis as well as plan and coordinate the instructional program which addresses the intellectual, emotional, social, cultural, and physical needs of the children in the prekindergarten classroom.

a. Prekindergarten teacher licensure shall be issued to an applicant who has completed the following:

(1) A baccalaureate degree (B.A. or B.S.) from an accredited college or university, and

(2) The requirements of a prekindergarten teacher preparation program approved by the Minnesota board of teaching. The prekindergarten teacher preparation program shall include 18 semester or 27 quarter hours of the course work which is listed below. These courses may be taken as a part of, or in addition to, the baccalaureate degree.

b. The prekindergarten teacher preparation program shall include the following:

(1) Prekindergarten education, early childhood, preschool, or nursery school education course work. A minimum of 10 semester or 15 quarter hours shall be in prekindergarten education and shall include course work in:

(a) Theory

(b) Curriculum

(c) Classroom management

(d) Teacher - child relations

(e) Home - school relations

(f) A minimum of 2 semester or 3 quarter hours shall be in student teaching at the prekindergarten level.

(2) Child development/child psychology and parent-child relations. A minimum of 6 semester or 9 quarter hours shall be course work in:

(a) Child development/child psychology which shall include the study of infants and young children with emphasis on

(i) Stages of development

(ii) Individual differences in rates and styles of learning

(iii) Assessment, record keeping, and observation skills.

(b) Parent-child relations shall include

(i) The study of the child in the family

(ii) The family as a social/cultural unit.

(3) Guided electives. A minimum of 2 semester or 3 quarter hours shall be course work in one of the following:

(a) Child health, nutrition, and safety

(b) Infant development

(c) Young children with special needs.

c. Prekindergarten teacher licensure requirements for kindergarten/elementary teachers are as follows:

(1) Licensed kindergarten and elementary teachers who desire prekindergarten licensure shall complete a program of 14 semester or 21 quarter hours of prekindergarten teacher preparation, as part of, or in addition to previous teaching preparation.

(2) The program requirements shall include:

(a) A minimum of 6 semester or 9 quarter hours in prekindergarten education, including not fewer than 2 semester or 3 quarter hours of credit in student teaching at the prekindergarten level. Course work shall be selected from theory, curriculum, classroom management, teacher-child relations, or home-school relations.

(b) A minimum of 6 semester or 9 quarter hours of course work in child development/child psychology and parent-child relations.

(i) Child development/child psychology shall include the study of infants and young children with emphasis on stages of development, individual differences in rates and styles of learning, and assessment, record keeping, and observation skills.

(ii) Parent-child relations shall include the study of the child in the family and the family as a social/cultural unit.

(c) A minimum of 2 semester or 3 quarter hours of credit in one of the following:

(i) Child health, nutrition, and safety

(ii) Infant development

(iii) Young children with special needs.

d. Continuing licensure shall be granted to a candidate who:

(1) Possesses a previously issued valid and appropriate entrance license and

(2) Has completed the equivalent of one school year of full-time teaching experience at the prekindergarten level.

e. The continuing license shall be renewed according to the rules of the board of teaching pertaining to continuing education.

f. All persons licensed under this rule shall meet the human relations requirements as outlined in rules of the board of teaching.

g. This rule shall become effective July 1, 1984, for all entrance licenses.

B. Prekindergarten associate.

1. The prekindergarten associate is licensed to teach a group of children on a daily basis under the direct supervision of a licensed prekindergarten teacher in the classroom. The prekindergarten associate takes an active part in planning and implementing the instructional program, but does not assume overall responsibility for the program.

a. Prekindergarten associate licensure shall be issued to an applicant who has completed the following:

(1) 60 semester or 90 quarter hours or an associate of arts or associate of science degree from an accredited college or university, and

(2) The requirements of a prekindergarten associate preparation program approved by the Minnesota board of teaching. The prekindergarten associate preparation program shall include 12 semester or 18 quarter hours of the course work or its equivalent which is listed below. These courses may be taken as part of, or in addition to, the 60 semester or 90 quarter hours or associate of arts or associate of science degree.

b. The prekindergarten associate preparation program shall include the following:

(1) Prekindergarten education including early childhood, preschool, or nursery school education course work. A minimum of 6 semester or 9 quarter hours shall be in prekindergarten education and shall include course work in:

(a) Theory

(b) Curriculum

(c) Classroom management

(d) Teacher - child relations

(e) Home - school relations

(f) A minimum of 2 semester or 3 quarter hours shall be in student teaching at the prekindergarten level.

(2) Child development/child psychology and parent-child relations. A minimum of 4 semester or 6 quarter hours shall be course work in:

(a) Child development/child psychology which shall be course work in study of developmental characteristics of infants and young children with emphasis on:

(i) Stages of development

(ii) Individual differences in rates of styles and learning

(iii) Assessment, record keeping, and observation skills.

(b) Parent-child relations shall include:

(i) The study of the child in the family

(ii) The family as a social/cultural unit.

(3) Guided electives. A minimum of 2 semester or 3 quarter hours shall be course work in one of the following:

(a) Child health, nutrition, and safety

(b) Infant development

(c) Young children with special needs.

c. Continuing licensure shall be granted to a candidate who:

(1) Possesses a previously issued valid and appropriate entrance license, and

(2) Has completed the equivalent of one school year of full-time teaching experience at the prekindergarten level.

d. The continuing license shall be renewed according to the rules of the board of teaching pertaining to continuing education.

e. All persons licensed under this rule shall meet the human relations requirements as outlined in rules of the board of teaching.

f. This rule shall become effective July 1, 1984, for all entrance licenses.

§ 3.052 Nursery school teachers.

Repeal.

[A.3. Licensed kindergarten and elementary school teachers who have not prepared to teach in nursery school but who wish to do so, shall take one course in nursery school education either as a part of, or in excess of, the requirements for kindergarten and/or elementary education. In addition, they must have 2 semester (3 quarter) hours of credit in student teaching in nursery school.]

Repeal. [A.4.] A.3.

Repeal.

[C. Temporary (limited) permit. A temporary (limited) permit may be issued to a person not fully meeting the requirements for a provisional license upon the written request of the director of the nursery school or the chairman of the sponsoring board certifying that a qualified person is not available and requesting permission to employ said applicant. This permit may be renewed annually for not more than five years provided the applicant shall meet in-service training requirements of the state board of education (8 quarter hours of credit earned during the period of the temporary (limited) permit).]

C. The provisions of this rule shall remain in effect until July 1, 1984, at which time this rule shall be repealed without further action by the board of teaching.

Chapter Nine: Code of Ethics

§ 3.130 Code of ethics for Minnesota teachers. (All new material.)

A. Each teacher upon entering the teaching profession, assumes a number of obligations, one of which is to adhere to a set of principles which defines professional conduct. These principles are reflected in the following code of ethics, which sets forth to the education profession and the public it serves standards of professional conduct and procedures for implementation.

This code shall apply to all persons licensed according to rules established by the Minnesota board of teaching.

B. Standards of professional conduct.

1. A teacher shall provide professional educational services in a non-discriminatory manner.

2. A teacher shall make reasonable effort to protect the student from conditions harmful to health and safety.

3. In accordance with state and federal laws, a teacher shall disclose confidential information about individuals only when a compelling professional purpose is served or when required by law.

4. A teacher shall take reasonable disciplinary action in exercising the authority to provide an atmosphere conducive to learning.

5. A teacher shall not use professional relationships with students, parents, and colleagues to private advantage.

6. A teacher shall delegate authority for teaching responsibilities only to licensed personnel.

7. A teacher shall not deliberately suppress or distort subject matter.

8. A teacher shall not knowingly falsify or misrepresent records or facts relating to that teacher's own qualifications or to other teachers' qualifications.

9. A teacher shall not knowingly make false or malicious statements about students or colleagues.

10. A teacher shall accept a contract for a teaching position that requires licensing only if properly or provisionally licensed for that position.

C. Complaints, investigation and hearing.

1. The enforcement of the provisions of the code of ethics for Minnesota teachers shall be in accord with M.S. 214.10.

M.S. 214.10 Complaints; investigation and hearing.

Subd. 1. Receipt of complaint. The executive secretary of a board, a board member or any other person who performs services for the board who receives a complaint or other communication, whether oral or written, which complaint or communication alleges or implies a violation of a statute or rule which the board is empowered to enforce, shall promptly forward the substance of the communication on a form prepared by the attorney general to the designee of the attorney general responsible for providing legal services to the board. Before proceeding further with the communication, the designee of the attorney general may require the complaining party to state his complaint in writing on a form prepared by the attorney general. Complaints which relate to matters within the jurisdiction of another governmental agency shall be forwarded to that agency by the executive secretary. An officer of that agency shall advise the executive secretary of the disposition of that complaint. A complaint received by another agency which relates to a statute or rule which a licensing board is empowered to enforce shall be forwarded to the executive secretary of the board to be processed in accordance with this section.

Subd. 2. Investigation and hearing. The designee of the attorney general providing legal services to a board shall evaluate the communications forwarded to him by the board or its members or staff. If the communication alleges a violation of statute or rule which the board is to enforce, the designee is empowered to investigate the facts alleged in the communication. In the process of evaluation and investigation, he shall consult with or seek the assistance of the executive secretary or, if the board determines, a member of the board who has been designated by the board to assist the designee. He may also consult with or seek the assistance of any other qualified persons who are not members of the board who the designee believes will materially aid in the process of evaluation or investigation. The executive secretary or the consulted board member may attempt to correct improper activities and redress grievances through education, conference, conciliation and persuasion, and in these attempts he may be assisted by the designee of the attorney general. If the attempts at correction or redress do not produce satisfactory results in the opinion of the executive secretary or the consulted board member, or if after investigation the designee providing legal services to the board, the executive secretary or the consulted board member believes that the communication and the investigation suggest illegal or unauthorized activities warranting board action, he shall inform the executive secretary of the board who shall schedule a disciplinary hearing in accordance with Minnesota statutes, chapter 15. Before the designee of the attorney general or the executive secretary may direct the holding of a disciplinary hearing, he shall have considered the recommendations of the consulted board member. Before scheduling a disciplinary hearing, the executive secretary must have received a verified written complaint from the complaining party. A board member who was consulted during the course of an investigation may participate at the hearing but may not vote on any matter pertaining to the case. The executive secretary of the board shall promptly inform the complaining party of the final disposition of the complaint. Nothing in this section shall preclude the board from scheduling, on its own motion, a disciplinary hearing based upon the findings or report of the board's executive secretary, a board member or the designee of the attorney general assigned to the board. Nothing in this section shall preclude a member of the board or its executive secretary from initiating a complaint.

Subd. 3. Discovery; subpoenas. In all matters pending before it relating to its lawful regulation activities, a board may issue subpoenas and compel the attendance of witnesses and the production of all necessary papers, books, records, documents, and other evidentiary material. Any person failing or refusing to appear or testify regarding any matter about which he may be lawfully questioned or produce any papers, books, records, documents, or other evidentiary materials in the matter to be heard, after having been required by order of the board or by a subpoena of the board to do so may, upon application to the district court in any district, be ordered to comply therewith. The chairman of the board acting on behalf of the board may issue subpoenas and any board member may administer oaths to witnesses, or take their affirmation. Depositions may be taken within or without the state in the manner provided by law for the taking of depositions in civil actions. A subpoena or other process or paper may be served upon any person named therein, anywhere within the state by any officer authorized to serve subpoenas or other process or paper in civil actions, with the same fees and mileage and in the same manner as prescribed by law for service of process issued out of the district court of this state. Fees and mileage and other costs shall be paid as the board directs.

2. When oral complaints alleging violations of the code of ethics are received, the executive secretary of the Minnesota board of teaching shall request the complaining party to submit the complaint in writing within 10 days.

3. Upon the receipt of a complaint in writing alleging violations of the code of ethics, the teacher named in the complaint shall be notified in writing within 10 days of the receipt of the complaint.

4. The teacher shall be entitled to be represented by the teacher's own counsel or representative at each stage of the investigation and hearing.

D. Enforcement procedures. The Minnesota board of teaching may impose one or more of the following penalties when it has found a violation of the code of ethics. These actions shall be taken only after all previous efforts at remediation have been exhausted.

1. The board of teaching may enter into agreements with teachers accused of violating the code of ethics which would suspend or terminate proceedings against the teacher on conditions agreeable to both parties.

2. A letter of censure from the board of teaching may be sent to the person determined to be in violation of the standards of the code of ethics. A copy of the letter shall be filed with the Minnesota board of teaching. Such letters shall be kept on file for a period of time not to exceed one calendar year.

3. A teacher who has been found to have violated the code of ethics may be placed on probationary licensure status for a period of time to be determined by the board of teaching. The board may impose conditions on the teacher during the probationary period which are to be directed toward improving the teacher's performance in the area of the violation. During this period, the teacher's performance or conduct will be subject to review by the board of teaching or its designee. Such review will be directed toward monitoring the teacher's activities or performance with regard to whatever conditions may be placed on the teacher during the probationary period. Before the end of the probationary period the board of teaching shall decide to extend or terminate the probationary licensure status or to take further disciplinary actions as are consistent with this rule.

4. The license to teach of the person determined to be in violation of the standards of the code of ethics may be suspended for a period of time determined by the Minnesota board of teaching.

5. The license to teach of the person determined to be in violation of the standards of the code of ethics may be revoked by the Minnesota board of teaching.

APPROVED AS TO FORM AND LEGALITY

DEC. 14 1978 19___

WARREN SPANNAUS, ATTORNEY GENERAL

BY _____

SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
DEC 14 1978
Joan Anderson Growe
Secretary of State

1:10PM

ADMIN 1000 (Rev. 1/78)

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL

Office Memorandum

TO : KENNETH L. PEATROSS
Executive Secretary
Minnesota Board of Teaching

DATE: December 14, 1978

FROM : LEE E. SHEEHY
Special Assistant
Attorney General

PHONE: 296-1288

SUBJECT: In the Matter of the Proposed Adoption of 5 MCAR Sections 3.005 - 3.015, 3.005 (new), 3.052, 3.053, 3.020 - 3.031, 3.020 (new), 3.074, 3.003, 3.086 (new), and 3.130 (new)

The above-captioned rules have been resubmitted to this office for review. With the exceptions noted below, the rules have been approved as to form and legality. I have taken the liberty of filing those rules approved by this office. Approved rules include 3.130 (new), 3.052, 3.053, 3.020 - 3.031, 3.020 (new), 3.074, and 3.003. These rules have been filed with the Secretary of State. Note that they have NOT been filed with the State Register; this must be done promptly by your agency.

Upon receipt and before transmittal to the State Register, it is important that you recheck these rules as to:

1. Affixation of the stamps of the Attorney General and Secretary of State to the last page of the Rules;

2. Coverage of these stamps of all rules submitted and approved except as noted herein; and

3. Inclusion of all pages of the rules in the approved set.

The rules which have not been approved by this office, nor filed with the Secretary of State, and the reasons for this action are as follows:

I. 3.005 F (3): As I discussed in my memorandum dated October 13, 1978, to agency counsel, agencies may not create task forces whose expenses are reimbursed and who serve a formal function in agency decision making without statutory authority authorizing the expenditure of State funds for such purposes. For example, Minn. Stat. § 15.0593 (1977 supp.) authorized the Governor to create by Executive Order advisory task forces in his office whose expenses may be paid. Although the agency has demonstrated statutory authority for the local licensing committee, it has still failed to show this office authority permitting

implementation of the "State Task Force for Continuing Education/ Relicensure." While this office grants great deference to agency discretion, agency rules do have the force and effect of law. Prior to approving rules as to form and legality, this office must be assured that the agency has the authority by statute to undertake the actions evidenced in the rules. This office is again requesting further evidence of the agency's authority for implementation of such a State Task Force and the payment of expenses to its members.

II. Section 3.086: While the agency has addressed some matters raised by my memorandum dated August 11, 1978, to agency counsel, the rule resubmitted relating to licensure of teachers of American Indian language and culture must be disapproved for the following reasons:

Subdivision A of the rule once more ignores the apparent statutory dichotomy that a person may be licensed to teach either American Indian language or American Indian culture. Secondly, the statutory licensing standard for teachers of American Indian culture has nothing to do with "achieved and demonstrated competence." The statutory term "competence" refers to an applicants abilities in the area of the American Indian language. The statute sets forth other standards relative to knowledge and understanding of American Indian history and culture.

Subdivision B of the rule perpetuates errors pointed out in my memorandum dated August 11, 1978. Specifically, B (1) requires any application for a license to be accompanied by an Affidavit of a school official attesting to the applicant's lingual skills and knowledge of the culture and history. This requirement is improper for two reasons. First, it fails to recognize the statutory dichotomy for licensure of a teacher of either American Indian language or American Indian culture and history. According to this provision, one must be competent in both areas to receive any license. Secondly, Subdivision B (1) conditions the granting of any license upon an applicant's ability to obtain certification from a school administrator (who is not required to have any expertise in the area of the subject matter to be taught) without any apparent need or statutory authority for such a requirement. The statute does permit the agency to establish requirements for applicants relating to academic study and training. See Minn. Stat. § 126.49, Subd. 1 (b). However, Subdivision B (2) of the rule appears to address these academic qualification requirements. The requirements of the rule in Subdivision B (1) seem redundant, unnecessary and improper given the provisions of (2). The agency may not condition granting of a license upon the applicant's ability to obtain some school administrator's concurrence with the application unless the agency shows the relationship of this requirement to its statutory authority to establish academic study and training requisites for potential applicants.

If you have any questions, do not hesitate to call me.

LES/ov

cc: Duane Harves
Chief Hearing Examiner

STATE OF MINNESOTA

COUNTY OF RAMSEY

BEFORE PETER C. ERICKSON
HEARING EXAMINER
OFFICE OF HEARING EXAMINERS

IN THE MATTER OF: The proposed adoption of rules of the Board of Teaching governing Continuing Education/Relicensure

FINDINGS OF FACT AND CONCLUSIONS

The above entitled matter came on for hearing before Hearing Examiner Peter C. Erickson of the State Office of Hearing Examiners at 9:00 a.m. on October 28-29, 1977, in Room 83 of the State Office Building, St. Paul, Minnesota.

Based upon the recommendations and proceedings herein, the Board of Teaching makes the following:

FINDINGS OF FACT

5 MCAR § 3.005 Continuing Education/Relicensure provision G.1.a. shall read as submitted to public hearing on October 28-29, 1977.

The Board of Teaching finds that conclusion 11. of the report of the Hearing Examiner makes reference to the relicensure of vocationally licensed teachers. The Board further finds that this conslusion, which relates to 5 MCAR § 3.005 provision G.1., is in error.

The Board further finds that provision G.1. provides for a local committee structure for the relicensure of teachers holding standard teaching licenses.

The hearing record shows that 5 MCAR § 3.005 provision G.14. provides for a local committee structure for the relicensure of teachers holding vocational teaching licenses.

CONCLUSIONS

The Board of Teaching concludes that 5 MCAR § 3.005 provision G.1. and provision G.14. provide respective and appropriate local committee structures for

the relicensure of teachers holding standard teaching licenses and teachers holding vocational teaching licenses.

STATE OF MINNESOTA
BOARD OF TEACHING

Kenneth L. Peatross

Kenneth L. Peatross, Executive Secretary
MINNESOTA BOARD OF TEACHING

MINNESOTA BOARD OF TEACHING
607 CAPITOL SQUARE BUILDING
550 CEDAR STREET
ST. PAUL, MINNESOTA 55101
(612) 296-2415

KENNETH L. PEATROSS
EXECUTIVE SECRETARY

KATHRYN C. RAYBURN, Chairman
513 - 32nd Street Northeast
Rochester, Minnesota 55901

JOSEPH J. MOREN, Vice-Chairman
304 East 32nd Street
Hibbing, Minnesota 55746

MARGERY H. HARRIS, Secretary
4624 Colfax Avenue South
Minneapolis, Minnesota 55409

ROBERT J. CASANOVA
982 South Market
Shakopee, Minnesota 55379

WILLIAM E. GARDNER
104 Burton Hall
University of Minnesota
Minneapolis, Minnesota 55455

LOWELL GILLETT
St. Cloud State University
St. Cloud, Minnesota 56301

EDWARD HUDOBA
United Labor Center
312 Central Avenue - Room 356
Minneapolis, Minnesota 55414

LUCILLE L. KAINU
590 Highway 33 North
Cloquet, Minnesota 55720

JO MALMSTEN
5350 Shady Hills Circle
Shorewood, Minnesota 55331

MARIE McNEFF
Augsburg College
Minneapolis, Minnesota 55454

CARL H. NEVILS
20200 Vance Street
Elk River, Minnesota 55330

ADDIE PERL
2240 Drew Avenue South
Minneapolis, Minnesota 55416

EDWARD A. RAPP
9955 Grouse Street Northwest
Coon Rapids, Minnesota 55433

AARON RUPERT
1409 West Minnehaha Avenue
St. Paul, Minnesota 55104

SISTER MARY DENISE VILLAUME
2475 Dodd Road
St. Paul, Minnesota 55120

NOREEN WELCH
209 North Estey Avenue
LuVerne, Minnesota 56156

DOLORES WINDINGSTAD
Route #1, Box 41
Dawson, Minnesota 56232

TO : Lee Sheehy
Special Assistant Attorney General

FROM : Kenneth L. Peatross, Executive Secretary
MINNESOTA BOARD OF TEACHING

K Beatross

DATE : December 1, 1978

SUBJECT: In the matter of the proposed adoption of 5 MCAR §§ 3.005 - 3.015, 3.005 (new), 3.086 (new), 3.130 (new)

Pursuant to the rules of the Office of the Attorney General, I hereby resubmit for final approval by the Office of the Attorney General the above captioned rules of the Board of Teaching heard at public hearing on October 28-29, 1977.

The rules have been amended by the Board of Teaching in compliance with your recommendations contained in correspondence dated October 18, 1978, and directed to Donald J. Mueting, Special Assistant Attorney General. In the one instance where the Board has not implemented the amendment to 5 MCAR § 3.005 E.2. and contained in the Hearing Examiner's conclusion number 11., the Board now files separate findings of fact and conclusions.

It is my understanding that 5 MCAR §§ 3.052, 3.053, 3.020 - 3.031, 3.020, 3.074, 3.003, are still pending final approval by your office subject to your review and approval of the above captioned rules. Following your review of the above captioned rules, I shall appreciate notification from you of the approval status of all of the remaining October 28-29, 1977, public hearing licensure rules proposed by the Board of Teaching.

If you have any questions with respect to the rules herewith resubmitted for approval, please do not hesitate to call me.

KLP/nad

Enclosures

cc: Donald J. Mueting

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS
ROOM 300 – 1745 UNIVERSITY AVENUE
ST. PAUL, MINNESOTA 55104
(612) 296-6910

January 18, 1978

TO ALL INTERESTED PARTIES:

Re: In the Matter of the Proposed adoption, amendment or repeal of Rules of the Board of Teaching governing Requirements for Issuance and Renewal of all Licenses, Qualifications Physical Education and Health Teachers, Suspension or Revocation of Licenses to Teach, Appeal to the Minnesota Board of Teaching, Social Studies in Secondary Schools, Science for Grades 5-9 and Grades 7-12, Human Relations Components in all Programs Leading to Licensure in Education, Issuance and Renewal of all Licenses; Fees, Teachers of Art, Teachers of Family Life Education, Teachers of American Indian Language and Culture, Code of Ethics, Continuing Education/Relicensure, Career Licensure in Teaching, Nursery School Teachers, Licensure of Prekindergarten Teachers and Prekindergarten Assistant Teachers, Teachers of Industrial Arts, Elementary School Counselors, Secondary School Counselors, Teachers in Middle Schools.

The Report of the Hearing Examiner in the above-entitled matter has been submitted to the Board of Teaching. Please note that the Report is a recommendation only and that the Board of Teaching may accept, modify or reject any part of it. However, the Board of Teaching may not take any final action on the proposed rule until at least five working days have expired. During that time, the Board of Teaching and the Office of Hearing Examiners will make a copy of the Report available for review by any interested individual. Copies will be furnished by the Office of Hearing Examiners for $3.40 each. Please use the order form on the reverse side.

A copy of the Report has also been filed with the Legislative Reference Library.

Sincerely,

Susan K. Derus

SUSAN K. DERUS
Administrative Assistant

SKD:ef

AN EQUAL OPPORTUNITY EMPLOYER

STATE OF MINNESOTA)
(ss.
COUNTY OF RAMSEY)

AFFIDAVIT OF SERVICE

ESTELLA FARMER, being first duly sworn, deposes and says that on the 18th day of January 1978, at the City of St. Paul, County of Ramsey, State of Minnesota, she served the attached Notice to Interested Persons File NO. BT-78-001-PE.

unstamped, by placing in the designated tray to be collected by messenger for delivery to the central mailing station as required by Minn. Stat., § 16.54 (1974), a true and correct copy thereof on all persons at the addresses shown on the Hearing Register who indicated thereon that they wished to be notified when the Examiner's Report was submitted to the Agency.

Estella Farmer

Subscribed and sworn to before me
this 18th day of January, 1978.

Eileen A. Gaiovnik

EILEEN A. GAIOVNIK
Notary Public, Ramsey Co. Mn.
MY COMMISION EXPIRES
December 14, 1980

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Peter C. Erickson, being first duly sworn, hereby deposes and says:

That at the City of St. Paul, county and state aforementioned, on the 18th day of January, 1978, he did serve the Report of the Hearing Examiner, File No. BT-78-001-PE.

upon The Board of Teaching

by personally handing to Nancy Dippel,

said Report of the Hearing Examiner.

Peter C. Erickson

Subscribed and sworn to before me this 18th day of January, 1978.

Eileen A. Gaiovnik

EILEEN A. GAIOVNIK
Notary Public, Ramsey Co. Mn.
MY COMMISION EXPIRES
December 14, 1980

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS
ROOM 300 – 1745 UNIVERSITY AVENUE
ST. PAUL, MINNESOTA 55104
(612) 296-6910

January 18, 1978

Mr. Kenneth L. Peatross
Executive Secretary
Board of Teaching
607 Capitol Square Building
550 Cedar Street
St. Paul, Minnesota 55101

RE: In the Matter of the Proposed adoption, amendment or repeal of Rules of the Board of Teaching governing Requirements for Issuance and Renewal of all Licenses, Qualifications Physical Education and Health Teachers, Suspension or Revocation of Licenses to Teach, Appeal to the Minnesota Board of Teaching, Social Studies in Secondary Schools, Science for Grades 5-9 and Grades 7-12, Human Relations Components in all programs Leading to Licensure in Education, Issuance and Renewal of all Licenses; Fees, Teachers of Art, Teachers of Family Life Education, Teachers of American Indian Language and Culture, Code of Ethics, Continuing Education/Relicensure, Career Licensure in Teaching, Nursery School Teachers, Licensure of Prekindergarten Teachers and Prekindergarten Assistant Teachers, Teachers of Industrial Arts, Elementary School Counselors, Secondary School Counselors, Teachers in Middle Schools.

Dear Mr. Peatross:

I enclose herewith and personally serve upon you the Report of the Hearing Examiner in the above-entitled matter. I also enclose the official record and I am herewith closing our file in this matter.

Sincerely,

Peter C. Erickson

PETER C. ERICKSON
Hearing Examiner

PCE:ef
Enc.
CC: Donald J. Mueting
Special Assistant
Attorney General

AN EQUAL OPPORTUNITY EMPLOYER

STATE OF MINNESOTA)
(ss.
COUNTY OF RAMSEY)

AFFIDAVIT OF SERVICE

Estella Farmer, being first duly sworn, deposes and says that on the 18th day of January, 1978, at the City of St. Paul, County of Ramsey, State of Minnesota, she served the attached Report of the Hearing Examiner, File No. BT-78-001-PE.

unstamped, by placing in the designated tray to be collected by messenger for delivery to the central mailing station as required by Minn. Stat., § 16.54 (1974), a true and correct copy thereof on all persons at the addresses shown on the attached mailing list.

Estella Farmer

Subscribed and sworn to before me
this 18th day of January, 1978.

Sandra A. Haven

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

Mr. Donald J. Mueting
Special Assistant Attorney General
Board of Teaching
Capitol Square Building
550 Cedar Street
St. Paul, Minnesota 55101

Mr. Kenneth L. Peatross
Executive Secretary
Board of Teaching
607 Capitol Square Building
550 Cedar Street
St. Paul, Minnesota 55101

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE BOARD OF TEACHING

In the Matter of the Proposed adoption, amendment or repeal of Rules of the Board of Teaching governing Requirements for Issuance and Renewal of all Licenses, Qualifications Physical Education and Health Teachers, Suspension or Revocation of Licenses to Teach, Appeal to the Minnesota Board of Teaching, Social Studies in Secondary Schools, Science for Grades 5-9 and Grades 7-12, Human Relations Components in all Programs Leading to Licensure in Education, Issuance and Renewal of all Licenses; Fees, Teachers of Art, Teachers of Family Life Education, Teachers of American Indian Language and Culture, Code of Ethics, Continuing Education/Relicensure, Career Licensure in Teaching, Nursery School Teachers, Licensure of Prekindergarten Teachers and Prekindergarten Assistant Teachers, Teachers of Industrial Arts, Elementary School Counselors, Secondary School Counselors, Teachers in Middle Schools.	REPORT OF HEARING EXAMINER

The above-entitled matter came on for hearing before Hearing Examiner Peter C. Erickson of the State Office of Hearing Examiners at 9:00 a.m. on October 28 and 29, 1977, in Room 83 of the State Office Building, St. Paul, Minnesota.

Donald J. Mueting, Special Assistant Attorney General, appeared as counsel for the Board of Teaching. Sixteen members of the Board were present at the hearing. The hearing continued until all interested groups or persons had an opportunity to be heard concerning the adoption of the proposed rules.

Pursuant to Minn. Stat. § 15.0412, subd. 4, this Report shall be available for review to all affected individuals upon request for at least five days.

The Board of Teaching shall, if it proposes to adopt the rules as originally proposed or amended, submit the complete hearing record, including its Findings and Order, to the Chief Hearing Examiner no earlier than five days subsequent to the receipt of this Report. This submission shall also clearly indi-

cate any changes made to the rules as originally proposed, preferably in the format that will be submitted to the State Register for publication. The Chief Hearing Examiner shall complete his review and submit his report to the Board on the issues of substantial changes in the rule and compliance with Minn. Stat. § 15.0412 within ten calendar days. Thereafter, the Board of Teaching shall be responsible for filing the rules with the Attorney General.

Based upon all the records and proceedings herein, the Examiner makes the following:

FINDINGS OF FACT

1. On September 27, 1977 the Board filed the following documents with the Chief Hearing Examiner:

(a) A copy of the proposed rules;
(b) A proposed Order for Hearing;
(c) A proposed Notice of Hearing; and
(d) A Statement of the estimated length and number of people attending the hearing.

2. On August 29, 1977 a Notice of Hearing and a copy of the proposed rules were published at 2 State Register 311.

On September 26, 1977 the Board mailed 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 notice.

4. On October 4, 1977 the Board filed the following documents:

(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 Affidavit of Mailing;
(e) The Secretary of State's Certificate and list;
(f) The Statement of Need; and
(g) The Statement of Evidence, including the names of witnesses to be called;
(h) The names of Board personnel who will represent the agency.

The documents were available for inspection at the Office of Hearing Examiners from the date of filing to the date of the hearing.

5. The record remained open through November 18, 1977 for the receipt of written comments and statements.

6. Statutory authority to promulgate the proposed rules is contained in Minn. Stat. §§ 125.185, 214.06, 214.10 (1976) and 126.49 (Supp. 1977).

7. Proposed new 5 MCAR § 3.001 is needed to replace obsolete language, provide additional fields for licensure, and clarify the administrative procedures for the issuance and renewal of licenses to teach.

A. The Board proposed to amend paragraph B of § 3.001 as follows to correct a printing error:

> B. An applicant must qualify separately for each licensure area for which application is made and provide evidence of satisfactory completion of a program in such licensure area which has been approved by the Minnesota Board of Teaching.

8. The proposed amendment to 5 MCAR § 3.072 is necessary to mandate that physical education teachers, who are licensed to teach K-12, have student teaching experience at both the elementary and secondary levels.

A. The Board proposed to amend § 3.072 by striking the word "public" so as to not restrict student teaching to public schools.

9. Proposed new 5 MCAR § 3.020 is necessary to update the appeal procedures used by the Board in conformance with Minnesota Statutes Chapter 15.

10. The proposed amendments to 5 MCAR §§ 3.041, 3.065 and 3.068 are necessary to reflect the philosophical concepts developed by the Board and to provide colleges and universities with the flexibility necessary to implement varying approaches for the preparation of teachers.

11. The proposed amendment to 5 MCAR § 3.003 is necessary to establish a new level of licensure pursuant to the Board's authority vested in Minn. Stat. § 214.06 Subd. 2.

A. The Board proposed to amend paragraph E of § 3.003 as follows to clarify the intent of the rule:

> E. The fee shall be nonrefundable for applicants not qualifying for a license, except the fee is refundable when the applicant for a license already holds the license for which application is made and that license does not expire in the year the application is submitted.

12. Proposed new 5 MCAR § 3.004 is necessary to set out the requirements for a "career license" as established in § 3.003. The Board contends that rules governing career licensure in teaching are needed:

> Because, with the elimination of life licensure for teachers in the State of Minnesota in 1969 and thereafter, only a single level of licensure exists for licensed teachers, and
> Because the continuing license established only minimal continuing education requirements, and fails to provide recognition and incentive to those teachers whose professional growth and activity greatly exceed the minimum levels, and
> Because significant professional contributions should be encouraged as one of the highest elements in any system of professional growth and activity, and
> Because paperwork, rather than the professional growth experience requirement, has proven to be the greatest source of criticism from members of the teaching profession in their evaluations of the continuing education system, and
> Because recognition for outstanding preparation and performance on the part of a classroom teacher has heretofore been predicted upon that teacher leaving the classroom to accept such reward and recognition, and
> Because licenses in the profession of teaching generally stress only the privileges, rather than the obligations, involved in the licensure of readiness to practice in the profession, and
> Because today teachers holding life licensure in the State of Minnesota are beyond the control of present rules regarding continuing education and professional growth, and
> Because only a system of licensure designed to attract, on a voluntary basis, these teachers can hope to bring the greatest portion of the profession under the umbrella of career-long professional growth, and
> Because the highest attainment in teaching should be permanent licensure, subject to continued high professional standards and regular growth activities, which includes commitments to continuing education and teaching practice, and
> Because both the teaching profession and its clientele, the people of Minnesota, stand to benefit from a system of licensure that emphasizes service as an obligation of the holder of a career license to teach.

A. Several persons spoke in favor of deleting the word "consecutive" from paragraph A.2 of § 3.003 because it would have a negative, or perhaps discriminatory, effect on teachers with intermittent breaks in their teaching career. This might particularly effect female teachers who take maternity leave.

B. Ms. Clarice Galliher testified that the language

of § 3.004 A.4 may allow a teacher to get career licensure in an area in which he did not receive his Master's Degree but only has a limited or entrance license to teach.

C. Charlotte Sandstrom testified that § 3.004 is "blatantly discriminatory against those vocational teachers who hold a valid vocational license to teach in a post-secondary vocational school, but do not hold a baccalaureate degree." Ms. Sandstrom suggested adding a new paragraph to section A which would read, "Has earned a vocational license and has earned at least 450 renewal units."

D. The Board commented that it was obliged to follow the state plan regarding qualifications for vocational teachers but did have the authority to license them.

E. Henry Winkels commented on behalf of the MFT that the rule should reflect a greater difference between a continuing license and a career license. Mr. Winkels recommended that § 3.004 E.1 be deleted; E.2 be amended by adding the language "and forwarding the same with affidavits and fees to the Director of Licensing"; and E.3 be amended to read ". . . affirmations of growth together with the license maintenance fee from the career licensee and forwarding the same to the Director of Licensing."

F. Robert Jung suggested that § 3.004 A.1 be amended to read, ". . . fifth year certificate, or 60 quarter hours beyond a baccalaureate degree (at least half of which are graduate credits) from a . . ." Mr. Jung contends that a 60 hour requirement of the teachers own choosing is of more value than the M.A. or Fifth Year.

G. David Benolken commented that clarification is needed "regarding renewal units for the continuing license area versus renewal units under the career licensure procedure" and "where a teacher has a life license in a teaching area plus a continuing license in an area not covered by a life license."

H. The Minnesota School Boards Association commented in opposition to the creation of a "Career Licensure" level for teachers. The MSBA equates the career license with a life license and contends that it will "drastically weaken continuing education under the umbrella of professional commitment."

I. The Board asserts that a career license is a ten-year license which uses different means to verify professional growth.

13. Proposed new 5 MCAR § 3.074 is necessary to set-out requirements and standards for the licensure of art teachers so that both institutions and individuals can follow the appropriate educational programs.

A. Opposition to the mandated "full school day experiences" for a "minimum of ten weeks" for student teaching was voiced by Saint Olaf College, Augsburg College, The College of Saint Catherine and Concordia College. Each contends that because of course scheduling, the specific full day, ten week student teaching experience may be difficult to comply with. It is argued that more general language should be used (as for physical education and music) to allow the colleges more flexibility in meeting student teaching requirements. The colleges feel that a ten week experience is an arbitrary figure; and that eight or nine weeks of student teaching is fully adequate.

14. Proposed new 5 MCAR § 3.085 is necessary to establish standards and requirements for teachers of family life education as there is presently no licensure rule in this area.

A. The MSBA contends that the broad subject areas set-out in § 3.095 A.3 might impose additional requirements on social studies or phy-ed teachers. It suggests a more restrictive definition of course.

B. The MSBA recommends that the words "family life education" be inserted in paragraph D.1 to clearly reflect the kind of entrance license referred to.

15. Proposed new 5 MCAR § 3.086 is needed to establish licensure requirements for teachers of American Indian language and culture pursuant to the mandate of Minn. Stat. § 126.49.

A. Tom Peacock, Director of Education of the Minnesota Chippewa Tribe, proposed that § 3.086 be amended by deleting paragraph B.3 which requires that an applicant be employed to teach before the license is granted. Mr. Peacock contends

that anyone who is able to meet the other requirements should be granted a license regardless of their employment status.

B. The Board commented that the purpose of paragraph B.3 is to provide licensure to persons who are already teaching American Indian language and culture. The intent is not to provide an avenue for the entrance of non-baccalaureate degreed persons into the teaching profession.

16. Proposed new 5 MCAR § 3.130 is necessary to set-out a code of ethics governing standards of professional teaching practices pursuant to the mandate of Minn. Stat. § 125.185. The rule includes the full text of Minn. Stat. § 214.10 so that teachers may be better apprised of the statutory regulatory procedure. Margery Harris, Secretary of the Board, testified that it is crucial to include the statutory language because of its unavailability to many teachers, all of whom play a part in the enforcement of the Code.

A. The MFT proposed the addition of the following standards in section B:

> A teacher abides by the written contract containing agreed upon terms and conditions of employment as established by the employer and the exclusive bargaining agent. The termination of a contract shall be in accord with the statutes of the State of Minnesota.
>
> A teacher, upon accepting a contract, assumes the obligation to fulfill the terms of the contract. A teacher accepts compensation in accordance with the agreed upon salary schedule, and does not use personal influence to receive more or less than the prescribed salary.
>
> A teacher adheres to collective agreements and courses of action endorsed by the exclusive bargaining agents of the school districts insofar as such agreements and actions are consistant with applicable law.

This language was included in the minority report of the task force which developed the Code. Its purpose is to clearly enunciate contractual duties and obligations as standards of conduct.

B. The MSBA suggested that § 3.130 B.10 be amended by adding the language "and honor" between the words accept and contractual to emphasize contract obligations. The Board

responded to this suggestion as follows:

> The MSBA also suggests at page 14 of its presentation that two words be added to the code of ethics for Minnesota teachers. It proposes that "and honor" be added to 5 MCAR 3.130 B.10. This addition would impose by rule a requirement that teachers abide by their teaching contract in every aspect. There are two reasons why this suggestion should not be adopted. First, there is already a statutory requirement that a teacher must teach for the term of his contract or be subject to the loss or suspension of his license. Minn. Stat. § 125.09 (1976). By placing this requirement in the code of ethics, the Board would be unnecessarily requiring that which is already stated in the law and also required under the common law of contracts. Second, it is possible that such language would require the Board of Teaching to actively enforce compliance with employment contracts negotiated between teachers' exclusive representatives and individual school boards in each of the over 400 Minnesota school districts. Such a task would be practically impossible for the Board of Teaching to perform and would also impose the Board of Teaching into contractual disputes between employees and employers.

C. Lowell Gillett, member of the Board of Teaching, recommended that § 3.130 B.1 be amended to read:

> "A teacher shall provide professional educational services in a nondiscriminatory manner."

Mr. Gillett stated:

> Proposals to change the nondiscrimination clause (B 1) in the proposed 5 MCAR 3.130 actually call attention to the need for change, but in a different direction than that which was proposed. The statement presently includes ten different areas where teachers are supposed not to discriminate. As written, it is readily apparent that this is intended to be an all inclusive list. These are not simply examples. In other words, these are the bases on which teachers shall not discriminate. However, the obvious purpose is to make <u>discrimination of any kind</u> a violation of the Code of Ethics. Attempting to list all possible areas where discrimination might occur is a hopeless task, since the possibilities are limitless.

D. The MEA commented on § 3.130 as follows:

(1) We urge, in Standard 1, the addition of the word "sexual orientation" following the word "disability," and preceding the words "or status," so that the standard would read:

> A teacher shall provide professional educational services in a non-discriminatory manner regardless of age, sex, national origin, race, color, creed, religion, disability, sexual orientation, or status with regard to public assistance and/or marriage.

This addition expands the meaning of the standard to reflect teachers' recognition of our obligation to teach all students regardless of their beliefs, attitudes and/or life styles.

(2) The Minnesota Education Association urges that the following be substituted for the proposed Standard 3:

> A teacher shall disclose confidential information about individuals only when a compelling professional purpose is served or when required by law.

To state that the teacher "shall protect" the individual's right to privacy places an unreasonable, and in fact, inappropriate burden of responsibility on the teacher.

In some situations, there is a legal duty to disclose; in some situations there is a legal duty to refrain from disclosure. In many situations, however, there is no specific legal obligation with regard to so-called "confidential" information. Therefore, Standard 3 as proposed falls short of a full statement regarding protection of individual privacy.

MEA's proposed language clearly defines the limits within which the teacher functions with regard to confidential information.

(3) The MEA urges the deletion of the words "maintain classroom management in order to" in Standard 4, so that the proposed Standard would read:

> A teacher shall take reasonable disciplinary action in exercising the authority to provide an atmosphere conducive to learning.

Our proposal states the Standard in more clear, concise language and reflects the teacher's authority to discipline beyond the classroom situation.

(4) The MEA urges the following changes in Standard 6:

> the addition of the word "shall" following "a teacher" in the first line.
>
> the deletion of the "s" in "delegates," and, the deletion of the words "authority for" preceding the words "teaching responsibilities," so that Standard 6 would read:
>
> > A teacher shall delegate teaching responsibilities only to licensed personnel.

The addition of the word "shall" maintains the consistency of form throughout statements of Standards. We use deletion of the words "authority for," as the phrase is redundant.

(5) The MEA urges the following changes in proposed Standard 7:

the addition of the words "suppress or" following the word "deliberately" and deletion of the words "in order to promote the personal views of the teacher," so that the Standard would read:

> A teacher shall not deliberately suppress or distort subject matter.

We believe that inclusion of the words "in order to promote the personal views of the teachers" limits the effect of this section of the Code. The scope of this section of the Code should imply that a teacher should not distort or suppress subject matter for any reason.

(6) MEA urges that the following be substituted for proposed Standard 10:

> A teacher shall accept a contract for a teaching position that requires licensing only if properly or provisionally licensed for that position.

MEA's language speaks to the issue of where licensing is required, including the provisionally licensed. There are teaching assignments, especially in the extracurricular areas, that do not require licensing.

The MEA strongly supports the Board of Teaching position to include the provisions of M.S.214.10 in the rule. Minnesota teachers must have knowledge of and easy access to the procedures for complaints, investigations and hearing.

The MEA urges the following revisions and additions in the section entitled "Enforcement Procedures."

(7) We recommend substituting the word "penalties" for the word "procedures" in the title for this section. This wording simply places the proper title on a section devoted entirely to penalties.

(8) The MEA urges the deletion of the words "in its discretion" in the first paragraph, so that that paragraph would read:

> The Minnesota Board of Teaching may impose one or more of the following penalties when it has found a violation of the Code of Ethics.

The word "may" implies discretion, so that the phrase "in its discretion" is redundant.

(9) In the paragraph numbered "2) in this section, the MEA urges the substitution of the words "shall whenever possible enter into agreement with the teacher who has been charged with a violation of the Code of Ethics" for the words "may enter into agreements with teachers accused of violating the Code of Ethics."

> The Board of Teaching shall whenever possible enter into agreement with the teacher who has been charged with a violation of the Code of Ethics, which would suspend or terminate proceedings against the teacher on conditions agreeable to both parties.

The central thrust of our recommendation in this portion of the document is to assure that top priority

be given to remediation of the issues. The primary effort should be directed toward an agreement with the teacher to assure that there would be no further violations of the Code of Ethics.

To this end we have suggested stronger wording for the second alternative listed. If adopted it would require that this penalty be used in preference to any others whenever possible.

(10) Further, MEA urges that the order in which the penalties are listed be revised so that this alternative (listed as number 2) be listed as number 1, with the others to follow. That listing conforms with the graduated severity of the alternatives and, by implication, grants priority to the alternative of an agreement between the Board of Teaching and the teacher.

Further, the MEA urges the following revision and additions:

(11) We recommend that the following language be added to #3 in the section entitled "Complaints, Investigation and Hearing:"

> "and such notice shall contain a complete copy of such complaint, including the name and address of the complaining person or persons.

The inclusion of such language insures that due process will be followed in handling complaints of alleged violations of the code.

(12) The MEA urges the addition of a procedure #5, to read:

> If the written complaint is not received within ten days of the oral complaint, all records of said complaint shall be destroyed and cannot be used in the future.

Oral complaints unsupported by written documentation should have the same value as an anonymous letter or of hearsay evidence in court. The record of such oral complaints should be kept only long enough to give time for a written, signed document to be submitted and should not be used in place of it.

(13) The MEA urges the addition of a procedure #6, to read:

> If, after investigation, a complaint alleging a violation of the Code of Ethics is found to be invalid, all records of said complaint shall be destroyed and cannot be used in the future.

We are concerned about the need to safeguard the career of a teacher against whom invalid complaints are made. Unfounded complaints, if allowed to remain on record, could prejudice a hearing officer merely by their quantity, even though all have been found to be invalid. For this reason, we feel that any complaints determined by investigation to be without foundation should be removed from the teacher's record or, at least, be prohibited from further use.

17. At hearing, the Board withdrew the proposed amendments to 5 MCAR § 3.073. No testimony or comments supported the amend-

ments as proposed.

18. Proposed new 5 MCAR § 3.005 is necessary to replace obsolete language contained in present §§ 3.005 through 3.015 and create a viable system for the implementation of continuing education requirements.

A. The Board proposed to amend § 3.005 G.14.a as follows to cover the situation of the state plan being adopted in rule form:

> a. The criteria for licensure renewal contained in the Minnesota state plan for vocational-technical education or successor rules shall replace the provisions of E.1.

B. Ms. Ruth Blackstad, MEA representative, proposed to amend § 3.005G.7 by adding a provision to read:

> Hold an open hearing annually to allow the teachers in each district to review the guidelines established by the local committee.

She contends that teachers in each district should have an opportunity to express their feelings about the guidelines formulated by the local committee.

C. The MEA also proposed to mandate that one vocationally licensed teacher be placed on the local committee in each district where there are vocationally licensed personnel and delete all of G.14.b. Other persons commented that the baccalaureate degree requirement for membership on the local committee effectively proscribes vocational teacher participation.

D. The MSBA suggested that G.7. K-M be deleted in conjunction with its proposal to delete the career licensure rule.

E. The MSBA challenges the authority of the Board to propose a rule which regulates college level teachers. (§ 3.005 G.14.d) The Association suggests that at a minimum, the rule should stand alone and not be included in the Vocational Teachers section.

19. The Board asserts that the need for and reasonableness of proposed new 5 MCAR §§ 3.102 and 3.103, rules governing elementary and secondary counselors, are as follows:

Because the last rules for secondary school counselors were developed in 1958 to be implemented in 1963. This is a long time ago and many societal changes have made the earlier preparation program ineffective and obsolete, and

Because by their own initiative counselor preparation institutions have made revisions in their preparation programs to update counseling skills in dealing with more recent problems that counselors meet, and

Because although the previous elementary counselor preparation rule is more recent, members of the task force felt that the preparation program should be very similar at both levels, allowing only for different techniques to be used at the different age levels as needed. Permission was requested from the Minnesota Board of Teaching and granted to work on these two rules simultaneously. An attempt was made to creat a K-12 rule but this created too long a preparation program to be practical. This created a need to keep two rules but to find a method whereby counselors prepared at one of these levels would have available a definite designated program to move to the other level, and

Because this would help provide counseling services for students, kindergarten through grade 12, in the many small schools and would help solve the problem of who is qualified to counsel in the middle schools that have been developing, and

Because there are population shifts, this rule is specifically designed to help counselors shift from one level to another, and

Because the scope of counseling services has increased over the years. An increasing number of students come from troubled and broken homes. In addition students are involved at earlier ages with drug, alcohol and sex problems. The counselor has been forced to become more actively involved with the total family. The task force considered the many publics the counselor must serve. The counselor is designated to help students, parents, teachers, administrators and persons in referral services in the community. The idea of working with all these significant others is to enhance and insure that the student has every opportunity to succeed. This rule is specifically designed to train a counselor who will be competent in these areas, and

Because the proposed rules are accompanied by very specific and extensive guidelines to help the colleges implement the new rules. It is understood that institutions may use somewhat different techniques in the preparation program, but they must insure that the graduate of the program has developed skills specified in the proposed rule, and

Because this will assure more consistency of competencies than we have at the present time, and

Because the existing rules simply stated that the counselor in preparation be prepared in a certain area. This often resulted in having

a course by that name meet the requirement, and
Because school counseling was very new in 1963, and the number of professionals in the field was small, and
Because since that time counseling has grown and come into the fore and much has been learned about the preparation the counselor needs from experiences over these years, and
Because the proposed rules when adopted will assure that a counselor prepared under the provisions of the rules and licensed will be able to render adequate counseling services and better meet the needs of students and other publics served, and
Because it is also expected that the new preparation program will serve as an incentive for counselors now in the field who were prepared many years ago to return to take new courses that will be offered to update their skills.

The Board commented further regarding the increase in teaching experience from one to two years as follows:

> The need for two years of teaching experience arises:
>
> Because a person who must counsel a student regarding his performance in an educational setting must be an educator who understands the learning environment, the motivational factors influencing or affecting student performance in the classroom, and the dynamics of selfdiscipline and of the interaction between students and between student teacher, and
>
> Because a person who must counsel with classroom teachers regarding student academic and social performance and who is to offer suggestions regarding correction, remediation, or enrichment of program or performance must be an educator with personal experience as a facilitator of learning and of student growth and development, both academically and socially, and
>
> Because it is recognized that the first year of any on-the-job experience -- but especially teaching experience -- is a continuum of preservice training in that it is the first time the individual has an opportunity to independently apply what he/she has learned and therefore has some of the characteristics of a laboratory learning experience and that the second year of the teaching experience constitutes a more sound foundation upon which to base further teacher training and experience in the same or related field(s) of education.

A. The Counselor Task Force proposal, as submitted to the Board of Teaching after two years of study, retained the "one year of teaching experience" requirement and provided for a full-time, one half school year internship for teachers who had not taught for one year. Also, alternative qualifica-

tions for licensure were added which allowed persons without a teaching license to become counselors after an extensive guidance and counseling educational curriculum.

The Board rejected the alternative route to licensure and increased the teaching requirement to two years or one year of internship for a licensed teacher.

Many persons spoke in favor of amending §§ 3.102 and 3.103 to include the alternate route to licensure. Evidence was presented as to the success and viability of "alternate route" counselors and programs. Proponents included: Ms. Elvera Springer, Counselor Task Force Chairperson; William J. Erpenbach, Ph.D., Supervisor, Counseling and Guidance Services, State of Wisconsin, Department of Public Instruction; L. Sunny Hanson, Ph.D., Professor, Counseling and Student Personnel Psychology, University of Minnesota; Joe Hogan, Chairperson, Counseling and Student Personnel, Mankato State University; and W. Wesley Tennyson, Professor, Educational Psychology, University of Minnesota. Professor Tennyson, citing Vogel, Counselor Certification Requirements for the Fifty States of the United States, stated that since 1967, the number of states requiring teacher licensure for counselor certification has dropped from fifty to thirty-five; requiring teaching experience from forty-six to twenty six.

Many, many letters were received from counselors all over the state which insisted that teaching experience, or at a minimum teaching licensure, was essential to the performance of a counselors duties. Harold Hebl, President of the Minnesota School Counselors Association, and several other practicing counselors, testified in favor of the rule as proposed by the Board.

B. Many persons testified that there is no need to increase the teaching experience requirement from one to two years. They argued that one year of teaching experience or one-half year of internship for newly licensed teachers, as set out in the Task Force proposal, is fully adequate.

C. Ms. Blackstad proposed amendments to §§ 3.102 A.4 and 3.103 A.4 which read:

> Have completed two years of teaching experience, or shall complete the equivalent of one year of teaching experience and one school year full-time internship in guidance and counseling at the secondary (elementary) school level.

This language changes the proposed rule to require a year of teaching experience in addition to the year of internship as the alternative to two years of teaching experience.

D. Dr. David Frye testified that "additional credit requirements (from 45 to 54) for entry level licensure are, from my frame of reference, counterproductive, unnecessary, discriminatory and self-serving."

E. Mary Jo Beaty proposed to delete §§ 3.102 A.5 and 3.103 A.5 which impose a 2,000 hour outside work experience requirement. She contends that the requirement places an unreasonable time burden on aspiring counselors.

It should be noted that this requirement is, however, contained in the present rules.

20. The Board of Teaching asserts that the need for and reasonableness of the repeal of present § 3.052 A.3 and C, rules governing nursery school teachers, and the adoption of § 3.053, rules governing licensure of prekindergarten teachers and prekindergarten assistant teachers, is as follows:

> Because the rule governing nursery school teachers was last amended in 1966, and
> Because since that time early childhood education has undergone much development and diversification in Minnesota, and
> Because repeal of 5 MCAR § 3.052 A. 3. C. as of July 1, 1978, and replacement of 5 MCAR § 3.052 with the proposed rule governing licensure of prekindergarten teachers and prekindergarten assistant teachers as of July 1, 1984, provides an effective balance between improvement of the quality of prekindergarten teaching and avoidance of undue hardship to present licensed teachers, and
> Because 5 MCAR § 3.052 A. 3. permitted licensed kindergarten and elementary school teachers with minimal preparation in prekindergarten education provided by two course experiences to gain nursery school teacher licensure, and
> Because teaching prekindergarten children is now recognized to require special knowledge and skills in relation to the intellectual, emotional, social, and

physical needs of very young children, not afforded by two courses alone. Thus, while it is proposed that licensed kindergarten and elementary school teachers could receive provisional nursery school licensure until 1984, full teacher licensure for nursery school on the basis of 5 MCAR § 3.052 A. 3. will be deleted as of July 1, 1978, and
Because few, if any, nursery school teachers at this time hold a temporary license according to 5 MCAR § 3.052 C., the need for the temporary license has diminished, and
Because persons qualifying for provisional or full nursery school licensure able to fill new positions are numerous, and
Because the factor of improved quality of nursery school teaching weighed against the factor of possible hardship to existing temporary license holders warrants deletion of 5 MCAR § 3.052 C. as of July 1, 1978, and
Because many prekindergarten teachers presently holding provisional licensure would lose positions if provisional licensure were ended immediately, and
Because licensed kindergarten and elementary teachers desiring prekindergarten licensure after July 1, 1978, may need additional time to obtain it, 5 MCAR § 3.052 C. governing provisional nursery school licensure should be kept in place until the proposed rule 5 MCAR § 3.053 becomes effective, and
Because the magnitude of the functions performed by adults in effective prekindergarten practice warrants low child to adult ratios, an overlapping of instructional/development tasks, and the organized division of labor, other adults besides the holder of full teacher licensure are called upon to discharge professional educational responsibilities in prekindergarten programs. As a category increasingly supported in early childhood literature, the proposed rule thus will grant a new level of licensure to assistant teachers who will work under the supervision of licensed prekindergarten teachers in prekindergarten classrooms. Prekindergarten assistant teacher preparation will include an approved program of 12 semester hours or 18 quarter hours of field-related credit taken as part of or in addition to 60 semester hours or 90 quarter hours from an approved college or university. The prekindergarten assistant teacher licensure, as part of the proposed rule, will be put in place by July 1, 1984, and
Because of recent development and diversification in the field of prekindergarten education, it has become necessary to more clearly frame alternatives for the prekindergarten licensure preparation program. Thus, in the proposed rule a minimum of 6 semester or 9 quarter hours in the child development/family relations areas and a guided elective course of 2 semester or 3 quarter hours in the child health, infant development, or special needs in early childhood areas will need to be completed for licensure by July 1, 1984, and

Because general education is a significant part of effective prekindergarten teacher preparation, the necessary 18 semester or 27 quarter hours as set forth for licensure in 5 MCAR § 3.052 will not be expanded, but will be kept at the same level of requirement in the proposed rule 5 MCAR § 3.053.

A. The Board proposed to amend § 3.053 by correcting a typographical lettering error in sections c through g of A.1.

B. The Board proposed to amend the repealing language to provide that the balance of § 3.052 would be repealed when § 3.053 became effective.

C. Dan Gartrell, spokesman for the Board on § 3.053, proposed to amend B.1 to read "... under the direct supervision of a licensed prekindergarten teacher in the classroom." This amendment would clarify the intent of the rule that one licensed prekindergarten teacher could not supervise more than one classroom taught solely by an assistant.

D. The Board proposed to amend b (c with the relettering) (1) by enumerating the course areas listed in A.1.b.(1). This addition will clarify the requirement.

E. Objection to the licensure of prekindergarten assistant teachers was made by the MSBA, the MFT, the Duluth Continuing Education Committee, the Hennepin Technical Center and the Duluth Public School District. The thrust of the argument is that with the different roles of assistants, aids and teachers now being used in institutions, selecting only prekindergarten assistants for licensure will disrupt role definitions and possibly lead to large scale licensure of all the aid-type positions.

F. The Minnesota Early Childhood Teacher Educators (MECTE) and Richard Jones, Dean of Education and Regional Services, Moorhead State University, proposed that the effective date of the rule be changed to July 1, 1980 from July 1, 1984. They argue that implementation can proceed faster than the Board projects and is needed more quickly.

G. The Early Childhood Education Subcommittee, created by the Board to draft a proposed rule, recommended to the Board that the terms Level I and Level II prekindergarten teachers be used in § 3.053. The Board instead used the terms prekindergarten teacher and assistant teacher. The Minnesota Head Start Directors Association, the Early Chilhood Studies Program at the University of Minnesota and several early childhood teacher educators and practitioners commented in opposition to the deletion of the Level I and II terminology. They stated that the prekindergarten assistant position does not fit the definition of an assistant as has been developed in the education profession. They argue that the prekindergarten assistant has many more professional duties than the commonly accepted role of an assistant. In order to show that level of responsibility, the terms Level I and II should be used.

H. Additionally, the Study Committee recommended that a provision for the Transferability and Equivalence of course work be included in the rule. The Board deleted that provision in proposed § 3.053. Opposition to the deletion was expressed by the Minnesota Head Start Directors Association, the Minnesota Association of Secondary Vocational Directors and the Minnesota Association for the Education of Young Children. They contend that the transferability and equivalency provision is essential to provide flexibility for persons with varied educational backgrounds in other kinds of institutions or programs. Presently, there are many programs outside of approved preparing institutions which train persons in the areas of child care and development.

21. Proposed new 5 MCAR § 3.054 is necessary because no rule presently exists for the licensure of teachers at the middle school level and students at the middle school level will be best served by a system of licensure which requires preparation by the teacher in areas which recognize the learning requirements of students at that age and level of development.

a. Dan Moriarty and Margie Brosseau proposed that a "grandfather" provision be inserted in § 3.054 as was done in § 3.085 to insure that teachers with experience or training in the middle school levels will receive credit toward the licensure requirements.

b. The Board responded that the last sentence in paragraph D is intended to function as a directive to preparing institutions regarding "grandfathering."

c. Ms. Brosseau stated further that the additional 24 credits required for middle school licensure, as compared to K-6 or 7-12, may have a very dilaterious effect on the formation and continuation of middle school programs.

Based on the foregoing Findings of Fact, the Examiner makes the following:

CONCLUSIONS

1. Due, timely and adequate legal notice of the hearing was properly served and filed by the Board of Teaching. All other substantive and procedural requirements of statute or rule have been complied with.

2. Pursuant to Minn. Stat. § 15.052, subd. 3 (1976) it is the duty of the Hearing Examiner to: ". . . (4) make a report on each proposed agancy action . . . taking notice of the degree to which the agency has (i) documented its statutory authority to take the proposed action, (ii) fulfilled all relevant, substantive and procedural requirements of law or rule, and (iii) demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts."

3. Throughout the course of these proceedings, many suggestions for additions, changes and deletions to the proposed rules were entered into the record. These suggestions varied from minor word or letter changes to major revisions or additions to the rules.

A Hearing Examiner can recommend that a rule be amended only for the purposes of clarification and effective implementation or when statutory authority, need or reasonableness is lacking.

The Hearing Examiner has no authority to recommend major substantive changes in the proposed rules if the need for and reasonableness of the rules has been demonstrated by an affirmative presentation of facts.

The Board of Teaching has the statutory responsibility to set policy for the teaching profession. These proposed rules reflect many major and minor policy decisions made by the Board. Policy consideration and determination must be dealt with by the Board at the time the rules are drafted. As has been stated, if the proposed rules are both reasonable and needed, the Hearing Examiner cannot reverse policy decisions made by the agency in the formulation of those rules.

4. Several pleas were made to the Examiner to clarify or rewrite sections of rules because of various broad policy considerations. This Examiner becomes a draftsman very infrequently; and that is only when the need for revised language has been clearly specified and none provided to the Examiner.

5. The Examiner concludes that the proposed rules should be amended as set out in Findings 7A, 8A, 11A, 16C, 17, 18A and B, and 20 A, B, C and D for the reasons stated therein.

6. Presently, Minnesota teachers hold licenses at four levels. (including life licensure) In 1969, the statutory provision authorizing life licensure was repealed, and recently reenacted, although there are no rules currently governing life licensure. In §§ 3.003 and 3.004, the Board is proposing to add a new level of licensure, a career license. This new level is a hybrid between a continuing license and a life license. The Examiner concludes that the need for a career license was not demonstrated by an affirmative presentation of facts. Rather, the evidence supporting the proposed rule suggests that a career license is a new level of licensure designed to be a substitute for life licensure and minimize year to year continuing education requirements.

7. The Examiner concludes that the "ten-week full school day" student teaching requirement for art teachers was not shown

to be needed or reasonable in light of the more flexible requirements in other areas and the diversified program offered by many colleges. Proposed 5 MCAR § 3.074 E. 2. d. (2) and 3. d. (2) should be amended to reflect more liberal requirements to provide more flexibility for preparing institutions. (See Finding 13 A)

8. In light of the expressed purpose and intent of § 3.086, the Examiner concludes that the rule is needed and reasonable as proposed. (See Finding 15 A and B)

9. The Examiner concludes that the inclusion of statutory language in proposed § 3.130 is crucial to the ability of a person affected by the rule to understand its implementation.

10. The Examiner concludes that § 3.130 be amended as set-out in Findings 16 D. (2) - (6), (8) and (10) for the reasons stated therein.

11. The Examiner concludes that § 3.005 G.1 be amended by either deleting the baccalaureate degree requirement or by providing for a "vocational educational seat" on the local committee. As written, vocational education instructors are subject to the mandates of a committee on which they cannot serve. Provisions dealing with career licensure in § 3.005 should be deleted. Also, G.14.d should be made a new paragraph H as it does not deal with the subject matter in paragraph G. (See Findings 18 C, D and E)

12. The Examiner concludes that the need for and reasonableness of the proposed amendments to §§ 3.102 and 3.103 have been demonstrated by an affirmative presentation of facts. Consequently, the appropriateness of the Board's decision to reject the Task Force proposal is beyond the scope of this report. (See Finding 19 A)

13. The Examiner concludes that § 3.053 be amended as set out in Findings 20 G and H for the reasons stated therein. The terminology proposed by the Board is unreasonable as it does not reflect the appropriate role positions as developed in the profession. To disallow the transferability of equivalent course work is unreasonable because of the many programs now available outside of approved preparing institutions.

14. The Examiner concludes that the Board of Teaching has documented its statutory authority to promulgate the proposed rules. With the exception of the items noted in Conclusions 6, 7 and 13, the need for and reasonableness of the proposed rules has been demonstrated by an affirmative presentation of facts.

Based upon the foregoing Conclusions, the Examiner makes the following:

RECOMMENDATION

That the Board of Teaching adopt the proposed rules as recommended to be amended in this report with the exception of the career licensure provision.

Peter C. Erickson

PETER C. ERICKSON
Hearing Examiner

Dated this 18 day of January, 1978.

M E M O R A N D U M

Paragraph H of § 3.005 sets out a right of appeal to the state committee for an applicant who has not been granted the requested number of renewal units. Minn. Stat. Chapter 15 mandates that this appeal be governed by the Administrative Procedures Act. A provision should be added to the appeal section stating that all appeals will be proceedings governed by Chapter 15.

Both the Hearing Examiner and the Board of Teaching filed a request with the Chief Hearing Examiner, pursuant to Minn. Stat. § 15.0412 Subd. 4 (1977 Supp.), that a 30 day extension be granted for the issuance of the report in this matter. The Chief Hearing Examiner granted the request and ordered that the extension continue through January 18, 1978.

PCE

STATEMENT OF COMPLIANCE WITH
MANUAL OF RULE MAKING PROCEDURES

I, Special Assistant Attorney General Donald J. Mueting, 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 Rule Making Procedures has been followed. Any exceptions are noted below.

Donald J. Mueting
Special Assistant Attorney General

Dated: 8/22/78

STATE OF MINNESOTA

COUNTY OF RAMSEY

BEFORE MINNESOTA
BOARD OF TEACHING

IN THE MATTER OF
the proposed adoption
of Rules of the Board
of Teaching governing
Code of Ethics for Minnesota
Teachers, Nursery School
Teachers, Licensure of
Prekindergarten Teachers
and Prekindergarten
Assistant Teachers.

ORDER ADOPTING RULES

The above-entitled matter came on for hearing before the Minnesota Board of Teaching on the 28th and 29th days of October, 1977 commencing at 9:00 a.m. each day in the State Office Building Auditorium after proper notice required by M.S. 1976, Section 15.0412 was served on all persons, associations, and other interested groups registered with the Secretary of State for that purpose.

After affording interested persons an opportunity to present written and oral data, statements and arguments, having heard all of the testimony, having considered all of the evidence adduced and upon the records, files and proceedings herein, and applicable statutory standards or criteria, and having confirmed the need for the above captioned rules.

NOW, THEREFORE, IT IS ORDERED that the existing rules identified as 5 MCAR § 3.130 Code of Ethics For Minnesota Teachers, 5 MCAR § 3.052 Nursery School Teachers, and 5 MCAR § 3.053 Licensure of Prekindergarten Teachers and Prekindergarten Assistant Teachers are adopted or amended this 21st day of July, 1978, pursuant to the authority vested in me by the Board of Teaching.

STATE OF MINNESOTA
BOARD OF TEACHING

Kathryn Rayburn

KATHRYN RAYBURN
Chairman

STATE OF MINNESOTA

COUNTY OF RAMSEY

BEFORE MINNESOTA
BOARD OF TEACHING

In the Matter of the
Proposed Adoption of
Rules of the Board
of Teaching Governing
Continuing Education/Relicensure,
Appeals to Minnesota Board
of Teaching, Teachers of Art,
and Issuance and Renewal
of All Licenses; Fees

ORDER ADOPTING RULES

The above-entitled matter came on for hearing before the Minnesota Board of Teaching on the 28th and 29th days of October, 1977 commencing at 9:00 a.m. each day in the State Office Building Auditorium after proper notice required by M.S. 1976, Section 15.0412 was served on all persons, associations, and other interested groups registered with the Secretary of State for that purpose.

After affording interested persons an opportunity to present written and oral data, statements and arguments, having heard all of the testimony, having considered all of the evidence adduced and upon the records, files and proceedings herein, and applicable statutory standards or criteria, and having confirmed the need for the above captioned rules.

NOW, THEREFORE, IT IS ORDERED that these rules identified as 5.MCAR § 3.005 Continuing Education/Relicensure, 5 MCAR § 3.020 Appeal to Board of Teaching, 5 MCAR § 3.074 Teachers of Art, 5 MCAR § 3.003 Issuance and Renewal of All Licenses; Fees, are adopted or amended this 21st day of July, 1978, pursuant to the authority vested in me by the Board of Teaching.

STATE OF MINNESOTA
BOARD OF TEACHING

KATHRYN RAYBURN
Chairman

STATE OF MINNESOTA

BOARD OF TEACHING

CERTIFICATE OF BOARD'S ADOPTION
OF RULES RESOLUTION

I, Margery H. Harris, do hereby certify that I am secretary of the Board of Teaching, a board duly authorized under the laws of the State of Minnesota, and that the following is a true, complete, and correct copy of a resolution adopted at a meeting of the Board on July 21, 1978, that a quorum was present at said meeting; that a majority of those present voted for the resolution; that said resolution is set forth in the minutes of said meeting and has not been rescinded or modified.

> "RESOLVED that the rules relating to Continuing Education/Relicensure, Appeals to the Minnesota Board of Teaching, Teachers of Art, and Issuance and Renewal of All Licenses; Fees, be and they hereby are approved and adopted, pursuant to authority vested in us by Minn. Stat. § 125.185 and that Kathryn Rayburn, Chairman of the Board of Teaching, be and hereby is authorized to sign an order adopting those rules."

IN WITNESS WHEREOF, I have hereunto subscribed my name this 21st day of July, 1978.

Margery H Harris
Secretary

ATTEST:

Joseph J. Moren
Vice Chairman

STATE OF MINNESOTA

BOARD OF TEACHING

CERTIFICATE OF BOARD'S ADOPTION
OF RULES RESOLUTION

I, Margery H. Harris, do hereby certify that I am secretary of the Board of Teaching, a board duly authorized under the laws of the State of Minnesota, and that the following is a true, complete, and correct copy of a resolution adopted at a meeting of the Board on July 21, 1978, that a quorum was present at said meeting; that a majority of those present voted for the resolution; that said resolution is set forth in the minutes of said meeting and has not been rescinded or modified.

"RESOLVED, that the rules relating to the Code of Ethics for Minnesota Teachers, Nursery School Teachers, Licensure of Prekindergarten Teachers and Prekindergarten Assistant Teachers be and they hereby are approved and adopted, pursuant to authority vested in us by M.S. § 125.185, and that Kathryn Rayburn, Chairman of the Board of Teaching, be and hereby is authorized to sign an order adopting those rules."

IN WITNESS WHEREOF, I have hereunto subscribed my name this 21st day of July, 1978.

Margery H Harris
Secretary

ATTEST:

Joseph J. Moran
Vice Chairman

STATE OF MINNESOTA

BOARD OF TEACHING

CERTIFICATE OF BOARD'S ADOPTION
OF RULES RESOLUTION

I, Margery H. Harris, do hereby certify that I am secretary of the Board of Teaching, a board duly authorized under the laws of the State of Minnesota, and that the following is a true, complete, and correct copy of a resolution adopted at a meeting of the Board on July 21, 1978, that a quorum was present at said meeting; that a majority of those present voted for the resolution; that said resolution is set forth in the minutes of said meeting and has not been rescinded or modified.

> "RESOLVED that in support of the adoption or amendment of rules presented for hearing by the Board of Teaching at the public hearing on October 28 and 29, 1977, the Board of Teaching adopts the Findings of Fact and Conclusions of Hearing Examiner Erickson dated January 18, 1978 with the exception that in support of the adoption or amendment of 5 MCAR §§ 3.130 and 3.053 the Board adopts separate Findings of Fact and Conclusions and authorizes Kenneth Peatross, Executive Secretary, to sign the separate Findings of Fact and Conclusions hereby adopted by the Board.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 21st day of July, 1978.

Margery H. Harris
Secretary

ATTEST:

Joseph J. Moran
Vice Chairman

STATE OF MINNESOTA

COUNTY OF RAMSEY

BEFORE PETER ERICKSON
HEARING EXAMINER
OFFICE OF HEARING EXAMINER

IN THE MATTER OF: The proposed adoption of rules of the Board of Teaching governing Code of Ethics for Minnesota Teachers, Licensure of Prekindergarten Teachers and Prekindergarten Associates

FINDINGS OF FACT AND CONCLUSIONS

The above entitled matter came on for hearing before Hearing Examiner Peter C. Erickson of the State Office of Hearing Examiners at 9:00 a.m. on October 28-29, 1977, in Room 83 of the State Office Building, St. Paul, Minnesota.

Based upon the recommendations and proceedings herein, the Board of Teaching makes the following:

FINDINGS OF FACT

1. 5 MCAR § 3.130 Code of Ethics for Minnesota Teachers provision B. 6. shall read:

> A teacher shall delegate authority for teaching responsibility only to licensed personnel.

This language is the same as that proposed by the Board at public hearing.

The Board finds that the phrase authority for is necessary in order to provide clarity for the intent of this standard in the code of ethics. To delete the phrase authority for may prohibit utilization of all unlicensed personnel in the public schools which is not the intent of the Board in proposing this standard.

2. 5 MCAR § 3.053 Licensure of Prekindergarten Teachers and Prekindergarten Associates.

The Board finds that it is necessary and reasonable to utilize the terms Prekindergarten Teacher and Prekindergarten Associate to clearly describe these positions and, therefore, clearly set forth licensing requirements. The Board finds that the term Prekindergarten Associate clearly describes the accepted definition

of this teaching role as it has been developed within the profession of education.

The Board further finds that the use of the terms Level I and Level II Teacher for these teaching roles is confusing, does not make an adequate distinction between levels of licensure and that it is more appropriate to utilize descriptive titles rather than levels to differentiate between these roles.

3. 5 MCAR § 3.053 Licensure of Prekindergarten Teachers and Prekindergarten Associates.

The Board finds that the above cited licensure rule shall not include a provision for the transferability of credit.

The Board finds that such a provision does not disallow such transferability and equivalence of course work.

The Board finds that based upon existing practice and current rules of the Board of Teaching the discretion for such decisions relating to transferability and equivalence of course work is the prerogative of approved teacher preparing institutions.

The Board finds that there is not adequate support based upon an affirmative presentation of facts in the public hearing record to require the Board to make such a comprehensive policy decision which has implications for the total scope of teacher licensure in Minnesota.

The Board further finds that the inclusion of a provision for the transferability and equivalence of course work in this rule is inconsistent and in conflict with the approved program basis which is established for teacher licensure in Minnesota.

The Board also finds that approved teacher preparing institutions must be afforded an opportunity to be heard regarding transferability and equivalence of course work before such a policy decision is made by the Board of Teaching.

CONCLUSIONS

The Board of Teaching concludes that the need for and reasonableness of the the proposed rules 5 MCAR § 3.130 and 5 MCAR § 3.053 have been demonstrated by an affirmative presentation of facts. The Board further concludes that the appropriateness of the rules is established as set forth in Findings 1. and 2. as above cited.

STATE OF MINNESOTA
BOARD OF TEACHING

Kenneth L. Peatross, Executive Secretary
MINNESOTA BOARD OF TEACHING

1. Memo to Hearing Examiner
2. Proposed Order for Hearing
3. Proposed Notice of Hearing
4. Order for Hearing
5. Notice of Hearing as Mailed
6. Statement of Evidence
7. List of Persons Anticipated to Testify
8. Statement of Need
9. Reference to Solicitation of Outside Opinion
10. Secretary of State's Certificate
11. Affidavit of Obtaining Secretary of State's List
12. Affidavit of Mailing
13. Affidavit of Mary Houde supplementing Affidavit of Mailing
14. Rules as Proposed

1. Report of Hearing Examiner
2. Findings of Fact and Conclusion
3. Order Adopting Rules
4. Approval of Chairman of Commerce Commission
5. Statement of Compliance
6. Rules as Adopted
7. Report - Chief Hearing Examiner

#472 Commerce / Insurance

RULES REVIEW CHECKLIST

DATE RULES RECEIVED 9-27 Temporary Rule _____

Resubmitted and Received _____

DUE DATE 10/17

a. Returned to Agency w/o filing w/Secy of State _____
b. Approved _____ Date Sent Back to Agency _____

- -

1. Rules as Adopted ✓
2. Rules as Proposed ✓
3. Certificate of Board's Authorizing Resolution, where applicable none in file - is it applicable - there is on approval of the prom. Rules by Chairman of Commerce Comm
4. Order for Hearing ✓
5. Notice of Hearing ✓
   (i) Sufficiency O.K. some [illegible] may not exact per HE Rules
6. Secretary of State's List ✓ - lobbyist def
7. Certificate of Acquisition of Secretary of State's List ✓ - ¶ 4 & 8 not exact HE ¶ 7 is incorrectly stated
8. Affidavit of Mailing ✓
   (i) At least 30 days prior to hearing ✓ Discrepancies: extra Hawke affidavit
9. Statement of Need and Evidence ✓
10. Hearing Examiner's Report ✓
11. Agency's Findings of Fact ✓
12. Certificate of Board's Resolution Adopting Rules, where applicable _____
13. Order Adopting ✓
14. Report of Chief Hearing Examiner ✓
    (i) Finding of No Substantial Change ✓
    (ii) Permission to Incorporate by Reference, where applicable _____
15. Certificate of Compliance with Rulemaking Procedures ✓ [Note exception]
16. Copy of Notice of Intent to Solicit Outside Opinion, where applicable _____
17. Petition by Public, where applicable _____.

ADMIN 1000 (Rev. 1/78)

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL - Commerce

Office Memorandum

TO : LEE SHEEHY
Special Assistant
Attorney General

DATE: 9/26/78

FROM : ROBERT J. CLAYTON RJC
Special Assistant
Attorney General

PHONE: 9412

SUBJECT: INSURANCE DIVISION RULES RELATING TO LEGIBLE TYPE FACE STYLES

Attached for your review is the hearing record in the above-referenced matter.

RJC:sl

Attachment

INS-78-012-HC

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF COMMERCE - INSURANCE DIVISION

IN THE MATTER OF THE PROPOSED)
ADOPTION OF RULES BY THE)
INSURANCE DIVISION RELATING)
TO LEGIBLE TYPE FACE STYLE.)

REPORT OF THE
CHIEF HEARING EXAMINER

WHEREAS, a hearing was held on May 9, 1978, before Harry Seymour Crump, a Hearing Examiner of the State Office of Hearing Examiners, on the above-entitled matter in compliance with Minn. Stat. § 15.0412, Subd. 4; and

WHEREAS, the Report of Hearing Examiner made pursuant to Minn. Stat. § 15.052, Subd. 3, was issued to the Insurance Division on June 14, 1978; and

WHEREAS, the Insurance Division has now determined to adopt rules pursuant to Minn. Stat. § 15.0412, Subd. 4; and

WHEREAS, the Insurance Division has submitted said rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. § 15.052, Subd. 4, and Rule HE 107; and

WHEREAS, the Chief Hearing Examiner finds that the final proposed rules are not substantially different from those proposed at the public hearing and that the Insurance Division has met all requirements of Minn. Stat. § 15.0412, Subd. 4.

NOW, THEREFORE, upon receipt of this Report, the Insurance Division has the responsibility of submitting the complete hearing record and the rules as adopted by the Division to the Attorney General and to publish in the State Register, all pursuant to Minn. Stat. § 15.0412, Subd. 4.

Dated this 11th day
of September, 1978.

DUANE R. HARVES
Chief Hearing Examiner

DEPARTMENT OF COMMERCE

INSURANCE DIVISION

RULES RELATING TO
LEGIBLE TYPE FACE STYLES

RULE 195

A. AUTHORITY

The rules hereinafter set forth are promulgated pursuant to Minn. Stat. §72C.07 (1977).

B. PURPOSE

The purpose of this rule is to provide insurance policies which are printed in type face styles that are easily readable to the average person.

C. GENERAL

1. These rules shall be considered applicable in all insurance policies and contracts required to be filed under Minn. Stat. §72C.11.

2. All insurers upon filing shall specify the type face styles used in each policy. The Commissioner will consider the following type face styles as being legible:

Aldine	Korinna
Baskerville	Modern Roman
Bodoni	Megaron
Bodoni Book	Melior
Century	Metro
Century Schoolbook	News Gothic
Chelmsford	Optima
Copperplate	Press Roman
Clarendon	Pyramid
Fairfield	Schoolbook
Futura	Sparton
Garamond	Theme
Gothic	Times Roman
Helios	Trade Gothic
Helvetica	Univers
Journal	Universe

This list is not intended to be exhaustive but is intended solely as an indication of the legibility of a type face style that is required. Any type face selected that meets the same standard of legibility will be approved. Extreme type styles such as "Old English" or heavy block are not acceptable.

3. Italics, bold face, and contrasting styles may be used to emphasize important or technical terms and for captions. When 2 or more type face styles are used, they shall be visually compatible.

APPROVED AS TO FORM AND LEGALITY
OCT. 13 1978 19___
WARREN SPANNAUS, ATTORNEY GENERAL
BY [signature]
SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
OCT 16 1978
[signature]
Secretary of State
10:05 AM

b

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE
INSURANCE DIVISION

In the Matter of the Proposed
Adoption of Rules by the
Insurance Division Relating to
Legible Type Face Style

STATEMENT OF COMPLIANCE
WITH MANUAL OF RULE
MAKING PROCEDURES

I, Special Assistant Attorney General Robert J. Clayton, do hereby declare that I have examined the proposed rules Minn. Reg. Ins 195 and all related documents and that, based on them and my personal familiarity with the applicable procedures, the Manual of Rule Making Procedures has been followed. Any exceptions are noted below:

The Affidavit of Service of the Notice of Hearing in this proceeding did not correctly document that the service was made upon all persons listed on the Secretary of State's list for insurance hearings and also on all insurance companies licensed to do business in the State of Minnesota. The records do reflect that the proper list was obtained from the Secretary of State. Moreover, the record submitted for review contains an Affidavit of Mary Houde stating that the mailing actually went to the persons on the Secretary of State's list. The incorrect list presented with the formal documents contained a list of persons notified in a products liability survey taken by the Insurance Division. In order to verify that the proper list was used, I obtained a copy of the notice which was mailed to and received by the Minnesota Retail Federation. This organization is on the Secretary of State's list, but is not on the list for the products liability survey. This, plus the Affidavit of Mary Houde indicating that the list was in fact properly served, confirms that proper notice was given.

Dated: September 1, 1978.

Robert J. Clayton

ROBERT J. CLAYTON
Special Assistant
Attorney General

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE
INSURANCE DIVISION

In the Matter of the Proposed Adoption of Rules by the Insurance Division Relating to Legible Type Face Style

APPROVAL OF CHAIRMAN OF COMMERCE COMMISSION

Pursuant to Minn. Stat. §45.021, as Chairman of the Commerce Commission, I hereby approve Minn. Reg. Ins 195 promulgated by the Commissioner of Insurance.

Dated: September 1, 1978.

John R. Larson

JOHN R. LARSON
Commissioner of Securities
Chairman, Commerce Commission

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE
INSURANCE DIVISION

In the Matter of the Proposed
Adoption of Rules by the
Insurance Division Relating to
Legible Type Face Style

ORDER
ADOPTING
RULES

The above-entitled matter came on for hearing before Harry S. Crump, Hearing Examiner of the State Office of Hearing Examiners, on May 9, 1978 at 9:00 a.m., Room 500, Metro Square Building, Saint Paul, Minnesota, after proper notice required by Minn. Stat. §15.0412 (1976) was served upon all persons, associations, and other interested groups registered with the Secretary of State for that purpose and on all insurance companies licensed to do business in the State of Minnesota.

After affording interested persons an opportunity to present written and oral data, statements and arguments, having heard all of the testimony, having considered all of the evidence adduced and upon the records, files and proceedings herein, and applicable statutory standards or criteria, and having confirmed the need for the above-captioned rules.

NOW THEREFORE IT IS ORDERED that these rules identified as Minn. Reg. Ins 195 in the form attached hereto are hereby adopted this 7th day of August, 1978, pursuant to authority vested in me by Minn. Stat. §§72C.12 and 72C.07 (1977 Supp.).

Berton W. Heaton

BERTON W. HEATON
Commissioner of Insurance

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE
INSURANCE DIVISION

In the Matter of the Proposed
Adoption of Rules by the
Insurance Division Relating to
Legible Type Face Style

FINDINGS OF FACT
AND CONCLUSIONS

The above-entitled matter came on for hearing before Hearing Examiner Harry S. Crump of the State Office of Hearing Examiners at 9:00 a.m. on May 9, 1978, in Room 500, Metro Square Building, Seventh and Robert Streets, Saint Paul, Minnesota.

Robert J. Clayton, Special Assistant Attorney General, Fifth Floor, Metro Square Building, appeared as counsel for the Insurance Commissioner (hereinafter "Commissioner"). Thomas L. O'Malley, Assistant Commissioner of Insurance, testified on behalf of the Insurance Division in support of the proposed rules.

Based upon all the records and proceedings herein, the Commissioner hereby adopts as his Findings of Fact and Conclusions, the Findings of Fact and Conclusions stated in the Report of the Hearing Examiner dated June 14, 1978, with the following exceptions:

FINDINGS OF FACT

1. The Hearing Examiner's Finding of Fact Number 4 is amended by adding the following phrase at the end of said Finding "and on all insurance companies licensed to do business in the State of Minnesota."

2. The Commissioner declines to adopt the following language included in Hearing Examiner's Finding of Fact Number 14, "The Examiner suggests that the Insurance Division publish examples of approved type face styles with the proposed rules as a guide for the industry to compare the type face style being used." Said language is in the form of a suggestion rather than a Finding, that samples of the type face styles listed in the Rule must be published with the Rule. Since the Commissioner had not proposed making such an inclusion of samples with the Rule and since no testimony was offered stating that such an inclusion should be made, there would not have been a basis for requiring that examples be included. Moreover, examples are not necessary since insurance companies can identify the type face styles by name.

Based on the foregoing Findings of Fact, the Commissioner makes the following additional

CONCLUSION

1. Examples of type face styles listed in the proposed Rule do not need to be included with the Rule when it is published.

Dated: August 7, 1978.

Berton W. Heaton

BERTON W. HEATON
Commissioner of Insurance

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF COMMERCE - INSURANCE DIVISION

In the Matter of the Proposed Adoption of Rules by the Insurance Division Relating to Legible Type Face Style.	REPORT OF HEARING EXAMINER

The above-entitled matter came on for hearing before Harry Seymour Crump, duly appointed Hearing Examiner in this matter at 9:00 a.m. on May 9, 1978, in the hearing room of the Department of Commerce at 500 Metro Square Building, Seventh and Robert Streets, in the City of Saint Paul, County of Ramsey, State of Minnesota.

This proceeding is a rules hearing held pursuant to Minn. Stat. Ch. 15 to determine whether the proposed rules should be adopted and given the force of law. Copies of this Report are available for review from the Insurance Division of the Department of Commerce and from the Office of Hearing Examiners.

Members of the agency panel appearing at the hearing session included the following: Thomas L. O'Malley, Assistant Commissioner, Division of Insurance; and Robert J. Clayton, Special Assistant Attorney General, assigned to the Insurance Division of the Department of Commerce.

Six (6) public witnesses appeared, but none spoke at the hearing. After the hearing, two (2) timely written comments were received concerning the proposed rules and made a part of the record.

Based upon all testimony, exhibits and written comments, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. On March 10, 1978, the Insurance Division filed the following documents with the Chief Hearing Examiner:

(a) A copy of the proposed rules;
(b) A proposed Order for Hearing; and

(c) A Statement of the estimated length and number of people to attend the hearing.

2. On April 4, 1978, a proposed Notice of Hearing was filed with the Chief Hearing Examiner.

3. On March 27, 1978, a Notice of Hearing and a copy of the proposed rules were published at 2 State Register 1782.

4. On April 7, 1978, the Insurance Division mailed 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 notice.

5. On April 14, 1978, the Insurance Division filed the following documents:

(a) The Order for Hearing;
(b) The Notice of Hearing as mailed;
(c) The Affidavit of Receipt of Secretary of State's list;
(d) The Affidavit of Mailing;
(e) The Statement of Need;
(f) The Secretary of State's Certificate and list;
(g) The Statement of Evidence, including the names of witnesses to be called;
(h) The names of the Division's personnel who will represent the agency;
(i) A Statement of Facts establishing reasonableness of the rules;
(j) A Statement of the publication of a Notice of intention to solicit outside opinion for the prior adoption of temporary rules; and
(k) Statements of comments in response to Notice in Paragraph (j) above.

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

6. The record remained open through May 16, 1978, for the receipt of written comments and statements.

7. Minn. Stat. § 72C.12 (1977 Supp.), grants the Commissioner the following general authority:

> In addition to the duties and powers enumerated elsewhere in sections 72C.01 to 72C.13 the commissioner shall have the power to promulgate rules consistent with sections 72C.01 to 72C.13 to effectuate its purpose.

Minn. Stat. § 72C.07 (1977 Supp.) grants the Commissioner the following specific authority:

Subdivision 1. All insurance policies covered by section 72C.11 shall be printed in legible type and in a type face style approved by the commissioner. The commissioner shall by emergency rule establish a list of type face styles which he will approve as acceptable not later than January 1, 1978.

Subd. 2. In determining whether a policy or contract is legible the commissioner shall consider, in addition to the requirements of subdivision 1 relating to type face size and style, the following factors:

(a) margin size;

(b) contrast and legibility of the color of the ink and paper;

(c) the amount and use of space to separate sections of the policy;

(d) the use of contrasting titles or headings for sections or similar aids; and

(e) any additional factors relevant to legibility which the commissioner may prescribe by rule.

8. The purpose for the proposed rules requires that insurance policies and contracts contain approved type face styles which are easily readable and understandable to the average person. The adoption of the proposed rules will also fulfill the requirement of the law to promulgate the rules herein. The proposed rules are the same as the adopted temporary rules.

9. On August 29, 1977, the Insurance Division published, at 2 State Register 339, a notice of intent to solicit outside opinion on the adoption of emergency rules establishing a list of the type face styles and size of print used in insurance policies as required by Laws, 1977, Ch. 345, § 7, subd. 1. The Insurance Division considered all comments duly received prior to the final adoption of the temporary rules. The Commissioner adopted temporary rules, effective January 10, 1978, and published them on February 13, 1978, in the State Register at 2 State Register 1494.

10. Approximately 110 comments, received in response to the notice of intent to solicit outside opinion, were subsequently filed with the Chief Hearing Examiner and considered as part of the hearing record herein. Comments, which were all favorable, were submitted by most of the insurance companies which have

offices located in Minnesota, as well as some companies which are located nationwide. The specific companies will not be mentioned since there were so many that submitted previous comments.

11. At the hearing, Assistant Commissioner O'Malley proposed the following errata to amend some type face styles, due to misspelled type face styles:

* * *

~~Baskeville~~ Baskerville;

~~Bodini~~ Bodoni; and

~~Bodini-Book~~ Bodoni Book.

* * *

The Examiner finds that these spelling changes are needed and reasonable. The changes would not constitute a substantial change.

12. The Assistant Commissioner also proposed that "Universe" type face style be deleted on the grounds that it was the same as "Univers". One comment suggested that Universe type face style be adopted as one of the approved type face styles because it is one of the standard IBM font styles used which meets the statutory requirements of being legible. The Examiner encourages the Insurance Division to include Universe in the proposed list because it is a different type face style from "Univers", and if the Insurance Division were aware of this fact, Universe would be included. This deletion may constitute a substantial change. It is reasonable and needed to include this type face style.

13. The proposed rules set forth a list of generally acceptable type face styles which are considered as legible and which can readily be identified by the insurance industry and the Insurance Division to facilitate compliance with the law. The proposed list of 32 type face styles is not intended to be an exclusive list of approved type face styles.

(a) One "previous" comment stated that there are four broad classes or styles of type consisting of the following:

Roman; Sans Serif; Script; and Black Letter. Each of these styles of type contains hundreds of different "type faces". The type face is the particular design of the letter. Roman and Sans Serif styles are utilized in most current reading materials. (A "previous" comment means a statement submitted in response to the Insurance Division's notice of intent to solicit outside opinions.)

(b) Most of the previous comments suggested that (in addition to comments on type sizes) the Commissioner adopt flexible rules on type face styles to allow for the industry's selection of any approved or newly developed type face styles which are as legible as the type face style listed in the (proposed) adopted (temporary) rules. One reason for such flexibility is to avoid undue hardship to the industry and to the public where companies operate in several states including Minnesota, and each state may have different requirements for type face styles. The impact of this would raise the general cost to the public. A summary of most comments suggested that the type face styles adopted by consistent with the type face style of other states.

(c) The Insurance Division is now proposing to adopt rules for type face styles which are similar to readability statutes and regulations presently in use in other states. At the hearing, the Assistant Commissioner stated, as the proposed rules indicated, that any type face styles selected by the industry which meet the same standard of legibility, as listed, will be approved. In response to previous comments regarding the approval of computer type print and IBM typewriter print, the Assistant Commissioner stated that some of the type face styles listed were computer print and that both styles would be approved on a individual basis where the type face style is legible.

(d) The Examiner finds that this proposed rule is reasonable and needed to provide for type face styles which are easily readable, flexible and in compliance with the requirements of law. (See, Statement of Need)

(e) The proposed rules provide for the specific exclusion of the "Old English" or "heavy black" type face style. Several comments previously submitted stated that extreme type face styles should not be approved as a legible type face style. At the hearing, the Assistant Commissioner stated that extreme type face styles such as Old English would not be approved. The Examiner finds that this proposed rule is reasonable and needed to exemplify clearly an unacceptable type face style.

14. A comment received after the hearing and in support of the proposed rules suggested that the Insurance Division clarify the 32 type face styles because the company finds duplication and a profusion of the same type faces (styles), but with different names. The Examiner suggests that the Insurance Division publish examples of approved type face styles with the proposed rules as a guide for the industry to compare the type face styles being used.

Based on the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS

1. That the Insurance Division gave proper notice of the promulgation of the proposed rules.

2. That the Insurance Division has statutory authority to adopt the proposed rules.

3. That the Insurance Division has fulfilled all relevant, substantive and procedural requirements of law or rule.

4. That the Insurance Division has demonstrated the need for and the reasonableness of the proposed rules by an affirmative presentation of facts in the record.

Based upon the foregoing Conclusions, the Hearing Examiner makes the following:

RECOMMENDATION

It is recommended that the proposed rules be adopted by the Insurance Division as set out in the Findings of Fact herein.

Dated: June 14, 1978.

Harry Seymour Crump

HARRY SEYMOUR CRUMP
Hearing Examiner

N O T I C E

Pursuant to Minn. Stat. § 15.0421, subd. 4, this Report shall be available for review to all affected individuals upon request for at least five days.

The Insurance Division shall, if it proposes to adopt the rules as originally proposed or amended, submit the complete hearing record, including its Findings and Order, to the Chief Hearing Examiner no earlier than five days subsequent to the receipt of this Report. This submission shall clearly indicate any changes made to the rules as originally proposed, preferably in the format that will be submitted to the State Register for publication. The Chief Hearing Examiner shall complete his review and submit his report to the Insurance Division on the issues of substantial changes in the rule and compliance with Minn. Stat. § 15.0412 within ten calendar days. Thereafter, the Insurance Division shall be responsible for filing the rules with the Attorney General and for notifying persons who have indicated that they wish to be notified of such filing.

STATE OF MINNESOTA)
(ss.
COUNTY OF RAMSEY)

INS-78-012-HC

AFFIDAVIT OF SERVICE

SUSAN WOJCIK, being first duly sworn, deposes and says that on the 14th day of June 1978, at the City of St. Paul, County of Ramsey, State of Minnesota, she served the attached Report of Hearing Examiner

unstamped, by placing in the designated tray to be collected by messenger for delivery to the central mailing station as required by Minn. Stat., § 16.54 (1974), a true and correct copy thereof on all persons at the addresses shown on the attached mailing list.

Susan Wojcik

Subscribed and sworn to before me
this 14th day of June, 1978.

Sandra A. Haven

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

Mr. Robert J. Clayton
Special Assistant Attorney General
Insurance Division - Department of
Commerce
500 Metro Square Building
Saint Paul, Minnesota 55101

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS
Room 300 -- 1745 University Avenue
St. Paul, Minnesota 55104
(612) 296-6910

Invoice No.: 692
Billing Date: 6-14-78
File No.: INS-78-012-HC

SOLD TO
Robert J. Clayton
Special Assistant
Attorney General
Insurance Division
Commerce Department
Fifth Floor
Metro Square Building
St. Paul, Minnesota 55155

SHIPPED TO

Quantity	Description	Unit Price	Total Amount
1 Tape	IN THE MATTER OF THE PROPOSED ADOPTION OF RULES BY THE INSURANCE DIVISION RELATING TO LEGIBLE TYPE FACE STYLE. May 9, 1978 St. Paul, Minnesota This tape is the official and entire proceeding of the hearing. Tape 1139. This invoice is to advise you of the charge for the above tape. The total amount will be billed to your agency at the end of the month on our regular billing statement.		$1.81

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS
ROOM 300 — 1745 UNIVERSITY AVENUE
ST. PAUL, MINNESOTA 55104
(612) 296-6910

June 14, 1978

Mr. Robert J. Clayton
Special Assistant
Attorney General
Insurance Division
Department of Commerce
500 Metro Square Building
Saint Paul, Minnesota 55101

STATE OF MINNESOTA
JUN 16 1978
DEPARTMENT OF COMMERCE

Re: In the Matter of the Proposed Adoption of Rules by the Insurance Division Relating to Legible Type Face Style. Docket No. INS-78-012-HC.

Dear Mr. Clayton:

Enclosed and served upon you by mail, please find my Report in the above-entitled matter.

I also enclose the official record, including Tape Number 1139.

Sincerely,

Harry Seymour Crump

HARRY SEYMOUR CRUMP
Hearing Examiner

HSC:sw
Encs.

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS
ROOM 300 – 1745 UNIVERSITY AVENUE
ST. PAUL, MINNESOTA 55104
(612) 296-6910

Re: INS-78-012-HC

To Whom It May Concern:

An amendment to Chapter 443 of the 1977 Session Laws eliminates the necessity of preparing a transcript of rules hearings unless requested by the Attorney General, the agency or the Hearing Examiner.

In cases where no transcript has been requested, it is the policy of the Office of Hearing Examiners to forward the official tape/tapes of the proceedings to the agency, to be maintained by them as part of the official record.

In accordance with our policy, enclosed please find the official taped record of the above hearing. In addition, I am forwarding to you a billing invoice to cover our costs for the tapes, as well as, instructions on the care and storage of the tapes.

If you have any questions, regarding this procedure, please do not hesitate to contact me at 296-8103.

Sincerely,

Susan K. Derus

SUSAN K. DERUS
Administrative Assistant

SKD:jc

ADMIN 1009

STATE OF MINNESOTA

DEPARTMENT OFFICE OF HEARING EXAMINERS

Office Memorandum

TO : ALL STATE AGENCIES

DATE: Sept. 30, 1977

FROM : DUANE R. HARVES
Chief Hearing Examiner

Duane R. Harves

PHONE: 8100

SUBJECT: CARE OF AUDIO-MAGNETIC TAPES

Chapter 443 of the 1977 Session Laws made certain amendments to the rulemaking provisions of the Administrative Procedure Act. One of these provisions eliminates the necessity of preparing a transcript of the hearing unless the Attorney General, the agency or the Hearing Examiner requests it.

We have already conducted hearings wherein no transcript was prepared. In such instances, the tapes are sent to the agency, which must then maintain the tapes as part of their record.

In view of this amendment, we thought it would be appropriate to obtain some information on the proper care of these tapes.

Attached to this memorandum is a letter we received from Interstate Office Systems. In order to protect your tapes, we suggest that this letter be circulated to those in your agency with responsibility for maintaining your records.

DRH:sh
Att.

interstate
office systems, inc.

4600 west 77th street minneapolis, minnesota 55435
suite 100 612-831-5646

August 16, 1977

Mr. Duane Harves
Chief Hearing Examiner
State of Minnesota
Department of Hearing Examiners
1745 University Avenue
St. Paul, Minnesota 55104

Dear Duane:

As you requested, I have listed some "do's" and "don'ts" regarding the proper storage and handling of the standard tape cassettes.

I hope you'll find these beneficial for your needs. They are as follows:

1. Store cassettes in a cool, dry place. Preferably in a cassette storage cabinet. These cabinets were designed to properly store the cassettes. While in the storage cabinet drawers, the cassettes can be easily identified and numbered according to date and hearing.

2. Cassettes should be stored in a handi-case or some other type of enclosure.

3. Always keep cassettes out of extremely hot places, such as the rear deck of an auto, or automobile seat. Always keep cassettes away from direct sunlight.

4. Never store cassettes near large electric motors, such as near an elevator equipment room.

5. Avoid airport metal detectors in the Security Areas.

If there is any additional information I can provide for you, Duane, please do not hesitate to contact me.

Cordially,
INTERSTATE OFFICE SYSTEMS, INC.

Dan Stolpa
Systems Consultant

DS:l

DICTATION SYSTEMS SONY. TELEPHONE ANSWERING SYSTEMS

RECEIVED
MAR 10 1978
OFFICE OF HEARING
EXAMINERS

PROPOSED RULES AND REGULATIONS

LEGIBLE TYPE FACE STYLES

I. AUTHORITY

The rules hereinafter set forth are promulgated pursuant to Minn. Stat. § 72C.07 (1977).

II. PURPOSE

The purpose of this rule is to provide insurance policies which are printed in type face styles that are easily readable to the average person.

III. GENERAL

1. These rules shall be considered applicable in all insurance policies and contracts required to be filed under Minn. Stat § 72C.11.

2. All insurers upon filing shall specify the type face styles used in each policy. The Commissioner will consider the following type face styles as being legible:

Aldine
Baskeville
Bodini
Bodini Book
Century
Century Schoolbook
Chelmsford
Copperplate
Clarendon
Fairfield
Futura
Garamond
Gothic
Helios
Helvetica
Journal
Korinna
Modern Roman
Megaron
Melior
Metro
News Gothic
Optima
Press Roman
Pyramid
Schoolbook
Sparton
Theme
Times Roman
Trade Gothic
Univers
Universe

This list is not intended to be exhaustive but is intended solely as an indication of the legibility of a type face style that is required. Any type face style selected that meets the same standard of legibility will be approved. Extreme type styles such as "Old English" or heavy block are not acceptable.

Exhibit No. M
File No.
Date

3. Italics, bold face, and contrasting styles may be used to emphasize important or technical terms and for captions. When 2 or more type face styles are used, they shall be visually compatible.

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE
INSURANCE DIVISION

In the Matter of the Proposed
Adoption of Rules by the
Insurance Division Relating
to Legible Type Face Styles

AFFIDAVIT

STATE OF MINNESOTA)
)ss.
COUNTY OF RAMSEY)

Mary L. Houde, being first duly sworn, deposes and says:

1. I am employed by the State of Minnesota, Insurance Division, as an Executive I. In such capacity, I supervise the Insurance Division's secretarial pool.

2. Stephanie Helgeson delivered the Secretary of State's mailing list to me in the above-referenced matter.

3. I supervised the mailing of the Notice of Hearing in this matter.

4. The Notice of Hearing was mailed by me to all persons on the Secretary of State's list given to me by Stephanie Helgeson and to all insurance companies licensed to do business in the State of Minnesota.

5. The attached list referred to in the Affidavit of Mailing prepared by me on April 12, 1978, in this matter is the list of persons referred to in paragraph 4 hereof.

FURTHER AFFIANT SAYETH NOT.

NORENE M. CARR
Notary Public, Ramsey Co. Mn.
MY COMMISSION EXPIRES
Febuary 25, 1981

Mary L. Houde
Mary L. Houde
Executive I

Subscribed and sworn to before
me this 29th day of August, 1978.

Norene M Carr

(13)

STATE OF MINNESOTA

COUNTY OF RAMSEY

AFFIDAVIT OF MAILING

In the matter of the Proposed
Adoption of Rules by the Insur-
ance Division Relating to Legible
Type Face Styles

Mary L. Houde, Executive I, being first duly sworn, deposes and says:

That on or before the seventh day of April, 1978, at the City of St. Paul, County of Ramsey, State of Minnesota, she served the attached papers by depositing in the United States mail, or in the case of State employees, in the inter office mail, at said City of St. Paul, a true and correct copy thereof, properly enveloped, with postage prepaid, to all persons and associations at the addresses listed in the attached lists.

Mary L. Houde
Executive I

Subscribed and sworn to before
me this 12 day of April,
1978.

Mae V. Wilson
Notary Clerk

MAE V. WILSON
Notary Public, Ramsey Co. Mn.
MY COMMISSION EXPIRES
October 16, 1979

Exhibit No. C

File No.

Date

(12)

RECEIVED
APR 14 1978
OFFICE OF HEARING
EXAMINERS

AFFIDAVIT

Stephanie M. Helgesen, being duly sworn on oath deposes and says:

1. That she is an employee of the Insurance Division of the State of Minnesota.

2. That on the Seventh day of April, she went to the Secretary of State's office for the State of Minnesota and requested a current list of all representatives of 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 M. S. 15.0412.

3. That on the Seventh day of April, in response to the above request, the Secretary of State provided her with such a list, a copy of which is attached hereto and incorporated by reference.

Further, affiant sayeth not,

Stephanie M. Helgesen

Stephanie M. Helgesen

April 13, 1978

Mae V. Wilson

Notary Public

MAE V. WILSON
Notary Public, Ramsey Co. Mn.
MY COMMISSION EXPIRES
October 16, 1979

Exhibit No. E

File No.

Date

(11)

RECEIVED
APR 14 1978
OFFICE OF HEARING
EXAMINERS

STATE OF MINNESOTA
COUNTY OF RAMSEY

CERTIFICATE

In the matter of the Proposed Adoption
of Rules of INSURANCE Division
Governing LEGIBLE TYPE FACE STYLES

I hereby certify that the attached 483 label, 5 sheets constitute the complete list of persons, associations, and other interested groups who as of 1:00 o'clock P .M, this 5th day of April, 19 78, have requested pursuant to M.S. 19 74, 15.0421, that their names be placed on file with the Secretary of State for the purpose of receiving notice of public hearing on proposed rules on the subject captioned above.

Secretary of State

Joan Anderson Growe

By Cheri L. Matteson

Exhibit No. 2
File No.
Date

(10)

RECEIVED
APR 14 1978
OFFICE OF HEARING
EXAMINERS

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE
INSURANCE DIVISION

IN THE MATTER OF THE PROPOSED
ADOPTION OF RULES BY THE INSURANCE
DIVISION RELATING TO LEGIBLE TYPE
FACE STYLES

A notice of intention to solicit outside opinion for proposed rules establishing the type face style of print mandated for use in insurance policies as required by Minn. Stat. § 72C.07 (Supp. 1977) was published on August 29, 1977 in the State Register, 2 S.R. 339, in accord with Minn. Stat. § 15.0412, Subd. 6 (1976). All statements and comments were required to be submitted in writing within 30 days. However, all information received prior to the final adoption of the temporary rules on January 10, 1978 was considered and is attached.

Exhibit No. F
File No. [illegible]

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE
INSURANCE DIVISION

RECEIVED
APR 14 1978
OFFICE OF HEARING
EXAMINERS

IN THE MATTER OF THE PROPOSED
ADOPTION OF RULES BY THE INSURANCE
DIVISION RELATING TO LEGIBLE TYPE
FACE STYLES

STATEMENT OF NEED

The above-captioned rules are not amendments to existing rules of the Insurance Division.

The need to adopt these rules arise from the legislative mandate in Minn. Stat. § 72C.07, Subd. 1 (Supp. 1977) which required the Commissioner of Insurance to establish by emergency rule a list of acceptable type face styles of print required for use in insurance policies and contracts subject to the Readability of Insurance Policies Act. The Commissioner adopted temporary rules, effective January 10, 1978, in accord with Minn. Stat. § 15.0412, Subd. 5 (Supp. 1977) and published them on February 13, 1978 in the State Register, 2 S.R. 1494. Notice that the temporary rules would be continued in effect for an additional 90 days, again in accord with Minn. Stat. § 15.0412, Subd. 5 (Supp. 1977), was published on March 27, 1978 in the State Register, 2 S.R. 1782.

To effectuate the purpose of the Readability of Insurance Policies Act; to make all insurance policies and contracts easily readable and understandable to the average person; it is now necessary to permanently adopt the temporary rules regarding legible type face styles.

In promulgating the temporary rules, the Commissioner solicited information from the insurance industry and from consumer groups in regard to type face styles of print presently in use and in regard to any potential forseeable problems. The resulting rules provide a list of type face styles that are easily readable and at the same time provide the flexibility necessary for the inclusion of type face styles of print developed in the future that are also equally readable. The proposed rules establishing a list of acceptable type face styles of print for use in insurance policies and contracts are reasonable and necessary to carry out the statutory scheme and to fulfill the mandatory statutory directive.

Dated: 4/14/78

Exhibit No. H
File No.
Date

Berton W. Heaton
BERTON W. HEATON
Commissioner of Insurance

8

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE
INSURANCE DIVISION

RECEIVED
APR 14 1978
OFFICE OF HEARING
EXAMINERS

IN THE MATTER OF THE PROPOSED
ADOPTION OF RULES BY THE INSURANCE
DIVISION RELATING TO LEGIBLE TYPE
FACE STYLES

Those individuals appearing in support of the proposed rules establishing the type face style of print mandated for use in insurance policies as required by Minn. Stat. § 72C.07 (Supp. 1977) will be Mary E. Mahoney, Assistant to the Commissioner of Insurance and possibly Al Clayton, Coordinating Printer of the Division of Publications and General Services, State Printer.

Exhibit No. 1
File No.
Date

RECEIVED
APR 14 1970
OFFICE OF HEARING EXAMINERS

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE
INSURANCE DIVISION

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES BY THE INSURANCE DIVISION RELATING TO LEGIBLE TYPE FACE STYLES

STATEMENT OF EVIDENCE

In addition to the "Statement of Need" which is available for inspection or purchase at the Office of Hearing Examiners, 1745 University Avenue, Saint Paul, Minnesota, 55104, and in support thereof, the Insurance Division will introduce the following evidence at the hearing in this matter:

I. Testimony

A. Mary E. Mahoney, Assistant to the Commissioner of Insurance, will testify to the following facts:

1. That the proposed rules relating to legible type face styles are reasonable and necessary to comply with the statutory mandate.
2. That they are similar to readability statutes and regulations presently in use in other states.
3. That the list of acceptable type face styles as compiled will faciliate easy implementation by insurance companies and by the Insurance Division in approving as readable policies required to be filed under the Act. This testimony will include a specific explanation of how each type face style of print on list was identified and assessed as readable. There will also be some testimony on the comments and suggestions received in regard to the rules.

B. Al Clayton, Coordinating Printer of the Division of Publications and General Services, State Printer, may testify to the following facts:

1. That the rules are reasonable in that they provide for insurance policies printed in type face styles that are easily readable to the average person and that compliance with the rules would not entail undue hardship on the insurance industry.

Exhibit No. 6
File No.
Date

2. That he identified and approved each type face style of print included on the list.

II. Statutes

The Division will be citing the following statutes at the hearing in this matter:

General: Minn. Stat. § 72C.01-72C.13 (Supp. 1977)

Specific: Minn. Stat. § 72C.07, Subd. 1 (Supp. 1977)

Dated 4/14/78

Berton W. Heaton

BERTON W. HEATON
Commissioner of Insurance

PROPOSED NOTICE OF HEARING

RECEIVED
APR 14 1978
OFFICE OF HEARING EXAMINERS

Department of Commerce

Insurance Division

In the Matter of the Proposed Adoption of Rules by the Insurance Division Relating to Legible Type Face Styles

NOTICE IS HEREBY GIVEN that a public hearing in the above entitled matter will be held pursuant to Minn. Stat. § 15.0412, Subd. 4, (1976) in the hearing room of the Department of Commerce, Fifth Floor, Metro Square Building, 7th and Robert Streets, St. Paul, Minnesota 55101, commencing at 9:00 A.M. on May 9, 1978, and continuing until all persons have had an opportunity to be heard.

All interested or affected persons will have the opportunity to participate concerning the adoption of the proposed rules captioned above. Statements may be made orally and written material may be submitted. In addition, whether or not an appearance is made at the hearing, witness' statements or material may be submitted by mail to Mr. Harry Crump, Hearing Examiners Office, Room 300, 296-8114, within five working days after the close of the hearing. The Hearing Examiner may extend the period for receipt of written comments up to 20 calendar days if requested. Those sending in written comments should also advise the Hearing Examiner whether or not they wish to be notified when the Hearing Examiner's report is available.

All such statements will be entered into and become a part of the record. Testimony and other evidence to be submitted for consideration should be pertinent to the matter at hand. For those wishing to submit written statements or exhibits, it is requested that at least three copies be furnished. In addition, to save time and avoid duplication, it is suggested that those persons, organizations, or associations having a common viewpoint or interest in these proceedings join together, where possible, and present a single statement on behalf of such interests.

Exhibit No. A

File No.

Date

The proposed rules, if adopted, will provide insurance policies which are printed in type face styles that are easily readable to the average person. The proposed rules are identical in every respect to the Adopted Temporary Rules, published at State Register Vol. II, No. 32, p. 1494, February 13, 1978 (2 S.R. 1494). Copies of the proposed rules are also available, and at least one free copy may be obtained by writing the Minnesota Insurance Division, Fifth Floor, Metro Square Building, St. Paul, Minnesota 55101. Additional copies will be available at the door on the date of the hearing. A Statement of Need explaining the Insurance Division's position relative to the necessity for the proposed rule changes and Statement of Evidence outlining the testimony and evidence which will be introduced by the Insurance Division in support of the porposed rules will be filed with the Hearing Examiners Office at least 25 days prior to the hearing and will be available there for public inspection.

Statutory authority of the Insurance Division to promulgate and adopt these rules is contained in Minn. Stat. § 72C.07 (1977).

Please be advised, that under Minn. Stat. § 10A.01, Subd. (11) 1974 any individual engaged for pay or other consideration for the purpose of representing persons or associations attempting to influence administrative action, such as the promulgation of these rules, must register with the State Ethics Commission as a lobbyist within five days of the commencement of such activity by the individual. Questions should be directed to the Ethical Practices Board, 41 State Office Building, St. Paul, Minnesota 55155, phone (612) 296-5615.

Please note that 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 also have the right to ask the Insurance Division to notify them of the date upon which this hearing record is submitted to the Attorney General. If you desire to be so notified, you may do this by so indicating at the hearing or by written request sent to the Hearing Examiner prior to the close of the record.

Dated: March 10, 1978

BERTON W. HEATON
Commissioner of Insurance

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE
INSURANCE DIVISION

RECEIVED
APR 14 1978
OFFICE OF HEARING
EXAMINERS

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES BY THE INSURANCE DIVISION RELATING TO LEGIBLE TYPE FACE STYLES

ORDER FOR HEARING

IT IS HEREBY ORDERED that a public hearing on the above-captioned rules be held in the Hearing Room, Commerce Department, Fifth Floor, Metro Square Building, 7th and Robert Streets, Saint Paul, Minnesota 55101, on May 9, 1978, commencing at 9:00 A.M. and continuing until all persons have had an opportunity to be heard.

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 and to all insurance companies having a current certificate of authority to do business in the State of Minnesota.

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

Dated: 4/14/78

Berton W. Heaton
BERTON W. HEATON
Commissioner of Insurance

Exhibit No. B
File No.
Date

(4)

PROPOSED NOTICE OF HEARING

RECEIVED
APR 4 1978
OFFICE OF HEARING EXAMINERS

Department of Commerce

Insurance Division

In the Matter of the Proposed Adoption of Rules by the Insurance Division Relating to Legible Type Face Styles

NOTICE IS HEREBY GIVEN that a public hearing in the above entitled matter will be held pursuant to Minn. Stat. § 15.0412, Subd. 4, (1976) in the hearing room of the Department of Commerce, Fifth Floor, Metro Square Building, 7th and Robert Streets, St. Paul, Minnesota 55101, commencing at 9:00 A.M. on May 9, 1978, and continuing until all persons have had an opportunity to be heard.

All interested or affected persons will have the opportunity to participate concerning the adoption of the proposed rules captioned above. Statements may be made orally and written material may be submitted. In addition, whether or not an appearance is made at the hearing, witness' statements or material may be submitted by mail to Mr. Harry Crump, Hearing Examiners Office, Room 300, 296-8114, within five working days after the close of the hearing. The Hearing Examiner may extend the period for receipt of written comments up to 20 calendar days if requested. Those sending in written comments should also advise the Hearing Examiner whether or not they wish to be notified when the Hearing Examiner's report is available.

All such statements will be entered into and become a part of the record. Testimony and other evidence to be submitted for consideration should be pertinent to the matter at hand. For those wishing to submit written statements or exhibits, it is requested that at least three copies be furnished. In addition, to save time and avoid duplication, it is suggested that those persons, organizations, or associations having a common viewpoint or interest in these proceedings join together, where possible, and present a single statement on behalf of such interests.

Exhibit No. J

File No.

Date

(3)

The proposed rules, if adopted, will provide insurance policies which are printed in type face styles that are easily readable to the average person. The proposed rules are identical in every respect to the Adopted Temporary Rules, published at State Register Vol. II, No. 32, p. 1494, February 13, 1978 (2 S.R. 1494). Copies of the proposed rules are also available, and at least one free copy may be obtained by writing the Minnesota Insurance Division, Fifth Floor, Metro Square Building, St. Paul, Minnesota 55101. Additional copies will be available at the door on the date of the hearing. A Statement of Need explaining the Insurance Division's position relative to the necessity for the proposed rule changes and Statement of Evidence outlining the testimony and evidence which will be introduced by the Insurance Division in support of the porposed rules will be filed with the Hearing Examiners Office at least 25 days prior to the hearing and will be available there for public inspection.

Statutory authority of the Insurance Division to promulgate and adopt these rules is contained in Minn. Stat. § 72C.07 (1977).

Please be advised, that under Minn. Stat. § 10A.01, Subd. (11) 1974 any individual engaged for pay or other consideration for the purpose of representing persons or associations attempting to influence administrative action, such as the promulgation of these rules, must register with the State Ethics Commission as a lobbyist within five days of the commencement of such activity by the individual. Questions should be directed to the Ethical Practices Board, 41 State Office Building, St. Paul, Minnesota 55155, phone (612) 296-5615.

Please note that 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 also have the right to ask the Insurance Division to notify them of the date upon which this hearing record is submitted to the Attorney General. If you desire to be so notified, you may do this by so indicating at the hearing or by written request sent to the Hearing Examiner prior to the close of the record.

Dated: March 10, 1978

BERTON W. HEATON
Commissioner of Insurance

STATE OF MINNESOTA
DEPARTMENT OF COMMERCE

RECEIVED
MAR 10 1978
OFFICE OF HEARING
EXAMINERS

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES BY THE INSURANCE DIVISION RELATING TO LEGIBLE TYPE FACE STYLES

PROPOSED ORDER FOR HEARING

IT IS HEREBY ORDERED that a public hearing on the above-captioned rules be held in the Hearing Room, Commerce Department, Fifth Floor, Metro Square Building, 7th and Robert Streets, Saint Paul, Minnesota 55101, on May 9, 1978, commencing at 9:00 A.M. and continuing until all persons have had an opportunity to be heard.

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 and to all insurance companies having a current certificate of authority to do business in the State of Minnesota.

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

Dated:

Berton W. Heaton

BERTON W. HEATON
Commissioner of Insurance

Exhibit No. K
File No.
Date

DEPARTMENT OF COMMERCE

Office Memorandum

TO : MR. HARRY CRUMP
HEARING EXAMINER

RECEIVED
MAR 10 1978
OFFICE OF HEARING
EXAMINERS

DATE: 10 March 1978

FROM : INSURANCE DIVISION

PHONE: 296-7967

SUBJECT: Proposed Legible TypeFace Styles

Please be advised that we anticipate that approximately twenty people will attend the hearing on Readable Policies on May 9, 1978, and that the time needed to conduct the hearing will be approximately one day.

SMH/cph

Exhibit No. 1
File No.
Date

(1)

#473 Dept of Transportation
Rail User Loan Guarantee Program

RULES REVIEW CHECKLIST

DATE RULES RECEIVED 9-29 Temporary Rule Yes

Resubmitted and Received _____

DUE DATE 10/12

a. Returned to Agency w/o filing w/Secy of State _____
b. Approved 10/2 Date Sent Back to Agency _____

- -

1. Rules as Adopted _____
2. Rules as Proposed _____
3. Certificate of Board's Authorizing Resolution, where applicable _____
4. Order for Hearing _____
5. Notice of Hearing _____
   (i) Sufficiency _____
6. Secretary of State's List _____
7. Certificate of Acquisition of Secretary of State's List _____
8. Affidavit of Mailing _____
   (i) At least 30 days prior to hearing _____
9. Statement of Need and Evidence _____
10. Hearing Examiner's Report _____
11. Agency's Findings of Fact _____
12. Certificate of Board's Resolution Adopting Rules, where applicable _____
13. Order Adopting _____
14. Report of Chief Hearing Examiner _____
    (i) Finding of No Substantial Change _____
    (ii) Permission to Incorporate by Reference, where applicable _____
15. Certificate of Compliance with Rulemaking Procedures _____
16. Copy of Notice of Intent to Solicit Outside Opinion, where applicable _____
17. Petition by Public, where applicable _____.

OUR FILE NO. 473

Attorney General

Jean Hansen
Department of Transportation

October 2, 1978

Lee E. Sheehy
Special Assistant
Attorney General

296-1288

Adoption of Temporary Rules of the Department of Transportation Relating to Implementation of the Rail User Loan Guarantee Program

The above-captioned temporary rules are approved as to form and legality pursuant to Minn. Stat. § 15.0412, Subd. 5.

This office recommends filing the original of the Order Adopting and Adopted Rules with the Secretary of State.

LES:mb

Enclosure

SMIN 1000 (REV. 4/77)

STATE OF MINNESOTA

Office Memorandum

DEPARTMENT of TRANSPORTATION
Room 313

TO : LEE SHEEHY
ATTORNEY GENERAL

DATE: September 29, 1978

FROM : Jean Hansen
DOT/Administration

PHONE: 296-7840

SUBJECT: ADOPTION OF TEMPORARY RULES OF THE DEPARTMENT OF TRANSPORTATION RELATING TO IMPLEMENTATION OF THE RAIL USER LOAN GUARANTEE PROGRAM

I am submitting the Notice of Request for Public Comment and the Temporary Rules Relating to Implementation of the Rail User Loan Guarantee Program for review and approval or disapproval.

LAWS OF MINNESOTA 1978, Chapter 667, Sec. 7 requires the Commissioner to solicit information or opinions from sources outside of the Department of Transportation prior to the adoption of any temporary rules. There were no comments within twenty days of the date of publication in the State Register Volume 3, Number 7, August 21, 1978.

Please advise me of your determination within the allotted 5 days.

STATE OF MINNESOTA

DEPARTMENT OF TRANSPORTATION

In the matter of the adoption of temporary rules of the Department of Transportation relating to Implementation of the Rail User Loan Guarantee Program.	NOTICE OF REQUEST FOR PUBLIC COMMENT

LAWS OF MINNESOTA 1978, Chapter 667, § 7 permits the Commissioner of Transportation to establish temporary rules relating to the rail user loan guarantee program to aid rail users in obtaining credit for participation in contracts for rail line rehabilitation.

Section 7 of the Act provides that the temporary rulemaking authority of the Commissioner shall be effective until permanent rules are adopted pursuant to Minn. Stat. ch. 15 or until October 15, 1979, whichever occurs first.

Section 7 of the Act also requires the Commissioner to solicit information or opinions from sources outside of the Department of Transportation prior to the adoption of any temporary rules.

In the matter of the adoption of)
temporary rules of the Department)
of Transportation relating to)
Implementation of the Rail User)
Loan Guarantee Program.)

NOTICE was given that the Department requested information and comments concerning the subject matter of the proposed rules on July 31, 1978 (3 S.R. 143).

Laws 1978, ch. 667 now requires that all interested persons or groups be allowed to submit for consideration their comments relating to the proposed rules set forth below. Comments (either written or oral) should be addressed to:

Sherri Y. Alston, Assistant Commissioner
for Public Transportation
Minnesota Department of Transportation
413 Transportation Building
Saint Paul, Minnesota 55155

Telephone: (612) 296-8048.

Matters submitted for consideration should be pertinent to the proposed rules. Any comments received by the Department of Transportation will become a part of the record of proceedings leading to the adoption of permanent rules. All comments must be received within twenty days of the date of this publication. The temporary rule may be revised on the basis of comments received.

In the matter of the adoption of)
temporary rules of the Department)
of Transportation relating to)
Implementation of the Rail User)
Loan Guarantee Program.)

PLEASE BE ADVISED that Minnesota Statutes, ch. 10A, requires each lobbyist to register with the Ethical Practices Board within five days after he or she commences lobbying. Lobbying includes attempting to influence rulemaking by communicating or urging others 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. Telephone: (612) 296-5615.

Jim Harrington
Commissioner
Department of Transportation

Jim Harrington

Dated this 7 day of August, 1978.

MINNESOTA CODE OF AGENCY RULES

DEPARTMENT OF TRANSPORTATION

IMPLEMENTATION OF THE RAIL
USER LOAN GUARANTEE PROGRAM

MCAR 1.4003. Authority and Definitions.

A. Authority. These rules are adopted pursuant to the provision of Minnesota Laws 1978, Chapter 667, Section 7.

B. Definitions. The following terms as they appear in these rules and regulations shall have these meanings:

1. "Account" means the Rail User Loan Guarantee Account established by Laws 1978, Chapter 667, Section 3.

2. "Act" means the Rail User Loan Guarantee Act, Laws 1978, Chapter 667.

3. "Borrower" means any "rail user" as that term is defined in Minn. Stat. § 222.48, Subd. 6 (1976).

4. "Capital Investment" means the cost of labor, materials and other incidental costs of rehabilitation of a rail line, including acquisition of right of way and structures.

5. "Collateral" means the security pledged for the loan which may include but not limited to land, buildings, machinery, equipment, furniture, fixtures, accounts receivable, marketable securities, cash surrender value life insurance and assignment of leases or leasehold interests.

6. "Commissioner" means the Commissioner of the Department of Transportation, State of Minnesota.

7. "Department" means Minnesota Department of Transportation.

8. "Lender" means any state or federally chartered bank, or in the case of revenue bonds issued under Minnesota Statutes 1976, Chapters 362A or 474, a municipality, county, or rural development financing authority.

9. "Loan" means a loan or advance of credit to a rail user for the purpose of making a capital investment in rail line rehabilitation.

10. "Personal Guarantee" means a personal or corporate obligation to pay the loan.

11. "Railroad" means a common carrier by rail as defined by 49 U.S.C. § 1(3), (1970).

12. "Rail Line" means a railroad roadbed, right-of-way, track structure and other appurtenances of railroad right-of-way, including but not limited to, public-use sidings.

13. "Rail User" means any person or entity described by Minn. Stat. § 222.48, Subd. 6 (1976).

14. "Rehabilitation" means the reconstruction or improvement of a rail line or portions thereof in order to improve rail service; or construction of a new rail line to replace an existing one.

MCAR 1.4004 Application Procedure

A. Loans by State or Federally Chartered Banks.

1. All information required to be submitted to the Commissioner for consideration for commitment to insure any eligible loan shall be submitted in duplicate, and include:

a) A written statement under oath executed by the borrower that the proceeds of the loan will be used solely for participation in contracts for capital investment for rail line rehabilitation.

b) A copy of the contract for rail line rehabilitation which must contain:

(1) The identification of the participating parties.

(2) The total amount of the contract for rehabilitation.

(3) The respective share of the amount of the contract for rehabilitation to be provided by each participating party.

(4) The conditions for repayment of the total amount of the contract to the participating parties.

(5) The nature of the capital improvements to be made.

(6) Identity of the escrow agent, if any.

c) The Loan application taken by the lender, together with all supporting documents and data, pertinent to the lenders credit consideration, including the following:

(1) Principal amount of the loan and repayment terms.

(2) The collateral offered.

(3) Investigative credit data developed.

(4) Borrower's statement of financial condition, including schedule of assets, liabilities, capital or net worth and income and expenses and for the immediately preceding three fiscal years.

(5) Application of person or persons, if any, making personal guarantee of such a loan together with their statement of financial condition as required in (4) above.

d) The form of the promissory note to be executed, complete except for signatures, and any personal guarantee forms to be executed by a person or persons providing guarantee of repayment of the loan.

e) The form of the security agreements or mortgages to be executed in connection with the loan, complete except for signatures; including the complete legal description of the property, personal or real, to be pledged, supplemented in addition by:

(1) A statement of the collateral's condition, marketability and appraised value, including the source of the appraisal.

(2) A statement of priority of such lien or security interest position based on official records search.

(3) Evidence of insurance coverage against customary perils and the availability of suitable loss payable assignments.

f) A Lender's sworn statement to the Commissioner which includes:

(1) The citation of Minnesota Statutes under which the interest rate and other expenses in connection with the loan are deemed lawful.

(2) Certification of lender's appraisal and consent to make the loan in the amount applied for which may be conditioned upon the granting of the commitment for insurance by the Commissioner.

g) An executed agreement between the lender and borrower that upon granting of the commitment for insurance by the Commissioner that:

(1) Funds will be disbursed only under the terms and for the purposes set forth in the application for insurance.

(2) Liens and security interests provided for in the application and documents offered in the application for insurance will be filed, recorded or, otherwise, perfected by the lender.

(3) Reasonable care shall be exercised by the lender or its agents to protect the interest of the State.

(4) A copy of the Notice of Default required by the Act to be sent to the borrower within 90 days of default of the loan shall also be sent to any person or persons guaranteeing the loan.

(5) If default is continued for 180 days and borrower has not made arrangements to meet his obligation, the lender shall promptly notify the Commissioner of the circumstances of default and file a claim for benefits under the act.

B. Loans by Municipalities, County or Rural Development Financing Authorities

1. All information required to be submitted to the Commissioner for consideration for commitment to insure any eligible loan shall be submitted in duplicate and include:

a) The information required by Part A, paragraphs (1) (a) through (g) (3) of this rule.

b) A copy of the application for the revenue bond project together with any attachments required to be submitted to the Minnesota Department of Commerce, Securities Division.

c) Evidence of the approval of the application for the revenue bond project by the Commissioner of Securities.

d) A statement that upon granting of the commitment for insurance by the Commissioner that a copy of the Notice of Default required by the Act to be sent to the borrower by the trustee within 15 days of the default of the terms of the revenue agreement will also be sent to any person or persons guaranteeing the agreement.

e) A statement that after 90 days, if default continues, the trustee shall file a claim with the Commissioner stating the nature of the default.

MCAR 1.4005 Requirements for obtaining approval of commitments for insuring loans prior to their execution or disbursement.

A. Eligibility Requirements for loans by State or Federally Chartered Banks; Terms.

1. Principal Amount. The original bona fide principal amount of any loan shall not exceed:

a) An amount which can be shown to be fully secured by the unencumbered current appraised value of the collateral to be pledged by or on behalf of the borrower; or

b) An amount which can be reasonably documented and shown to be secured by the value found in the personal guarantee up to a maximum proportion of 40 percent of the original bona fide principal with the remaining proportion to be fully secured in the manner prescribed in (a) above.

c) In no event shall the amount, in aggregate with other outstanding obligations of the borrower, exceed the current balance contained in the account multiplied by 10.

2. Interest Rate. The interest rate agreed upon between the borrower and the lender shall be expressed clearly in the loan agreement in annual percentage rate terms and include the manner in which lapsed periods of time are to be calculated for purposes of application of that rate, if interest is to calculated or collected in intervals of less than one calendar year.

3. Repayment Terms. The loan agreement shall provide for repayment terms which:

a) Include a schedule of installment payments of principal and interest which will extinguish the original bona fide principal of the loan over a term not exceeding 15 years from the date of execution of the loan.

b) Include a schedule of periodic installment payments of principal and interest coming due at least each 3 months or such lesser intervals as are reasonably consistent with the revenue income flow determined to support the ability on the part of the borrower to repay the obligation.

c) Provide that the first such installment of principal and interest may be scheduled so as to coincide with the first anticipated revenue.

d) Include language which provides that no refinancing, extension or deferment of the originally contracted obligation as approved for insurance or its security, or otherwise, as would operate to modify the original contract terms may be made between the borrower and the lender unless such considerations are in writing and expressly approved by the Commissioner.

e) Include language which effectively renders the obligation as documented to be nontransferable as to all or any part of its interests without prior written approval of the Commissioner.

4. No loan agreement may be the subject of any extension of time or deferment of originally scheduled installment payments which would result in the final contracted payment of principal or interest or combination thereof to fall due at a date more than 15 years from the date of origin without prior written approval of the Commissioner.

B. Eligibility Requirments For Loans by Municipalities, County or Rural Development Financing Authorities; Terms.

1. Principal Amount. The original bona fide principal amount as to the amount insured of any revenue agreement, exclusive of interest and expense shall not exceed:

a) An amount which can be shown to be fully secured by the unencumbered current appraised value of the collateral to be pledged by or on behalf of the borrower, or

b) An amount which can be reasonably documented and shown to be secured by the value found in the personal guarantee up to a maximum proportion of 40 percent of the original bona fide principal with the remaining proportion to be fully secured in the manner prescribed in (a) above,

c) In no event shall the amount exceed the current balance contained in the account when multiplied by ten.

2. Repayment of Revenue Agreement. The repayment of the revenue agreement shall be such that it will produce income and revenue sufficient to provide for the repayment of principal and interest on all bonds issued thereunder when due.

3. Repayment of Revenue Agreement: Terms. The revenue agreement shall provide for:

a) Repayment terms, including a schedule of installment payments of principal and interest, which will extinguish the original bona fide principal of the bonds over a period not to exceed 15 years from the date of origin.

b) Language which provides that no revision of the revenue agreement may be made between the borrower and the lender unless such revisions are approved by the Commissioner.

c) Language which would effectively render the revenue agreement nontransferable as to all or any part of its interest without the expressed approval of the Commissioner.

EA-78-003-WS

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE MINNESOTA ENERGY AGENCY

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE MINNESOTA ENERGY AGENCY GOVERNING CONTENTS OF APPLICATIONS FOR CERTIFICATES OF NEED AND CRITERIA FOR ASSESSMENT OF NEED FOR FUEL CONVERSION FACILITIES, COAL SLURRY OR COAL LIQUIDS PIPELINES, NUCLEAR FUEL PROCESSING FACILITIES AND NUCLEAR WASTE STORAGE OR DISPOSAL FACILITIES, 6 MCAR § 2.1101-2.1191.	REPORT OF THE CHIEF HEARING EXAMINER

The above-entitled matter was submitted to the Chief Hearing Examiner for review pursuant to the provisions of Minn. Stat. § 15.052, Subd. 4, and Minn. Rule HE 107. This review is limited to ensuring compliance with Minn. Stat. § 15.0412, Subd. 4, and to determine whether or not the rules as finally adopted are substantially different from those proposed prior to hearing.

Based upon a review of the record, the Chief Hearing Examiner makes the following:

FINDINGS OF FACT

1. A Notice of Hearing was published in the State Register and mailed to all persons who had registered with the Secretary of State at least 30 days prior to the first day of hearing.

2. The full text of the proposals was published at least 30 days prior to the first day of hearing.

3. All documents required to be filed prior to the hearing pursuant to Minn. Rule HE 103 were filed more than 25 days prior to the hearing.

4. The Hearing Examiner issued his report on September 12, 1978, and the Energy Agency, by and through its Director, issued its own Findings of Fact, Conclusions and Decision on September 22, 1978, adopting in part the Hearing Examiner's recommendations and rejecting others.

5. The Hearing Examiner, in his Finding 11, found that the agency had failed to make an affirmative presentation of facts establishing the need for and reasonableness of the introductions and various subdivisions of the Energy Agency rules on alternatives. The Director of the Energy Agency, in his Finding 6, has disagreed with the Hearing Examiner for the reasons stated within that Finding. The initial agency presentation in support of this particular rule can be found in the Statement of Need. Additional agency presentations can be found in the transcript coming from Mr. David Jacobson and Mr. Dwight Wagenius in response to questions from the participants at the hearing as well as in response to questions from the Hearing Examiner. (See pages 129 through 147.)

Based upon the foregoing Findings of Fact, the Chief Hearing Examiner makes the following:

CONCLUSIONS

1. That the rules as finally adopted by the Director of the Energy Agency are not substantially different from those proposed in the Notice of Hearing and as were published in the State Register.

2. That the Energy Agency has complied with the provisions of Minn. Stat. § 15.0412, Subd. 4, including the making of an affirmative presentation of facts establishing the need for and reasonableness of its rules on alternatives as discussed in Finding 5 above. In making this conclusion, the Chief Hearing Examiner would have agreed with the Hearing Examiner that the justification for the rule given in the agency's Statement of Need, taken alone, would have been an insufficient presentation of facts. However, the Chief Hearing Examiner agrees with the Director that the presentation in the Statement of Need was in fact "buttressed" by the testimony of Mr. Jacobson and Mr. Wagenius sufficiently to sustain the agency's burden. In so concluding, the Chief Hearing Examiner has not endorsed the Director's conclusion that: "...the same arguments for alternatives have been advanced in previous rulemaking proceedings by the agency before

the same Hearing Examiner."

NOW, THEREFORE, the Minnesota Energy Agency shall have the responsibility of filing the rules with the Attorney General for his review as to form and legality and for publishing the rules in the State Register.

Dated this 28th day
of September, 1978.

Duane R. Harves by Wm Seltz

DUANE R. HARVES
Chief Hearing Examiner

Adopted September 22, 1978

A.G.'s copy

MINNESOTA ENERGY AGENCY RULES
GOVERNING CONTENTS OF APPLICATIONS
FOR CERTIFICATES OF NEED AND
CRITERIA FOR ASSESSMENT OF NEED FOR
FUEL CONVERSION FACILITIES, COAL
SLURRY OR COAL LIQUIDS PIPELINES, NUCLEAR FUEL
PROCESSING FACILITIES AND NUCLEAR
WASTE STORAGE OR DISPOSAL FACILITIES

Chapter 11

§§ 2.1101 - ~~2.1191~~ 2.1186

§ 2.1101 Purpose of rules. The purpose of these rules is to specify the contents of applications for certificates of need and to specify criteria for assessment of need pursuant to Minnesota Statutes section 116H.13 for fuel conversion facilities, coal slurry or coal liquids pipelines, nuclear fuel processing facilities, and nuclear waste storage or disposal facilities~~, and all other large energy facilities not specifically covered by 6 MCAR §§ 2.0601 - 2.0641, 2.0701 - 2.0791, 2.0801 - 2.0881, 2.0901 - 2.0981, or 2.1001 - 2.1091~~.

§ 2.1102 Applicability of rules.

A. Each person applying for a certificate of need to construct one of the following types of large energy facilities pursuant to these rules shall provide all information required by these rules:

1. a new fuel conversion facility;

2. ~~any project which, within a period of two years, would expand the design capacity~~ expansion of an existing fuel conversion facility by at least 25 tons per hour of input material over the base capacity of the facility;

3. a new coal slurry or coal liquids pipeline;

4. ~~any project which, within a period of two years, would expand the design throughput~~ expansion of an existing coal slurry pipeline by at least 1000 tons of coal or coal derivatives per day over the base capacity of the facility;

5. ~~any project which, within a period of two years, would expand the design throughput~~ expansion of an existing coal liquids pipeline by at least 15,000 barrels per day over the base capacity of the facility;

6. a new nuclear fuel processing facility;

7. ~~any project which, within a period of two years, would expand the design output~~ expansion of an existing nuclear fuel processing facility by at least 20 percent of the base capacity of the facility;

8. a new nuclear waste storage or disposal facility; and

9. ~~any project which, within a period of two years, would expand the design capacity~~ expansion of an existing nuclear waste storage or disposal facility by at least 20 percent of the base capacity of the facility~~;~~.

~~10. any large energy facility or equivalent expansion other than those given by 6 MCAR § 2.1102 A 1 through 9 or specifically covered by 6 MCAR §§ 2.0601 2.0641, 2.0701 2.0791, 2.0801 2.0881, 2.0901 2.0981, or 2.1001 2.1091.~~

B. Exception. The following types of facilities shall not be subject to these rules:

1. any large energy facility on which construction has begun or has been completed by the effective date of these rules;

2. any nuclear waste storage or disposal facility to be constructed in conjunction with a large generating facility which itself requires a certificate of need, unless the total capacity of that storage facility is not covered by the certificate of need issued for the large electric generating facility and associated facilities; and

3. any facility covered by Minn. Stat. §§ 116C.71-.74 (Supp. 1977), unless expressly authorized by the legislature.

§ 2.1103 Application procedures and timing.

A. Each application for a certificate of need pursuant to these rules shall be submitted in the form and manner prescribed by these rules.

B. A minimum of seven (7) bound copies and one (1) unbound copy of the application shall be filed with the director for use by the director and the Agency staff. The director ~~may~~ shall require additional copies, not to exceed one hundred (100) copies total, to supply other governmental authorities, potential intervenors, and libraries designated as distribution points for public use. The director shall provide for the record at the hearing a list indicating the distribution of the additional copies. All documents, forms, and schedules filed with the application shall be typed on 8 1/2" x 11" paper except for drawings, maps, and similar materials. Each application shall contain a title page and a complete table of contents which includes the applicable rule by the titles and numbers given in these rules. The date of preparation and the applicant's name shall appear on the title page, as well as on each document filed with the application.

C. Subsequent to the filing of an application, any changes or corrections to the application shall comply with rule 6 MCAR § 2.1103 B as to the number of copies and size of documents. In addition, each page of a change or correction to a previously filed page shall be marked with the word "REVISED" and with the date the revision was made. The original copy of the changes or corrections shall be filed with the hearing examiner, and the remaining copies shall be submitted to the director.

D. Each application for a certificate of need shall be accompanied by a cover letter signed by an authorized officer or agent of the applicant. The cover letter shall specify the type of facility for which a certificate of need is requested and the number of copies of the application filed.

E. A hearing examiner shall be assigned, and a public hearing shall be scheduled to commence no later than eighty days after the receipt of the application, in accordance with Minnesota Energy Agency Rules Governing Certificate of Need Program, 6 MCAR § 2.0500 et seq., and the Hearing Examiner

Rules for Contested Case Procedures, 9 MCAR § 2.201 et seq.

F. A decision on an application for a certificate of need shall be made by the director no later than six months from the receipt of the application, provided that the application as received is substantially complete.

G. The director shall notify the applicant within 15 days of the receipt of an application if the application is not substantially complete. Upon such notification, the applicant may correct any deficiency and may resubmit the application. A decision shall be made upon the revised application within six months of the date of resubmission, assuming it is then substantially complete.

H. Prior to the submission of an application, a person shall ~~may~~ be exempted from any data requirement of these rules upon a written request to the director for exemption from specified rules and a showing by that person in the request that the data requirement (1) is unnecessary to determine the need for the proposed facility or (2) may be satisfied by submission of another document. A request for exemption shall be filed at least 20 days prior to submission of an application. The director shall respond in writing to each such request within 15 days of receipt, including reasons for the decision. The director shall file a statement of exemptions granted and reasons therefor prior to commencement of the hearings.

I. When an application for a certificate of need is denied, the director shall state the reason(s) for the denial.

§ 2.1104 Definitions. For purposes of these rules, the following definitions shall apply:

A. "Agency" means the Minnesota Energy Agency;

B. "Applicant" means the person or persons submitting a certificate of need application;

C. "Application" means a document, the contents of which are described in these rules, submitted to the director for the purpose of obtaining a certificate of need;

D. "Barrel" means that quantity of liquid equaling 42 gallons (159.0 litres);

E. "Btu" means British thermal unit, a common unit of energy measurement which is used in these rules for comparative purposes;

F. "Coal liquids pipeline" means any pipeline greater than six inches (15.2 centimetres) in diameter and having more than 50 miles (80.4 kilometres) of its length in Minnesota used for the transportation of liquids derived from coal;

G. "Coal slurry pipeline" means any pipeline greater than six inches (15.2 centimetres) in diameter and have more than 50 miles (80.4 kilometres) of its length in Minnesota used for the transportation of coal or any solid derivative thereof;

H. "Demand" means that quantity of products or services from the applicant's facilities for which there are willing and able purchasers;

I. "Director" means the director of the Agency;

J. "Energy product" means any fuel or other natural resource that may be used to provide energy;

K. "Expansion" means an increase in the capacity of an existing large energy facility, accomplished by one or more methods, including, but not limited to, increasing the size

of the facility, using new or different technology, or adding pumping stations;

L. "Firm contract customers" means customers served under schedules or contracts which neither anticipate not permit interruption unless a state of emergency exists;

M. "Forecast" means a projection of future demand for some specified time period;

N. "Forecast years" means the sixteen-year period consisting of the year of application plus the next fifteen years;

O. "Fuel conversion facility" means any facility intended to convert coal, peat, wood, or any other material, excepting fissile, fertile, or fissionable nuclear material, into another combustible fuel and having the capacity to process 25 tons (22.7 metric tons) of the material per hour at its peak capacity. A fuel conversion facility shall include any storage facility ~~on the site~~ needed for operation of the facility at the design capacity. A coal-cleaning or coal-agglomerating facility shall not be considered a fuel conversion facility unless its operation causes a change in the molecular structure of the input coal;

P. "Interruptible contract customers" means customers served under schedules or contracts which anticipate or permit interruption of service during the term of the contract;

Q. "Joint application" means an application submitted to the director by two or more persons;

R. "Mbpd-mile" means a descriptive unit used as a measure of the size of a coal liquids pipeline, the quantity of which is determined by multiplying (1) either the length in miles of the new (section of) pipeline in Minnesota, or 50 if the capacity expansion is achieved by adding power, and (2) the new or additional design capacity in thousand barrels per day (Mbpd). If the pipeline capacity would be expanded by a combination of looping and adding power, the Mbpd-miles corresponding to each method of expansion shall be calculated and the sum of the two shall be the size of the pipeline;

S. "Mcf" means thousand cubic feet, a common unit of volume measurement for natural gas;

T. "Minnesota service area" means that part of an applicant's service area which is in Minnesota;

U. "Mton-mile" means a descriptive unit used as a measure of the size of a coal slurry pipeline, the quantity of which is determined by multiplying (1) either the length in miles of the new (section of) pipeline in Minnesota, or 50 if the capacity expansion is achieved by adding power, and (2) the new or additional design capacity in thousands of tons per day (Mton). If the pipeline capacity would be expanded by a combination of looping and adding power, the Mton-miles corresponding to each expansion shall be calculated and the sum of the two shall be the size of the pipeline;

V. "Nuclear fuel processing facility" means any facility designed for or capable of processing or reprocessing any material for use as a fuel in a nuclear reactor. A nuclear fuel processing facility shall include any radioactive or non-radioactive waste storage or disposal facility on the site needed for operation of the facility at the design capacity;

W. "Nuclear waste storage or disposal facility" means any facility designed for or capable of serving as a temporary or permanent depository for radioactive or associated nonradioactive wastes produced by a nuclear reactor or a nuclear fuel processing facility, including any burial ground for low-level radioactive wastes;

X. "Peak day" means that day during a calendar year when demand is the greatest;

Y. "Peak demand" means the highest demand placed upon a facility within a designated period of time;

Z. "Person" means an individual, partnership, corporation, joint stock company, unincorporated association or society, municipal corporation, or a government or governmental subdivision, unit or agency, other than a court of law;

AA. "Promotional practices" means any actions or policies

by an applicant, an applicant's customers, or other persons which directly or indirectly give rise to the demand for the facility, including, but not limited to, advertising, billing practices, and other marketing activities;

BB. "Service area" means that geographical area in which the applicant has customers;

CC. "Substantially complete application" means an application which is deemed by the director to be in substantial compliance with the information requirements of these rules; ~~and~~

DD. "Ton" means 2000 pounds (907.2 kilograms); and

EE. "Base capacity" means either (1) the capacity or throughput of a large energy facility as of the effective date of these rules, (2) the capacity or throughput of a certified new large energy facility, or (3) if a large energy facility has been expanded since the effective date of these rules, the capacity or throughput of the facility following the most recent certified expansion.

§ 2.1105 Filing fees and payment schedule.

A. The fee for processing an application shall be:

1. $5,000 plus $50 per ton of hourly design input for a new or expanded fuel conversion facility;

2. $5,000 plus $10 per Mton-mile for a new or expanded coal slurry pipeline;

3. $5,000 plus $1 per Mbpd-mile for a new or expanded coal liquids pipeline;

4. $20,000 plus $50 per ton of yearly design input for a nuclear fuel processing facility; or

5. $20,000 for a nuclear waste storage or disposal facility;

plus such additional fees as are reasonably necessary for completion of the evaluation of need for the proposed facility.

B. Fifty percent of the fee set according to 6 MCAR § 2.1105 A 1, 2, 3 or 4 shall accompany the application, and the balance shall be paid 90 days after submission of the applica-

tion. The applicant shall be notified prior to the time the application is acted upon by the director of any additional fees, which fees shall be paid within 30 days of notification. The billing of such additional fees shall be accompanied by an itemized document showing the necessity for the additional assessment.

C. No certificate shall be issued until all fees are paid in full.

§ 2.1111 Criteria for assessment of need.

A. Purpose of the criteria. The criteria for assessment of need shall be used by the director in the determination of need for each proposed large energy facility which is subject to these rules. The factors listed under each of the criteria set forth herein at 6 MCAR § 2.1111 C shall be evaluated to the extent that the director deems them applicable and pertinent to each facility proposed pursuant to these rules. The director shall make a specific written finding with respect to each of the criteria. In the case of an application for a certificate of need for an expansion of a nuclear waste storage or disposal facility serving an existing large electric generating facility, the director shall not make a decision which could reasonably be expected to result in a forced shutdown of the generating facility.

B. Consideration of alternatives. The director shall consider only those alternatives proposed before the close of the public hearing and for which there exists substantial evidence on the record with respect to each of the criteria listed in 6 MCAR § 2.1111 C.

C. Criteria. A certificate of need shall be granted to the applicant if it is determined that:

1. the probable direct or indirect result of denial would be an adverse effect upon the future adequacy, reliability, safety, or efficiency of energy supply to the applicant,

to the applicant's customers, or to the people of Minnesota and neighboring states, considering:

a. the accuracy of the applicant's forecast of demand for the energy or service that would be supplied by the proposed facility;

b. the effects of existing or expected conservation programs of the applicant, the state government, or the federal government;

c. the effects of promotional practices in creating a need for the proposed facility, particularly promotional practices which have occurred since 1974;

d. the ability of current facilities and planned facilities not requiring certificates of need to meet the future demand; and

e. the effect of the proposed facility, or a suitable modification thereof, in making efficient use of resources;

2. a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence on the record by parties or persons other than the applicant, considering:

a. the appropriateness of the size, the type, and the timing of the proposed facility compared to those of reasonable alternatives;

b. the cost of the proposed facility and the cost of energy to be supplied by the proposed facility compared to the costs of reasonable alternatives and the cost of energy that would be supplied by reasonable alternatives;

c. the effects of the proposed facility upon the natural and socioeconomic environments compared to the effects of reasonable alternatives; and

d. the expected reliability of the proposed facility compared to the expected reliability of reasonable alternatives;

3. it has been demonstrated by a preponderance of the evidence on the record that the consequences of granting the certificate of need for the proposed facility, or a suitable

modification thereof, are more favorable to society than the consequences of denying the certificate, considering:

a. the relationship of the proposed facility, or a suitable modification thereof, to overall state energy needs;

b. the effects of the proposed facility, or a suitable modification thereof, upon the natural and socio-economic environments compared to the effects of not building the facility;

c. the effects of the proposed facility, or a suitable modification thereof, in inducing future development; and

d. the socially beneficial uses of the output of the proposed facility, or a suitable modification thereof, including its uses to protect or enhance environmental quality; and that

4. it has not been demonstrated on the record that the design, construction, operation or retirement of the proposed facility will fail to comply with those relevant policies, rules and regulations of other state and federal agencies and local governments.

§ 2.1121 Contents of application.

A. An application for a certificate of need shall provide all information required by 6 MCAR §§ 2.1131 through 2.1135 and, optionally, 2.1186. An application shall also provide information for specific types of facilities as indicated below.

1. An applicant for a fuel conversion facility shall refer to 6 MCAR §§ 2.1141 through 2.1144 for the additional information required.

2. An applicant for a coal slurry or coal liquids pipeline shall refer to 6 MCAR §§ 2.1145 through 2.1149 for the additional information required.

3. An applicant for a nuclear fuel processing facility shall refer to 6 MCAR §§ 2.1151 through 2.1154 for the additional information required.

4. An applicant for a nuclear waste storage or disposal facility shall refer to 6 MCAR §§ 2.1155 through 2.1159 for the additional information required.

5. ~~An applicant for any facility other than those listed in 6 MCAR § 2.1121 A 1 through 4 or specifically covered by 6 MCAR §§ 2.0601 — 2.641, 2.0701 — 2.0791, 2.0801 — 2.0881, 2.0901 — 2.0981, or 2.1001 — 2.1091 shall refer to 6 MCAR § 2.1181 for the additional information required.~~

B. Joint application. If an application for a certificate of need is jointly submitted by two or more persons, then each such person shall submit separate information in response to the general information section (6 MCAR § 2.1131), the conservation programs section (6 MCAR § 2.1135), and the appropriate historical data and forecast section (6 MCAR § 2.1143, 2.1148, 2.1153, or 2.1158).

C. Multi-party ownership and use. An application for a certificate of need for a facility which would be owned and used by two or more persons shall be considered as a joint application for purposes of these rules.

§ 2.1131 General information. Each application shall include the following general information:

A. the applicant's complete name and address, telephone number, and standard industrial classification code(s);

B. the complete name, title, address and telephone number of the official or agent to be contacted concerning the applicant's filing;

C. a brief description of the nature of the applicant's business and of the products which are manufactured, produced, or processed, or of the services rendered;

D. a brief description of the proposed facility and its planned use;

E. the total fee for the application as prescribed by 6 MCAR § 2.1105 and the amount of the fee submitted with the application; and

F. the signature(s) and title(s) of the applicant's officer(s) or executive(s) authorized to sign the application and the signature of the preparer of the application if prepared by an outside agent.

§ 2.1132 Schedule of other filings. Each application shall contain a schedule listing all known federal, state, and local agencies or authorities with which the applicant must file for the proposed facility. The following information shall be included on the schedule:

A. the names of all known federal, state, or local authorities with which the applicant must file;

B. the title of each required permit or certificate issued by the authorities named in response to 6 MCAR § 2.1132 A and needed by the applicant;

C. for each permit or certificate listed in response to 6 MCAR § 2.1132 B, the date an application was filed or the projected date of future application;

D. for each permit or certificate listed in response to 6 MCAR § 2.1132 B, the actual date a decision was made on the application, or the anticipated decision date; and

E. for each permit or certificate listed in response to 6 MCAR § 2.1132 B for which an application was filed, the disposition or status of the permit or certificate.

§ 2.1133 Need summary. Each application shall contain a summary of the major factors which justify the need for the proposed facility. Except upon prior approval of the director, this summary shall not exceed 15 pages, including text, tables, graphs and figures.

§ 2.1134 Additional considerations. Each application shall contain an explanation of the relationship of the proposed facility to each of the following socioeconomic considerations:

A. socially beneficial uses of the output of the facility, including its uses to protect or enhance environmental quality;

B. promotional activities which may have given rise to the demand for the facility; and

C. the effects of the facility in inducing future development.

§ 2.1135 Conservation programs. Each application shall include the following information:

A. the name of the committee, department or individual responsible for the applicant's energy conservation and efficiency programs;

B. a list of the applicant's energy conservation and efficiency goals and objectives;

C. a description of the specific energy conservation and efficiency programs the applicant has considered, a list of those which have been implemented, and the reasons why the other programs have not been implemented;

D. a description of the major accomplishments which have been made with respect to energy conservation and efficiency;

E. a description of the applicant's future plans through the forecast years with respect to energy conservation and efficiency; and

F. a quantification of the manner by which these programs affect or help determine the applicant's forecast of demand, a list of the total costs by program, and a discussion of the expected effects in reducing the need for new large energy facilities.

§ 2.1141 Description of proposed fuel conversion facility. Each application for a fuel conversion facility shall contain the following information:

A. a physical description of the facility, including:

1. its location, to the fullest extent known;

2. an estimate of the required land area and the height of the tallest structures;

3. its design capacity in tons per hour of input material;

4. a schematic drawing showing major components of the facility; and

5. a map showing the planned location of the facility and its interconnections with energy transportation systems;

B. data regarding design and construction of the facility, including:

1. if known, the complete name and business address of the engineer and firm that would be responsible for the design of the facility;

2. if known, the complete name and business address of the company which would construct the facility;

3. the proposed date for commencing construction and the proposed in-service date;

4. the estimated installed cost of the facility in current dollars; and

5. the estimated economic life of the facility; and

C. data regarding operation of the facility, including:

1. a narrative description of the steps of the process;

2. the types and sources of input materials that would be processed by the facility and the estimated energy content of each in Btu per appropriate unit of measure;

3. the types of output products, the amount of each, and the estimated energy content of each in Btu per appropriate unit of measure;

4. the projected annual operating and maintenance costs in current dollars for each of the first five calendar years of operation;

5. a description of the methods that would be used to transport input and output materials to and from the facility;

6. the estimated amounts and types of energy products that would be consumed during operation at the design capacity;

7. the expected average percentage of use of the full design capacity for each of the first five calendar years of operation; and

8. a discussion of the maintenance requirements of the facility, including the estimated impact on production.

§ 2.1142 Alternatives. Each application for a fuel conversion facility shall contain a description of alternatives available to the applicant which differ significantly from the proposed facility with respect to location, size, timing, or design. The description of each alternative shall include the following information, if applicable:

A. the location of the facility, to the fullest extent known;

B. the design capacity of the facility;

C. a schematic drawing showing major components of the facility;

D. a map showing the planned location of the facility and its interconnections with energy transportation systems;

E. the probable date for commencing construction and the probable in-service date;

F. the estimated installed cost of the alternative in current dollars;

G. the estimated economic life of the facility;

H. the input materials that would be processed by the facility and the products that would be produced;

I. the projected annual operating and maintenance costs

in current dollars for each of the first five calendar years of operation;

J. a description of the methods that would be used to transport input and output materials to and from the facility;

K. the estimated amounts and types of energy products that would be consumed during operation of the facility at the design capacity;

L. the expected average percentage of use of the full design capacity for each of the first five calendar years of operation;

M. a discussion of the maintenance requirements of the facility, including the estimated impact on production; and

N. the reason(s) why the alternative was rejected.

§ 2.1143 Historical and forecast data. Each applicant for a fuel conversion facility shall provide five years of historical energy data, as well as a forecast of demand through the forecast years. If the fuel conversion facility is designed primarily to provide energy for the applicant's own use, data shall be submitted in response to 6 MCAR § 2.1143 A. If the facility is designed to produce pipeline quality gas for sale by either a utility or a pipeline company, data shall be submitted in response to 6 MCAR § 2.1143 B. In all other cases, data shall be submitted in response to 6 MCAR § 2.1143 C.

A. The applicant shall submit the following information about its historical and projected use of energy products:

1. for each of the energy products which would be produced by the proposed facility, the amount of that product consumed by the applicant during each of the five preceding calendar years;

2. the amounts of any other energy products consumed by the applicant during each of the five preceding calendar years;

3. the amounts of those energy products listed in response to 6 MCAR § 2.1143 A 1 and 2 which were consumed at the applicant's Minnesota location(s);

4. for the first six forecast years, the eleventh forecast year (the tenth year after the year of application), and the sixteenth forecast year, the projected demand by the applicant for each of the energy products named in response to 6 MCAR § 2.1143 A 1 and 2 and the projected demand for each at the applicant's Minnesota location(s);

5. a discussion of the methodology, statistical techniques, and data bases used in providing the forecast data required by 6 MCAR § 2.1143 A 4;

6. any major assumptions made in providing the forecast data required by 6 MCAR § 2.1143 A 4, and a discussion of the sensitivity of the projections to changes in the assumptions; and

7. any other known large energy facilities which may be constructed during the forecast years for use by the applicant.

B. A gas utility or pipeline company shall submit the following information:

1. for each of the ten preceding calendar years, the first six forecast years, the eleventh forecast year (the tenth year after the year of application), and the sixteenth forecast year, annual gas consumption by ultimate consumers and the number of such customers within the applicant's system in each of the following categories:

a. residential firm (when gas is supplied through a single meter for both residential and commercial uses, it should be reported according to its principal use, and apartment buildings shall be reported as residential even if not metered separately);

b. commercial firm who use less than 200 Mcf

on peak day;

c. commercial firm with a peak day requirement equal to or greater than 200 Mcf;

d. industrial firm who use less than 200 Mcf on peak day;

e. industrial firm with a peak day requirement equal to or greater than 200 Mcf;

f. commercial and industrial interruptible;

g. other (this category shall include storage gas and other sales or deliveries not covered in categories a through f);

h. unaccounted for; and

i. the sum of categories a through h;

2. if the applicant's service area includes consumers outside of Minnesota, annual gas consumption by ultimate consumers within the applicant's Minnesota service area for each of the years given in 6 MCAR § 2.1143 B 1;

3. for each of the years given in 6 MCAR § 2.1143 B 1 and for each of the categories listed in 6 MCAR § 2.1143 B 1 a through i, an estimate of the daily demand for gas by ultimate consumers in the applicant's system at the time of system peak demand;

4. for each of the years given in 6 MCAR § 2.1143 B 1, the applicant's system peak demand by month;

5. a discussion of methodology, statistical techniques, and data bases used in providing the forecast data required by 6 MCAR § 2.1143 B 1 through 4;

6. a discussion of the assumptions made by the applicant with respect to the availability of alternate sources of energy, the expected conversion from other fuels to gas or vice versa, the future prices of gas for customers in the applicant's system and the effect that such prices will likely have on the applicant's system demand, the effect of existing energy

conservation programs under federal or state legislation on long-term gas demand, and any other factor considered important by the applicant;

7. a discussion of the sensitivity of the forecast to changes in the assumptions;

8. for a gas utility only, for the last calendar year, the current calendar year, the first full calendar year before the proposed facility is expected to be in operation, and the first full calendar year of operation of the proposed facility, an annual supply curve consisting of a single graph for each year and showing the contributions from:

a. pipeline contract demand;

b. gas from storage;

c. synthetic gas other than propane;

d. liquefied natural gas;

e. propane peak-shaving gas; and

f. the proposed facility;

9. for a gas pipeline company only, for the last calendar year, the current calendar year, the first full calendar year before the proposed facility is expected to be in operation, and the first full calendar year of operation of the proposed facility, an annual supply curve consisting of a single graph for each year and showing the contributions from:

a. own production;

b. committed purchases from other gas producers;

c. gas from storage;

d. emergency purchases (historical year only);

e. other sources; and

f. the proposed facility; and

10. any other known large energy facilities which may be constructed during the forecast years for use by the applicant.

C. The applicant shall submit the following information

about its consumption and sales of energy products:

1. for each of the energy products which would be produced by the proposed facility, the amount sold or transported by the applicant during each of the five preceding calendar years;

2. the amounts of those energy products listed in response to 6 MCAR § 2.1143 C 1 that were sold or transported by the applicant in its Minnesota service area;

3. for each of the energy products consumed by the applicant and for each of the five preceding calendar years, the total amount consumed and the amount consumed at the applicant's Minnesota locations;

4. for the first six forecast years, the eleventh forecast year (the tenth year after the year of application), and the sixteenth forecast year, the projected total demand for products produced by the proposed facility within the applicant's service area and the projected demand within its Minnesota service area;

5. a discussion of the methodology, statistical techniques, and data bases used in providing the forecast data required by 6 MCAR § 2.1143 C 4;

6. any assumptions made in supplying the projections made in response to § 6 MCAR § 2.1143 C 4, and a discussion of the sensitivity of the projections to changes in the assumptions; and

7. any other known large energy facilities which may be constructed during the forecast years for use by the applicant.

§ 2.1144 Environmental data. Each applicant shall provide environmental data for the proposed facility and for each alternative facility described in response to 6 MCAR § 2.1142. The following information relating to construction and operation

of each of these facilities shall be provided, to the extent that such information is reasonably available to the applicant and applicable to the particular alternative:

A. a description of each alternative site, including:

1. the nature of the terrain at the site;

2. the general soil and bedrock type(s) at the site;

3. the depth to groundwater at the site;

4. the types of vegetation (forest, brush, marsh, pasture, and cropland) on the site, and the approximate percentage of each;

5. the predominant types of land use (such as residential, forest, agricultural, commercial, and industrial) within five miles of the site, and the approximate percentage of each;

6. lakes, streams, wetlands or drainage ditches within five miles of the site and any other lakes, streams, wetlands, drainage ditches, wells or storm drains into which liquid contaminants could flow;

7. trunk highways and airports within five miles of the site;

8. national natural landmarks, national wilderness areas, national wildlife refuges, national wild and scenic rivers, national parks, national forests, national trails, and national waterfowl production areas within five miles of the site, as mapped on the Inventory of Significant Resources by the State Planning Agency;

9. state critical areas, state wildlife management areas, state scientific and natural areas, state wild, scenic and recreational rivers, state parks, state scenic wayside parks, state recreational areas, state forests, state trails, state canoe and boating rivers, state zoo, designated trout streams, and designated trout lakes within five miles of the site, as mapped on the Inventory of Significant Resources by the State Planning Agency;

10. national historic sites and landmarks, national monuments, National Register Historic Districts, registered state historic or archaeological sites, state historical districts, sites listed on the National Register or Historic Places, and any other Cultural Resources within five miles of the site, as indicated by the Minnesota Historical Society; and

11. areas within five miles of the site designated by regional or local authorities as having recreational, cultural, historical, or scientific significance, as indicated by local units of government;

B. data on wastes and emissions associated with construction or operation of the facility, including:

1. the types and estimated amounts of solid and liquid wastes, including aromatic compounds, that would be produced by the facility;

2. the types and estimated amounts of gaseous and particulate emissions into the air that would occur during full operation from each emission source, and the location and nature of the release point;

3. locations which may be sources of fugitive dust and the nature of each source;

4. the locations, routes and final receiving waters for any discharge points, and for each discharge point the source, the amount and the nature of the discharge;

5. any area from which runoff may occur, potential sources of contamination in the area, and receiving waters for any runoff;

6. the sources and estimated amounts of heat rejected from the facility; and

7. the maximum noise levels (in decibels, A scale) expected at the property boundary and the expected maximum increase over ambient noise levels;

C. data regarding pollution control and safeguards

equipment, including:

1. the methods that would be used to recycle or dispose of solid or liquid wastes;

2. the types of emission control devices and dust control measures that would be used;

3. the types of water pollution control equipment and runoff control measures that would be used;

4. the measures that would be taken to prevent spills of pollutants or to minimize the environmental effect of a spill on surface waters and groundwaters;

5. the methods that would be used to reduce the effects of heat rejected by the facility;

6. any other equipment or measures, including noise control or erosion control, that would be used to reduce the impact of the facility; and

7. the types of environmental monitoring that are planned for the facility, if any, and a description of any relevant environmental monitoring data already collected; and

D. estimates of induced developments, including:

1. the types and amounts of vehicular traffic that would be generated by the facility due to construction activity and, later, to operational needs;

2. the work forces required for construction and for operation of the facility;

3. the extent to which the facility would create or add to the need for expanded utility or public services, including high voltage transmission lines, access roads, and the like;

4. the amount of water which would be appropriated and the amount which would be consumed by the facility, the expected source of the water, and the uses for the water;

5. the amount of agricultural land, including pasture land, that would be removed from agricultural use if the facility

were constructed, and known circumstances associated with the facility that could lead to reduced productivity of surrounding agricultural land; and

6. the number of people that would have to relocate if the facility were constructed.

§ 2.1146 Description of proposed coal slurry or coal liquids pipeline. Each application for a coal slurry or coal liquids pipeline shall contain the following information:

A. a physical description of the facility, including:

1. a pipeline system map showing the planned route, mileages, and locations of pumping stations, mainline valves, dump basins or storage facilities, and interconnections with other energy transportation systems;

2. the diameter and the expected length within Minnesota;

3. the design throughput in tons per day of coal (coal slurry pipeline) or in barrels per day (coal liquids pipeline);

4. to the extent known, specifications for the pipe (diameter, length, wall thickness, and grade) and the valves (diameter and American National Standards Institute rating) with the maximum allowable operating pressure for each;

5. to the extent known, specifications for the pumps (diameter, maximum allowable operating pressures, and maximum capabilities); and

6. to the extent known, specifications for the prime movers (type, maximum power capacity in horsepower, efficiency, allowable maximum and minimum operating temperatures, and energy requirement in Btu per ton of coal or barrel of coal liquids pumped);

B. data regarding design and construction of the facility,

including:

1. if known, the complete name and business address of the engineer and firm that would be responsible for the design;

2. if known, the complete name and business address of the company which would construct the facility;

3. the proposed date for commencing construction and the proposed in-service date;

4. the estimated installed cost of the facility in current dollars; and

5. the estimated economic life of the facility; and

C. data regarding operation of the facility, including:

1. a list of expected sources of supply for transportation during the first five calendar years of operation, designated as in-state or as out-of-state, the expected dates and durations of the contracts with the suppliers, and the quantities expected to be involved;

2. a list of expected recipients of the transported slurry or coal liquids during the first five calendar years of operation, designated either as in-state or as out-of-state, the expected dates and durations of the contracts with the 25 largest recipients, and the quantities expected to be involved;

3. the expected maximum operating pressure and capacity of the facility at the time of peak demand;

4. the expected power requirement from the prime movers at each station at the time of peak demand (in kilowatts, thousands of cubic feet per hour, or gallons per hour);

5. the expected average percentage of use of the full design capacity for each of the first five calendar years of operation;

6. the estimated tariffs or transportation costs for the pipeline for each of the first five calendar years of operation; and

7. for a coal slurry pipeline, a description of what would be done with the slurry water or other carrier after it had been used to transport coal.

§ 2.1147 Alternatives. Each application for a coal slurry or coal liquids pipeline shall contain a description of alternatives available to the applicant which differ significantly from the proposed facility with respect to location, size, timing, or design.

A. If the alternative is another pipeline, all of the information required by 6 MCAR § 2.1146 A through C shall be submitted for the alternative. The applicant shall also indicate the reason(s) for rejecting the alternative.

B. If the alternative is not a pipeline, the description of the alternative shall include the following information, if applicable:

1. the location of the alternative, to the fullest extent known;

2. the dimensions and design capacity of the alternative;

3. a schematic drawing showing major components of the alternative;

4. a map showing the planned location of the facility and its interconnections with energy transportation systems;

5. the probable date for commencing construction and the probable in-service date;

6. the estimated installed cost of the alternative in current dollars;

7. the estimated maintenance requirements of the alternative;

8. the estimated economic life of the alternative; and

9. the reason(s) why the alternative was rejected.

§ 2.1148 Historical and forecast data. Each applicant for a coal slurry or coal liquids pipeline shall provide five years of historical energy data, as well as a forecast of demand through the forecast years. If the proposed pipeline is designed primarily to provide energy for the applicant's own use, data shall be submitted in response to 6 MCAR § 2.1148 A. If the proposed pipeline is designed primarily to transport or distribute energy to be used by others, data shall be submitted in response to 6 MCAR § 2.1148 B.

A. The applicant shall submit the following information about its historical and projected use of energy products:

1. for each of the energy products which would be transported by the proposed facility, the amount of that product consumed by the applicant during each of the five preceding calendar years;

2. the amounts of any other energy products consumed by the applicant during each of the five preceding calendar years;

3. the amounts of those energy products named in response to 6 MCAR § 2.1148 A 1 and 2 which were consumed at the applicant's Minnesota locations;

4. for the first six forecast years, the eleventh forecast year (the tenth year after the year of application), and the sixteenth forecast year, the projected demand by the applicant for each of the energy products named in response to 6 MCAR § 2.1148 A 1 and 2 and the projected demand for each at the applicant's Minnesota locations;

5. a discussion of the methodology, statistical techniques, and data bases used in providing the forecast data required by 6 MCAR § 2.1148 A 4;

6. any major assumptions made in providing the fore-

cast data required by 6 MCAR § 2.1148 A 4, and a discussion of the sensitivity of the projections to changes in the assumptions; and

7. any other known large energy facilities which may be constructed during the forecast years for use by the applicant.

B. The applicant shall submit the following information about its transportation and distribution of energy products:

1. a list of the energy products transported or distributed in its service area during each of the five preceding calendar years;

2. for each energy product listed in response to 6 MCAR § 2.1148 B 1, the annual and peak-day quantities transported or distributed for each of the five preceding calendar years in the appropriate units of measure;

3. a list of sources of supply of energy products for transportation or distribution during the five preceding calendar years, designated as either in-state or out-of-state, the dates and durations of the contracts with the suppliers or shippers, and the quantities of each energy product involved;

4. for each of the five preceding calendar years and for each energy product, the percentage of in-state delivery of the annual amounts given in response to 6 MCAR § 2.1148 B 2;

5. a list of each storage facility, pipeline, or other major facility owned or operated by the applicant and associated with the transportation and distribution of the energy products given in response to 6 MCAR § 2.1148 B 1, and the average percentage of use of each such facility during the summer season and during the winter season;

6. a list of the energy products the applicant expects to transport or distribute in its service area during the first six forecast years, the eleventh forecast year

(the tenth year after the year of application), and the sixteenth forecast year, and the annual and peak-day quantities expected in the appropriate units of measure;

7. a discussion of the methodology, statistical techniques, and data bases used in providing the forecast data required by 6 MCAR § 2.1148 B 6;

8. a discussion of the methods, assumptions and factors employed for purposes of estimation in response to 6 MCAR § 2.1148 B 6;

9. a discussion of the sensitivity of the forecast to changes in the assumptions; and

10. any other known large energy facilities which may be constructed during the forecast years for use by the applicant.

§ 2.1149 Environmental data. Each applicant shall provide environmental data for the proposed facility and for each alternative facility described in response to 6 MCAR § 2.1147. Enviornmental data for each pipeline considered shall conform to the format given in subdivisions A through D of 6 MCAR § 2.1149. Environmental data for any other alternative shall include a list of the natural and cultural resources, as given in items 7 through 12 of 6 MCAR § 2.1149 A, that would be directly affected, and a discussion of those applicable areas of environmental concern that are detailed in subdivisions B through D of 6 MCAR § 2.1149. The applicant shall provide:

A. a description of each alternative route, including:

1. the names of cities or population centers through which the route passes;

2. the number of miles of the route which passes through, respectively, federal lands, state lands, county or tax-forfeit lands, incorporated areas, and private land outside corporate areas;

3. the general soil types along the route and the approximate percentage of each;

4. the general bedrock types along the route and the approximate percentage of each;

5. the general terrain along the route;

6. the types of vegetation along the route (forest, brush, marsh, pasture, and cropland) and the approximate percentage of each;

7. the predominant types of land use along the route (such as residential, forest, agricultural, commercial, and industrial) and the approximate percentage of each;

8. the names of major lakes or streams and the number of wetlands of five acres of more through which the route passes, as well as any others into which liquid contaminant from the pipeline could flow;

9. trunk highways, airports, or railroad lines under which the route passes;

10. national natural landmarks, national wilderness areas, national wildlife refuges, national wild and scenic rivers, national parks, national forests, national trails, and national waterfowl production areas through which the route passes, as mapped on the Inventory of Significant Resources by the State Planning Agency;

11. state critical areas, state wildlife management areas, state scientific and natural areas, state wild, scenic and recreational rivers, state parks, state scenic wayside parks, state recreational areas, state forests, state trails, state canoe and boating rivers, state zoo, designated trout streams, and designated trout lakes through which the route passes, as mapped on the Inventory of Significant Resources by the State Planning Agency; and

12. national historic sites and landmarks, national monuments, National Register Historic Districts, registered

state historic or archaeological sites, state historical districts, sites listed on the National Register of Historic Places, and any other Cultural Resources through which the route passes, as indicated by the Minnesota Historical Society;

B. data on wastes and emissions associated with construction or operation of the facility, including:

1. the types and estimated amounts of solid and liquid wastes that would be produced;

2. the types and estimated amounts of gaseous and particulate emissions into the air that would occur during full operation of the pipeline from each emission source, and the location and nature of the release point;

3. locations which may be sources of fugitive dust and the nature of each source;

4. the locations, routes and final receiving waters for any discharge points, and for each discharge point the source, the amount and the nature of the discharge;

5. any area from which runoff may occur, potential sources of contamination in the area, and receiving waters for any runoff; and

6. the maximum noise levels (in decibels, A scale) expected along the route and the expected maximum increase over ambient noise levels;

C. data regarding pollution control and safeguards equipment, including:

1. the types of emission control devices and dust control measures that would be used, including provisions for controlling coal dust left in evaporated dump basins;

2. the types of water pollution control equipment and runoff control measures that would be used, including methods to treat any residual slurry water that may enter freshwater bodies;

3. the measures that would be taken to prevent slurry

or coal liquids spills or to minimize the environmental effect of a spill on surface waters and groundwaters;

4. for a coal slurry pipeline, a description of the procedure in case of electrical outage at one or more pump stations or cessation of slurry movement for any reason;

45. any other equipment or measures, including noise control or erosion control, that would be used to reduce the impact of the facility; and

56. the types of environmental monitoring that are planned for the facility, if any, and a description of any relevant environmental monitoring data already collected; and

D. estimates of induced developments, including:

1. the extent to which the facility would create or add to the need for expanded utility or public services;

2. the work force required for construction and for operation of the facility;

3. the amount of water which would be appropriated and the amount which would be consumed by the facility, the expected source of the water, and the use(s) for the water;

4. a discussion of the effects on agricultural operations, including the number of farms and the number of acres of cropland and pasture land that would be affected by construction of the pipeline, the number of drainage ditches that would be affected, and the efforts that would be used to mitigate effects on production (e.g., segregating topsoil, avoiding soil compaction, providing adequate depth of cover); and

5. the number of people who would have to relocate if the facility were constructed.

§ 2.1151 Description of proposed nuclear fuel processing facility. Each application for a nuclear fuel processing facility shall contain the following information:

A. a physical description of the facility, including:

1. its location, to the fullest extent known;

2. the required land area, the height of the tallest

structures, and, if applicable, the depth and size of any underground caverns;

3. its design capacity in tons per year of input material; and

4. a schematic drawing showing major components of the facility;

B. data regarding design and construction of the facility, including:

1. if known, the complete name and business address of the engineer and firm that would be responsible for the design of the facility;

2. if known, the complete name and business address of the company which would construct the facility;

3. the proposed date for commencing construction and the proposed in-service date;

4. the estimated installed cost of the facility in current dollars; and

5. the estimated economic life of the facility;

C. data regarding operation of the facility, including:

1. a narrative description of the steps of the process;

2. the ~~types, amounts, and~~ sources and amounts of input materials that would be processed by the facility during operation at the design capacity, including uranium, plutonium and structural metals in tons per year and fission product nuclides in curies per year ~~and the method(s) of transporting these materials to the facility~~;

3. the types and amounts of output materials from the processing facility during operation at the design capacity ~~and the method(s) of transporting or disposing of these materials~~;

4. the projected annual operating and maintenance costs in current dollars for each of the first five calendar years of operation;

5. the methods that would be used to transport materials to and from the facility;

~~5~~6. the projected types and amounts of energy products that would be consumed during operation at the design capacity;

~~6~~7. the expected average percentage of use of the full design capacity for each of the first five calendar years of operation; and

~~7~~8. a discussion of the maintenance requirements of the facility, including the estimated impact on production.

§ 2.1152 Alternatives. Each application for a nuclear fuel processing facility shall contain a description of alternatives available to the applicant which differ significantly from the proposed facility with respect to location, size, timing, or design. The description of each alternative shall include the following information, if applicable:

A. the location of the facility, to the fullest extent known;

B. the required land area, the height of the tallest structures and, if applicable, the depth and size of any underground caverns;

C. its design capacity in the appropriate units of measure;

D. a schematic drawing showing major components of the facility;

E. the probable date for commencing construction and the probable in-service date;

F. the estimated installed cost of the alternative in current dollars;

G. the estimated economic life of the facility;

H. the sources and amounts of input materials that would be processed by the facility, including uranium, plutonium, structural metals and fission products, and the products that would be produced;

I. the projected annual operating and maintenance costs in current dollars for each of the first five calendar years of operation;

J. the methods that would be used to transport materials to and from the facility;

K. the projected types and amounts of energy products that would be consumed during operation at the design capacity;

L. the estimated average percentage of use of the full design capacity for each of the first five years of operation;

M. a discussion of the maintenance requirements of the facility, including the estimated impact on production; and

N. the reason(s) why the alternative was rejected.

§ 2.1153 Historical and forecast data. Each applicant for a nuclear fuel processing facility shall provide five years of historical data, as well as a forecast of demand through the forecast years. The following information shall be included:

A. the amount of each input material, in tons per year, produced nationally and the amount produced within Minnesota during each of the last five calendar years preceding the year of application;

B. for each of the last five calendar years preceding

the year of application, the year-end capacity within Minnesota and within the United States, in tons of input material per year, to process the materials listed in response to 6 MCAR § 2.1153 A;

C. an estimate of the amount of each input material expected to be produced nationally (including, if applicable, spent fuel from foreign reactors which use uranium supplied by the United States) and within Minnesota during the first six forecast years, the eleventh forecast year (the tenth year after the year of application), and the sixteenth forecast year;

D. a discussion of the methodology, statistical techniques, and data bases used in providing the forecast data required by 6 MCAR § 2.1153 C;

E. a list of known facilities to be added in the United States during the forecast years, including locations, in-service dates, and design capacities, for processing the same types of materials that would be processed by the proposed facility; and

F. any major assumptions made in supplying the information required by 6 MCAR § 2.1153 A through D, and a discussion of the sensitivity of the information to changes in the assumptions.

§ 2.1154 Environmental data. Each applicant shall provide environmental data for the proposed facility and for each alternative facility described in response to 6 MCAR § 2.1152. The following information relating to construction and operation of each of these facilities shall be provided, to the extent that such information is reasonably available to the applicant and applicable to the particular alternative:

A. a description of each alternative site, including:

1. the nature of the terrain at the site;

2. the general soil type(s) at the site;

3. the type(s) and depth(s) of bedrock underlying the site;

4. the depth to groundwater at the site;

5. the types of vegetation (forest, brush, marsh, pasture, and cropland) on the site, and the approximate percentage of each;

6. the predominant types of land use (such as residential, forest, agriculture, commercial, and industrial) within five miles of the site, and the approximate percentage of each;

7. lakes, streams, wetlands or drainage ditches within five miles of the site and any other lakes, streams, wetlands, drainage ditches, wells or storm drains into which liquid contaminants from the site could flow;

8. trunk highways, airports, and air traffic corridors within five miles of the site;

9. national natural landmarks, national wilderness areas, national wildlife refuges, national wild and scenic rivers, national parks, national forests, national trails, and national waterfowl production areas within five miles of the site, as mapped on the Inventory of Significant Resources by the State Planning Agency;

10. state critical areas, state wildlife management areas, state scientific and natural areas, state wild, scenic and recreational rivers, state parks, state scenic wayside parks, state recreational areas, state forests, state trails, state canoe and boating rivers, state zoo, designated trout streams, and designated trout lakes within five miles of the site, as mapped on the Inventory of Significant Resources by the State Planning Agency;

11. national historic sites and landmarks, national monuments, National Register Historic Districts, registered state historic or archaeological sites, state historical

districts, sites listed on the National Register of Historic Places, and any other Cultural Resources within five miles of the site, as indicated by the Minnesota Historical Society; ~~and~~

12. areas within five miles of the site designated by regional or local authorities as having recreational, cultural, historical, or scientific significance, as indicated by local units of government; and

13. the estimated total population within fifty miles of the site, and a map showing the distribution of the population within fifty miles of the site;

B. data on wastes and emissions associated with construction or operation of the facility, including:

1. the types and estimated amounts of solid, liquid, and gaseous radioactive wastes that would be produced by the facility, and the level of radioactivity of each in curies per year;

2. an analysis of human exposure to ionizing radiation attributable to operation of the facility, taking account of the pathways of radioactive releases to man;

3. the types and estimated amounts of nonradioactive solid and liquid wastes that would be produced;

4. the types and estimated amounts of nonradioactive gaseous and particulate emissions into the air that would occur during full operation from each emission source, and the location and nature of the release point;

5. locations which may be sources of fugitive dust and the nature of each source;

6. the nature and estimated amount of nonradioactive discharges to water, and the locations, routes and final receiving waters for any discharge points;

7. any area from which runoff may occur, potential sources of contamination in the area, and receiving waters for any runoff;

8. the sources and estimated amounts of heat rejected by the facility; and

9. the maximum noise levels (in decibels, A scale) expected at the property boundary and the expected maximum increase over ambient noise levels;

C. data regarding pollution control and safeguards equipment, including:

1. the provisions that would be made for management of radioactive materials;

2. a description of contingency plans to reduce the effects of an accidental release to radioactive materials;

3. the methods that would be used to recycle or dispose of solid or liquid wastes;

4. the types of emission control devices and dust control measures that would be used;

5. the types of water pollution control equipment and runoff control measures that would be used;

6. the measures that would be taken to prevent spills or leaks of pollutants, or to minimize the effects of spills or leaks on the environment;

7. the methods that would be used to reduce the effects of heat rejected by the facility;

8. any other equipment or measures, including noise control or erosion control, that would be used to reduce the effects of the facility on the environment; and

9. the types of environmental monitoring, if any, that are planned for the facility and a description of any relevant environmental monitoring data already collected; and

D. estimates of induced developments, including:

1. the types and amounts of vehicular traffic that would be generated by the facility due to construction activity and, later, to operational needs;

2. the work forces required for construction and

for operation of the facility;

3. the extent to which the facility would create or add to the need for expanded utility or public services, including high voltage transmission lines, access roads, and the like;

4. the amount of water which would be appropriated and the amount which would be consumed by the facility, the expected source of the water and the use(s) for the water;

5. the amount of agricultural land, including pasture land, that would be removed from agricultural use if the facility were constructed, and known circumstances associated with the facility that could lead to reduced productivity of surrounding agricultural land; and

6. the number of people that would have to relocate if the facility were constructed.

§ 2.1156 Description of proposed nuclear waste or disposal facility. Each application for a nuclear waste storage or disposal facility shall contain the following information;

A. a physical description of the facility, including:

1. its location, to the fullest extent known;

2. the required land area, the height of the tallest structures and, if applicable, the depth and size of any underground caverns;

3. its design capacity in cubic metres; and

4. a schematic drawing showing major components of the facility;

B. data regarding design and construction of the facility, including:

1. if known, the complete name and business address of the engineer and firm that would be responsible for the design of the facility;

2. if known, the complete name and business address

of the company which would construct the facility;

3. the proposed date for commencing construction and the proposed in-service date;

4. a description of the construction techniques;

5. the estimated installed cost of the facility in current dollars; and

6. the estimated economic life of the facility; and

C. data regarding operation of the facility, including:

1. a narrative description of the steps of the storage or disposal process, starting at the point the nuclear wastes are produced;

2. the sources, types, and amounts of nuclear waste products that would be stored, the method(s) of transporting these materials to the facility, and the level of radioactivity of each in curies per year;

3. if the facility is only for temporary storage, the length of time material would be stored there and the method of transporting the material to its disposal site; and

4. the expected maintenance requirements of the facility, if any.

§ 2.1157 Alternatives. Each application for a nuclear waste storage or disposal facility shall contain a description of alternatives available to the applicant which differ significantly from the proposed facility with respect to location, size, timing or design. The description of each alternative shall include the following information, if applicable:

A. the location of the facility, to the fullest extent known;

B. the required land area, the height of the tallest structures and, if applicable, the depth and size of any underground caverns;

C. its design capacity in the appropriate units of measure;

D. a schematic drawing showing major components of the facility;

E. the probable date for commencing construction and the probable in-service date;

F. the estimated installed cost of the alternative in current dollars;

G. the sources, types, and amounts of nuclear waste products that would be involved in the alternative, the method(s) of transporting these materials, and the level of radioactivity of each in curies per year;

H. the estimated maintenance requirements of the alternative;

I. the estimated economic life of the facilities involved in the alternative; and

J. the reason(s) why the alternative was rejected.

§ 2.1158 Historical and forecast data. Each applicant for a nuclear waste storage or disposal facility shall provide five years of historical data, as well as a forecast of demand through the forecast years. The following information shall be included:

A. for each material that would be stored in the proposed facility, the amount (in cubic metres) produced nationally and within Minnesota during each of the last five calendar

years preceding the year of application;

B. for each of the last five calendar years preceding the year of application, the year-end capacity (in cubic metres) within Minnesota and within the United States to store the materials listed in response to 6 MCAR § 2.1158 A;

C. an estimate of the amount (in cubic metres) of each material listed in response to 6 MCAR § 2.1158 A expected to be produced nationally and within Minnesota during the first six forecast years, the eleventh forecast year (the tenth year after the year of application), and the sixteenth forecast year;

D. a list of known facilities to be added in the United States during the forecast years, including locations, design capacities (in cubic metres), and in-service dates, for storing the same types of materials that would be stored in the proposed facility;

E. the expected years during which the material stored in the proposed facility would reach 10 percent, 25 percent, 50 percent, and 100 percent of ththe capacity of the facility;

F. a discussion of the methodology, statistical techniques, and data bases used in providing the forecast data required by 6 MCAR § 2.1158 C and E; and

G. any major assumptions made in supplying the information required by 6 MCAR § 2.1158 A through E, and a discussion of the sensitivity of the information to changes in the assumptions.

§ 2.1159 Environmental data. Each applicant shall provide environmental data for the proposed facility and for each alternative facility described in response to 6 MCAR § 2.1157. The following information relating to construction and operation of each of these facilities shall be provided to the extent that such information is reasonably available to the

applicant and applicable to the particular alternative:

A. a description of each alternative site, including:

1. the nature of the terrain at the site;

2. the general soil type(s) at the site;

3. the type(s) and depth(s) of bedrock underlying the site;

4. the depth to groundwater at the site;

5. the types of vegetation (forest, brush, marsh, pasture, and cropland) on the site, and the approximate percentage of each;

6. the predominant types of land use (such as residential, forest, agricultural, commercial, and industrial) within five miles of the site, and the approximate percentage of each;

7. lakes, streams, wetlands or drainage ditches within five miles of the site and any other lakes, streams, wetlands, drainage ditches, wells or storm drains into which liquid contaminants from the site could flow;

8. trunk highways, airports, and air traffic corridors within five miles of the site;

9. national natural landmarks, national wilderness areas, national wildlife refuges, national wild and scenic rivers, national parks, national forests, national trails, and national waterfowl production areas within five miles of the site, as mapped on the Inventory of Significant Resources by the State Planning Agency;

10. state critical areas, state wildlife management areas, state scientific and natural areas, state wild, scenic and recreational rivers, state parks, state scenic wayside parks, state recreational areas, state forests, state trails, state canoe and boating rivers, state zoo, designated trout streams, and designated trout lakes within five miles of the site, as mapped on the Inventory of Significant Resources by

the State Planning Agency;

11. national historic sites and landmarks, national monuments, National Register Historic Districts, registered state historic or archaeological sites, state historical districts, sites listed on the National Register of Historic Places, and any other cultural resources within five miles of the site, as indicated by the Minnesota Historical Society; ~~and~~

12. areas within five miles of the site designated by regional or local authorities as having recreational, cultural, historical, or scientific significance, as indicated by local units of government; and

13. the estimated total population within fifty miles of the site, and a map showing the distribution of the population within fifty miles of the site;

B. data on wastes and emissions associated with construction or operation of the facility, including:

1. the types and estimated amounts of solid, liquid, and gaseous radioactive wastes that would be produced by the facility, and the level of radioactivity of each in curies per year;

2. an analysis of human exposure to ionizing radiation attributable to operation of the facility, taking account of the pathways of radioactive releases to man;

3. the types and estimated amounts of nonradioactive solid and liquid wastes that would be produced;

4. the types and estimated amounts of nonradioactive gaseous and particulate emissions into the air that would occur during full operation from each emission source, and the location and nature of the release point;

5. locations which may be sources of fugitive dust and the nature of each source;

6. the nature and estimated amount of nonradio-

active discharges to water, and the locations, routes and final receiving waters for any discharge points;

7. any area from which runoff may occur, potential sources of contamination in the area, and receiving waters for any runoff;

8. the sources and estimated amounts of heat rejected by the facility; and

9. the maximum noise levels (in decibels, A scale) expected at the property boundary and the expected maximum increase over ambient noise levels;

C. data regarding pollution control and safeguards equipment, including:

1. the provisions that would be made for management of radioactive materials;

2. a description of contingency plans to reduce the effects of an accidental release of radioactive materials;

3. the methods that would be used to recycle or dispose of solid or liquid wastes;

4. the types of emission control devices and dust control measures that would be used;

5. the types of water pollution control equipment and runoff control measures that would be used;

6. the measures that would be taken to prevent spills or leaks of pollutants, or to minimize the effects of spills or leaks on the environment;

7. the methods that would be used to reduce the effects of heat rejected by the facility;

8. any other equipment or measures, including noise control or erosion control, that would be used to reduce the effects of the facility on the environment; and

9. the types of environmental monitoring, if any, that are planned for the facility and a description of any

relevant environmental monitoring data already collected; and

D. estimates of induced developments, including:

1. the types and amounts of vehicular traffic that would be generated by the facility due to construction activity and, later, to operational needs;

2. the work forces required for construction and for operation of the facility;

3. the extent to which the facility would create or add to the need for expanded utility or public services, including high voltage transmission lines, access roads, and the like;

4. the amount of water which would be appropriated and the amount which would be consumed by the facility, the expected source of the water and the use(s) for the water;

5. the amount of agricultural land, including pasture land, that would be removed from agricultural use if the facility were constructed, and known circumstances associated with the facility that could lead to reduced productivity of surrounding agricultural land; and

6. the number of people that would have to relocate if the facility were constructed.

~~§ 2.1181 Other facilities.~~

~~A. Any applicant for certification of a large energy facility other than those specifically covered by the foregoing rules or by other Agency rules (that is, 6 MCAR §§ 2.0601 - 2.0641, 2.0701 - 2.0791, 2.0801 - 2.0881, 2.0901 - 2.0981, or 2.1001 - 2.1091) shall comply with this rule as to substantive content of the application. The need for that facility will be assessed by the criteria stated in 6 MCAR § 2.1111.~~

~~B. An application submitted pursuant to this rule shall contain at least four data sections in addition to the information required by 6 MCAR § 2.1121 A. Those sections shall be, respectively, a description of the proposed facility; a~~

~~description of alternatives to the proposed facility, historical and forecast data, and environmental data. The specific data requirements shall be requested of the director by the prospective applicant in a written request which shall contain a general description of the proposed facility. The director shall respond to the request within 30 days of receipt by supplying to the prospective applicant an express listing of the specific data requirement for the four sections. Following receipt of that listing, the prospective applicant may elect to follow the provisions of 6 MCAR § 2.1103 H.~~

§ 2.1186 Other data filed with the application. In addition to the information required by these rules, an applicant may file additional data if it believes that such data is relevant to the director's decision.

~~§ 2.1191 Certificate of need modifications.~~

~~A. Issuance of a certificate of need may be made contingent upon modifications specified by the director.~~

~~B. The following changes in a facility previously certified by the director shall not require recertification:~~

~~1. capacity additions or subtractions of less than ten (10) percent of the capacity approved by the director; and~~

~~2. changes of less than two years in the in-service date.~~

~~C. If an applicant determines that a change greater or other than those specified by 6 MCAR § 2.1191 B is necessary or desirable, it shall inform the director of the desired change, accompanied by a written statement detailing the reasons for the proposed change. The director shall evaluate these reasons and within 45 days of receipt of said statement notify the applicant whether the proposed change is acceptable without recertification.~~

APPROVED AS TO FORM AND LEGALITY
OCT. 23 1978
WARREN SPANNAUS, ATTORNEY GENERAL
BY Lee E. Sheehy
SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
OCT 24 1978
Joan Anderson Growe
Secretary of State
1:05 pm

#474 Energy Agency - 6 MCAR §§ 2.101-2.1191

RULES REVIEW CHECKLIST

DATE RULES RECEIVED 9-29 Temporary Rule No

Resubmitted and Received _____

DUE DATE 10-9

a. Returned to Agency w/o filing w/Secy of State _____
b. Approved _____ Date Sent Back to Agency _____

- -

1. Rules as Adopted ✓
2. Rules as Proposed ✓
3. Certificate of Board's Authorizing Resolution, where applicable N.A.
4. Order for Hearing ✓
5. Notice of Hearing ✓
   (i) Sufficiency ✓
6. Secretary of State's List ✓
7. Certificate of Acquisition of Secretary of State's List ✓
8. Affidavit of Mailing ✓
   (i) At least 30 days prior to hearing ✓
9. Statement of Need and Evidence ✓
10. Hearing Examiner's Report ✓
11. Agency's Findings of Fact ✓
12. Certificate of Board's Resolution Adopting Rules, where applicable _____
13. Order Adopting ✓
14. Report of Chief Hearing Examiner ✓
    (i) Finding of No Substantial Change ✓
    (ii) Permission to Incorporate by Reference, where applicable N.A.
15. Certificate of Compliance with Rulemaking Procedures ✓
16. Copy of Notice of Intent to Solicit Outside Opinion, where applicable N.A.
17. Petition by Public, where applicable N.A.

① typo p. 6

② HE p. 15 - no affirm finding ⊖ # of copies
Agency finding re 3 rebuts

③ ~~HE~~ p. 16 - subst. chg. finding
Agency dropped amendment

④ HE p. 21 - no affirm present. of fact ⊖
Chief HE disagreed alt. neg.
& so did I

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL
ST. PAUL 55155

WARREN SPANNAUS
ATTORNEY GENERAL

September 29, 1978

TELEPHONE
(612) 296-6196

Lee E. Sheehy
Special Assistant Attorney General
Department of Administration
G-25 State Administration Building
50 Sherburne Avenue
St. Paul, Minnesota 55155

RE: In the Matter of the Proposed Adoption of Rules of the Minnesota Energy Agency Governing Contents of Applications for Certificates of Need and Criteria for Assessment of Need for Fuel Conversion Facilities, Coal Slurry or Coal Liquids Pipelines, Nuclear Fuel Processing Facilities and Nuclear Waste Storage or Disposal Facilities, 6 MCAR §§ 2.1101-2.1191.

Docket No. EA-78-003-WS

Dear Mr. Sheehy:

Enclosed pursuant to Minn. Stat. § 15.0412, subd. 4 (Supp. 1977) and Minn. Regs. Atty. Gen. 301 et seq. is the entire record of the above-captioned proceeding.

I understand that your mandate is to act within twenty days, but after ten days. In this case the Agency is aware of at least one potential certificate of need applicant who is awaiting the effectiveness of the proposed rules. If you could act as soon as possible after the ten days during which you cannot act, the Agency would be grateful.

Thank you for considering this request for expedition.

Sincerely,

Dwight S. Wagenius

DWIGHT S. WAGENIUS

Special Assistant Attorney General

720 American Center Building
150 East Kellogg Boulevard
St. Paul, Minnesota 55101
(612) 296-8278

DSW/bm

Enclosure

AN EQUAL OPPORTUNITY EMPLOYER

STATE OF MINNESOTA

MINNESOTA ENERGY AGENCY

In the Matter of the Proposed Adoption of Rules of the Minnesota Energy Agency Governing Contents of Applications for Certificates of Need and Criteria for Assessment of Need for Fuel Conversion Facilities, Coal Slurry or Coal Liquids Pipelines, Nuclear Fuel Processing Facilities and Nuclear Waste Storage or Disposal Facilities, 6 MCAR §§ 2.1101-2.1191.	)	Docket No. EA-78-003-WS **STATEMENT OF COMPLIANCE WITH MANUAL OF RULEMAKING PROCEDURES**

I, Special Assistant Attorney General Dwight S. Wagenius, 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~~ have been followed.

DATED: September 29, 1978.

DWIGHT S. WAGENIUS
Special Assistant Attorney General

ADMIN 1000 (Rev. 1/78)

STATE OF MINNESOTA

DEPARTMENT Attorney General

Office Memorandum

TO : Lee Sheehy
Special Assistant Attorney General
Department of Administration

DATE: 10/10/78

FROM : Dwight S. Wagenius
Special Assistant Attorney General
Minnesota Energy Agency

PHONE: 8278

SUBJECT: **Energy Agency Adopted Rules 6 MCAR §§ 2.1101-.1191**
Docket No. EA-78-003-WS

As I indicated to you in our telephone conversation this morning, there is a typographical error in the filed copies of the subject adopted rules. The error appears in the sixth line of rule 1104 0, on page 6 of the rules.

The Hearing Examiner recommended that the words "on the site" be deleted from the proposed rule. The Director accepted that recommendation. The filed copies of the adopted rules erroneously make it appear that the words "on the site" were inserted rather than deleted.

As you suggested, I have attached copies of a corrected page six for insertion into the filed copies of the adopted rules.

DSW/bm

Attachment

RECEIVED
OCT 10 1978
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

STATE OF MINNESOTA

MINNESOTA ENERGY AGENCY

In the Matter of the Proposed Adoption of Rules of the Minnesota Energy Agency Governing Contents of Applications for Certificates of Need for Fuel Conversion Facilities, Coal Slurry or Coal Liquids Pipelines, Nuclear Fuel Processing Facilities and Nuclear Waste Storage or Disposal Facilities, 6 MCAR §§ 2.1101-2.1191.	)	Docket No. EA-78-003-WS **ORDER ADOPTING RULES**

The above-entitled matter came on for hearing before William Seltzer of the Minnesota Office of Hearing Examiners for the director of the Minnesota Energy Agency at 9:30 a.m. on May 4, 1978, in Conference Room "D", of the Veterans Service Building, Saint Paul, Minnesota. Proper notice required by Minn. Stat. § 15.0412 (Supp. 1977) was served upon all persons, associations, and other interested groups registered with the Secretary of State for that purpose.

After affording interested persons an opportunity to present written and oral data, statements and arguments, having considered all the evidence adduced, and upon the records, files and proceedings herein, and applicable statutory standards or criteria, and having confirmed the need for the above-captioned rules and the reasonableness thereof,

NOW, THEREFORE, IT IS ORDERED that the rules identified as 6 MCAR §§ 2.1101-2.1186 are adopted this 22nd day of September, 1978, pursuant to authority vested in me by Minn. Stat. §§ 116H.08(a), 116H.13 (1976).

STATE OF MINNESOTA
MINNESOTA ENERGY AGENCY



JOHN P. MILLHONE
Director

EA-78-003-OS

STATE OF MINNESOTA

MINNESOTA ENERGY AGENCY

RECEIVED
MAR 17 1978
OFFICE OF HEARING EXAMINERS

In the Matter of the Proposed Adoption of Rules of the Minnesota Energy Agency Governing Contents of Applications for Certificates of Need and Criteria for Assessment of Need for Fuel Conversion Facilities, Coal Slurry or Coal Liquids Pipelines, Nuclear Fuel Processing Facilities, and Nuclear Waste Storage or Disposal Facilities, 6 MCAR §§ 2.1101-2.1191.

ORDER FOR HEARING

IT IS HEREBY ORDERED that a public hearing on the above-captioned rules be held in Room D of the Veterans Service Building, 20 West 12th Street and Columbus Avenue between Wabasha and Iglehart, Saint Paul, on May 4, 1978, commencing at 9:30 a.m. and continuing until all persons have had an opportunity to be heard.

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.

Dated: March 17, 1978

John P. Millhone
Director

RECEIVED
APR 7 1978
OFFICE OF HEARING EXAMINERS

STATE OF MINNESOTA

MINNESOTA ENERGY AGENCY

In the Matter of the Proposed Adoption of Rules of the Minnesota Energy Agency Governing Contents of Applications for Certificates of Need and Criteria for Assessment of Need for Fuel Conversion Facilities, Coal Slurry or Coal Liquids Pipelines, Nuclear Fuel Processing Facilities, and Nuclear Waste Storage or Disposal Facilities, 6 MCAR §§ 2.1101-2.1191.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a public hearing in the above entitled matter will be held in Room D of the Veterans Service Building, Saint Paul, Minnesota 55155 on May 4, 1978, commencing at 9:30 a.m. and continuing until all persons have had an opportunity to be heard.

All interested or affected persons will have an opportunity to participate. Statements may be made orally and written materials may be submitted at the hearing. In addition, written materials may be submitted by mail to William Seltzer, Office of Hearing Examiners, Room 300, 1745 University Avenue, St. Paul, Minnesota 55104, telephone 612/296-8105, either before the hearing or for five working days after the public hearing ends, or for a longer period not to exceed 20 days if ordered by the Hearing Examiner.

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 also 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 notified, you may so indicate at the hearing or by written request sent to the Hearing Examiner prior to the close of the record.

The proposed rules, if adopted, would establish the contents of applications for certificates and criteria for assessment of need for fuel conversion facilities, coal slurry or coal liquids pipelines, nuclear fuel processing facilities, and nuclear waste storage or disposal facilities. The rules would also specify the criteria for assessment of need for all large energy facilities not covered by these proposed rules or by any other certificate of need rules promulgated by the Agency. After the assessment of need criteria have been promulgated, no large energy facility covered by these rules shall be sited or constructed in Minnesota without the issuance of a Certificate of Need by the Director of the Minnesota Energy Agency.

Copies of the proposed rules are now available and one free copy may be obtained by writing to the Minnesota Energy Agency, 720 American Center Building, 150 East Kellogg Boulevard, St. Paul, Minnesota 55101. Copies will also be available at the door on the date of the hearing. The Agency's authority to promulgate the proposed rules is contained in Minn. Stat. §§ 116H.08(a) and 116H.13 (1976).

Notice is hereby given that 25 days prior to the hearing a statement of need and reasonableness will be available for review at the Agency and at the Office of Hearing Examiners. This statement of need and reasonableness will include a summary of all of the evidence which will be presented by the Agency at the hearing justifying both the need for and the reasonableness of the proposed rules. Copies of the statement of need and reasonableness may be obtained from the Office of Hearing Examiners at a minimal charge.

Please be advised that Minnesota Statutes, chapter 10A, requires each lobbyist to register with the Ethical Practices Board within five days after he commences lobbying. Lobbying includes attempting to influence rulemaking by communicating or urging others 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 five 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, telephone 612/296-5615.

Dated: March 17, 1978

John P. Millhone
Director

STATE OF MINNESOTA

MINNESOTA ENERGY AGENCY

In the Matter of the Proposed Adoption of Rules of the Minnesota Energy Agency Governing Contents of Applications for Certificates of Need and Criteria for Assessment of Need for Fuel Conversion Facilities, Coal Slurry or Coal Liquids Pipelines, Nuclear Fuel Processing Facilities and Nuclear Waste Storage or Disposal Facilities, 6 MCAR §§ 2.1101-2.1191.	CERTIFICATE OF DELIVERY SECRETARY OF STATE LIST

I hereby certify that the attached 483 labels and 2 sheet(s) constitute the complete list of persons, associations, and interested groups who as of 1:30 o'clock P.M., this 3rd day of April, 1978, have requested pursuant to Minn. Stat. § 15.0412 (Supp. 1977) that their names be placed on file with the Secretary of State for the purpose of receiving notice of public hearing on proposed rules on the subject captioned above.

JOAN ANDERSON GROWE
Secretary of State
State of Minnesota

By Cheri L. Mattson

STATE OF MINNESOTA

MINNESOTA ENERGY AGENCY

In the Matter of the Proposed Adoption of Rules of the Minnesota Energy Agency Governing Contents of Applications for Certificates of Need and Criteria for Assessment of Need for Fuel Conversion Facilities, Coal Slurry or Coal Liquids Pipelines, Nuclear Fuel Processing Facilities and Nuclear Waste Storage or Disposal Facilities, 6 MCAR §§ 2.1101-2.1191.	AFFIDAVIT OF MAILING

Karla V. Sand, being first duly sworn upon oath, deposes and says:

That on the 4th day of April, 1978, at the City of Saint Paul, County of Ramsey, State of Minnesota, she served the attached Notice of Hearing by depositing in the United States mail a true and correct copy thereof, properly enveloped, with first class postage prepaid, to all persons and associations at the addresses listed in the attached Certificate of the Secretary of State.

Karla V. Sand

Subscribed and sworn to before me this 7th day of April, 1978.

Beverly Wilbur
Notary Public

BEVERLY WILBUR
NOTARY PUBLIC — MINNESOTA
RAMSEY COUNTY
My Commission Expires Nov. 13, 1981

STATE OF MINNESOTA

MINNESOTA ENERGY AGENCY

In the Matter of the Proposed Adoption of Rules of the Minnesota Energy Agency Governing Contents of Applications for Certificates of Need and Criteria for Assessment of Need for Fuel Conversion Facilities, Coal Slurry or Coal Liquids Pipelines, Nuclear Fuel Processing Facilities and Nuclear Waste Storage or Disposal Facilities, 6 MCAR §§ 2.1101-2.1191.	AFFIDAVIT OF RECEIPT OF THE SECRETARY OF STATE'S MAILING LIST

David L. Jacobson, being first duly sworn upon oath, deposes and says:

1) That he is an employee of the Minnesota Energy Agency of the State of Minnesota.

2) That on the 29th day of March, 1978, he made of the Office of the Secretary of State of the State of Minnesota a request for a current list of all representatives of 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 (Supp. 1977).

3) That on the 3rd day of April, 1978, in response to the above request, the Secretary of State provided him with such a list, a copy of which is attached hereto and incorporated by reference herein.

Further affiant sayeth not.

David L. Jacobson

Subscribed and sworn to before me this 7th day of April, 1978.

Beverly Wilbur
Notary Public

BEVERLY WILBUR
NOTARY PUBLIC — MINNESOTA
RAMSEY COUNTY
My Commission Expires Nov. 13, 1981

RECEIVED
MAR 17 1978
OFFICE OF HEARING
EXAMINERS

PROPOSED

MINNESOTA ENERGY AGENCY RULES

GOVERNING CONTENTS OF APPLICATIONS

FOR CERTIFICATES OF NEED AND

CRITERIA FOR ASSESSMENT OF NEED FOR

FUEL CONVERSION FACILITIES, COAL

SLURRY OR COAL LIQUIDS PIPELINES, NUCLEAR FUEL

PROCESSING FACILITIES AND NUCLEAR

WASTE STORAGE OR DISPOSAL FACILITIES

Chapter 11

§§ 2.1101 - 2.1191

§ 2.1101 Purpose of rules. The purpose of these rules is to specify the contents of applications for certificates of need and to specify criteria for assessment of need pursuant to Minnesota Statutes section 116H.13 for fuel conversion facilities, coal slurry or coal liquids pipelines, nuclear fuel processing facilities, nuclear waste storage or disposal facilities, and all other large energy facilities not specifically covered by 6 MCAR §§ 2.0601 - 2.0641, 2.0701 - 2.0791, 2.0801 - 2.0881, 2.0901 - 2.0981, or 2.1001 - 2.1091.

§ 2.1102 Applicability of rules.

A. Each person applying for a certificate of need to construct one of the following types of large energy facilities pursuant to these rules shall provide all information required by these rules:

1. a new fuel conversion facility;

2. any project which, within a period of two years, would expand the design capacity of an existing fuel conversion facility by at least 25 tons per hour of input material;

3. a new coal slurry or coal liquids pipeline;

4. any project which, within a period of two years, would expand the design throughput of an existing coal slurry pipeline by at least 1000 tons of coal or coal derivatives per day;

5. any project which, within a period of two years, would expand the design throughput of an existing coal liquids pipeline by at least 15,000 barrels per day;

6. a new nuclear fuel processing facility;

7. any project which, within a period of two years, would expand the design output of an existing nuclear fuel processing facility by at least 20 percent;

8. a new nuclear waste storage or disposal facility;

9. any project which, within a period of two years, would expand the design capacity of an existing nuclear waste storage or disposal facility by at least 20 percent; and

10. any large energy facility or equivalent expansion other than those given by 6 MCAR § 2.1102 A 1 through 9 or specifically covered by 6 MCAR §§ 2.0601 - 2.0641, 2.0701 - 2.0791, 2.0801 - 2.0881, 2.0901 - 2.0981, or 2.1001 - 2.1091.

B. Exception. The following types of facilities shall not be subject to these rules:

1. any large energy facility on which construction has begun or has been completed by the effective date of these rules;

2. any nuclear waste storage or disposal facility to be constructed in conjunction with a large generating facility which itself requires a certificate of need, unless the total capacity of that storage facility is not covered by the certificate of need issued for the large electric generating facility and associated facilities; and

3. any facility covered by Minn. Stat. §§ 116C.71-.74 (Supp. 1977), unless expressly authorized by the legislature.

§ 2.1103 Application procedures and timing.

A. Each application for a certificate of need pursuant to these rules shall be submitted in the form and manner prescribed by these rules.

B. A minimum of seven (7) bound copies and one (1) unbound copy of the application shall be filed with the director. The director may require additional copies, not to exceed one

hundred (100) copies total. All documents, forms, and schedules filed with the application shall be typed on 8 1/2" x 11" paper except for drawings, maps, and similar materials. Each application shall contain a title page and a complete table of contents which includes the applicable rule by the titles and numbers given in these rules. The date of preparation and the applicant's name shall appear on the title page, as well as on each document filed with the application.

C. Subsequent to the filing of an application, any changes or corrections to the application shall comply with rule 6 MCAR § 2.1103 B as to the number of copies and size of documents. In addition, each page of a change or correction to a previously filed page shall be marked with the word "REVISED" and with the date the revision was made. The original copy of the changes or corrections shall be filed with the hearing examiner, and the remaining copies shall be submitted to the director.

D. Each application for a certificate of need shall be accompanied by a cover letter signed by an authorized officer or agent of the applicant. The cover letter shall specify the type of facility for which a certificate of need is requested and the number of copies of the application filed.

E. A hearing examiner shall be assigned, and a public hearing shall be scheduled to commence no later than eighty days after the receipt of the application, in accordance with Minnesota Energy Agency Rules Governing Certificate of Need Program, 6 MCAR § 2.0500 et seq., and the Hearing Examiner Rules for Contested Case Procedures, 9 MCAR § 2.201 et seq.

F. A decision on an application for a certificate of need shall be made by the director no later than six months from the receipt of the application, provided that the application as received is substantially complete.

G. The director shall notify the applicant within 15 days of the receipt of an application if the application is

not substantially complete. Upon such notification, the applicant may correct any deficiency and may resubmit the application. A decision shall be made upon the revised application within six months of the date of resubmission, assuming it is then substantially complete.

H. Prior to the submission of an application, a person may be exempted from any data requirement of these rules upon a written request to the director for exemption from specified rules and a showing by that person in the request that the data requirement (1) is unnecessary to determine the need for the proposed facility or (2) may be satisfied by submission of another document. A request for exemption shall be filed at least 20 days prior to submission of an application. The director shall respond in writing to each such request within 15 days of receipt, including reasons for the decision. The director shall file a statement of exemptions granted and reasons therefor prior to commencement of the hearings.

I. When an application for a certificate of need is denied, the director shall state the reason(s) for the denial.

§ 2.1104 Definitions. For purposes of these rules, the following definitions shall apply:

A. "Agency" means the Minnesota Energy Agency;

B. "Applicant" means the person or persons submitting a certificate of need application;

C. "Application" means a document, the contents of which are described in these rules, submitted to the director for the purpose of obtaining a certificate of need;

D. "Barrel" means that quantity of liquid equaling 42 gallons (159.0 litres);

E. "Btu" means British thermal unit, a common unit of energy measurement which is used in these rules for comparative purposes;

F. "Coal liquids pipeline" means any pipeline greater than six inches (15.2 centimetres) in diameter and having more than 50 miles (80.4 kilometres) of its length in Minnesota used for the transportation of liquids derived from coal;

G. "Coal slurry pipeline" means any pipeline greater than six inches (15.2 centimetres) in diameter and having more than 50 miles (80.4 kilometres) of its length in Minnesota used for the transportation of coal or any solid derivative thereof;

H. "Demand" means that quantity of products or services from the applicant's facilities for which there are willing and able purchasers;

I. "Director" means the director of the Agency;

J. "Energy product" means any fuel or other natural resource that may be used to provide energy;

K. "Expansion" means an increase in the capacity of an existing large energy facility, accomplished by one or more methods, including, but not limited to, increasing the size of the facility, using new or different technology, or adding pumping stations;

L. "Firm contract customers" means customers served under schedules or contracts which neither anticipate nor permit interruption unless a state of emergency exists;

M. "Forecast" means a projection of future demand for some specified time period;

N. "Forecast years" means the sixteen-year period consisting of the year of application plus the next fifteen years;

O. "Fuel conversion facility" means any facility intended to convert coal, peat, wood, or any other material, excepting fissile, fertile, or fissionable nuclear material, into another combustible fuel and having the capacity to process 25 tons (22.7 metric tons) of the material per hour at its peak capacity. A fuel conversion facility shall include any storage facility on the site needed for operation of the facility at the design capacity;

P. "Interruptible contract customers" means customers served under schedules or contracts which anticipate or permit interruption of service during the term of the contract;

Q. "Joint application" means an application submitted to the director by two or more persons;

R. "Mbpd-mile" means a descriptive unit used as a measure of the size of a coal liquids pipeline, the quantity of which is determined by multiplying (1) either the length in miles of the new (section of) pipeline in Minnesota, or 50 if the capacity expansion is achieved by adding power, and (2) the new or additional design capacity in thousand barrels per day (Mbpd). If the pipeline capacity would be expanded by a combination of looping and adding power, the Mbpd-miles corresponding to each method of expansion shall be calculated and the sum of the two shall be the size of the pipeline;

S. "Mcf" means thousand cubic feet, a common unit of volume measurement for natural gas;

T. "Minnesota service area" means that part of an applicant's service area which is in Minnesota;

U. "Mton-mile" means a descriptive unit used as a measure of the size of a coal slurry pipeline, the quantity of which is determined by multiplying (1) either the length in miles of the new (section of) pipeline in Minnesota, or 50 if the capacity expansion is achieved by adding power, and (2) the new or additional design capacity in thousands of tons per day (Mton). If the pipeline capacity would be expanded by a combination of looping and adding power, the Mton-miles corresponding to each expansion shall be calculated and the sum of the two shall be the size of the pipeline;

V. "Nuclear fuel processing facility" means any facility designed for or capable of processing or reprocessing any material for use as a fuel in a nuclear reactor. A nuclear

fuel processing facility shall include any radioactive or non-radioactive waste storage or disposal facility on the site needed for operation of the facility at the design capacity;

W. "Nuclear waste storage or disposal facility" means any facility designed for or capable of serving as a temporary or permanent depository for radioactive or nonradioactive wastes produced by a nuclear reactor or a nuclear fuel processing facility;

X. "Peak day" means that day during a calendar year when demand is the greatest;

Y. "Peak demand" means the highest demand placed upon a facility within a designated period of time;

Z. "Person" means an individual, partnership, corporation, joint stock company, unincorporated association or society, municipal corporation, or a government or governmental subdivision, unit or agency, other than a court of law;

AA. "Promotional practices" means any actions or policies by an applicant, an applicant's customers, or other persons which directly or indirectly give rise to the demand for the facility, including, but not limited to, advertising, billing practices, and other marketing activities;

BB. "Service area" means that geographical area in which the applicant has customers;

CC. "Substantially complete application" means an application which is deemed by the director to be in substantial compliance with the information requirements of these rules; and

DD. "Ton" means 2000 pounds (907.2 kilograms).

§ 2.1105 Filing fees and payment schedule.

A. The fee for processing an application shall be:

1. $5,000 plus $50 per ton of hourly design input for a new or expanded fuel conversion facility;

2. $5,000 plus $10 per Mton-mile for a new or expanded coal slurry pipeline;

3. $5,000 plus $1 per Mbpd-mile for a new or expanded coal liquids pipeline;

4. $20,000 plus $50 per ton of yearly design input for a nuclear fuel processing facility; or

5. $20,000 for a nuclear waste storage or disposal facility;

plus such additional fees as are reasonably necessary for completion of the evaluation of need for the proposed facility.

B. Fifty percent of the fee set according to 6 MCAR § 2.1105 A 1, 2, 3 or 4 shall accompany the application, and the balance shall be paid 90 days after submission of the application. The applicant shall be notified prior to the time the application is acted upon by the director of any additional fees, which fees shall be paid within 30 days of notification. The billing of such additional fees shall be accompanied by an itemized document showing the necessity for the additional assessment.

C. No certificate shall be issued until all fees are paid in full.

§ 2.1111 Criteria for assessment of need.

A. Purpose of the criteria. The criteria for assessment of need shall be used by the director in the determination of need for each proposed large energy facility which is subject to these rules. The factors listed under each of the criteria set forth herein at 6 MCAR § 2.1111 C shall be evaluated to the extent that the director deems them applicable and pertinent to each facility proposed pursuant to these rules. The

director shall make a specific written finding with respect to each of the criteria.

B. Consideration of alternatives. The director shall consider only those alternatives proposed before the close of the public hearing and for which there exists substantial evidence on the record with respect to each of the criteria listed in 6 MCAR § 2.1111 C.

C. Criteria. A certificate of need shall be granted to the applicant if it is determined that:

1. the probable direct or indirect result of denial would be an adverse effect upon the future adequacy, reliability, safety, or efficiency of energy supply to the applicant, to the applicant's customers, or to the people of Minnesota and neighboring states, considering:

a. the accuracy of the applicant's forecast of demand for the energy or service that would be supplied by the proposed facility;

b. the effects of existing or expected conservation programs of the applicant, the state government, or the federal government;

c. the effects of promotional practices in creating a need for the proposed facility, particularly promotional practices which have occurred since 1974;

d. the ability of current facilities and planned facilities not requiring certificates of need to meet the future demand; and

e. the effect of the proposed facility, or a suitable modification thereof, in making efficient use of resources;

2. a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence on the record by parties or persons other than the applicant, considering:

a. the appropriateness of the size, the type,

and the timing of the proposed facility compared to those of reasonable alternatives;

b. the cost of the proposed facility and the cost of energy to be supplied by the proposed facility compared to the costs of reasonable alternatives and the cost of energy that would be supplied by reasonable alternatives;

c. the effects of the proposed facility upon the natural and socioeconomic environments compared to the effects of reasonable alternatives; and

d. the expected reliability of the proposed facility compared to the expected reliability of reasonable alternatives;

3. it has been demonstrated by a preponderance of the evidence on the record that the consequences of granting the certificate of need for the proposed facility, or a suitable modification thereof, are more favorable to society than the consequences of denying the certificate, considering:

a. the relationship of the proposed facility, or a suitable modification thereof, to overall state energy needs;

b. the effects of the proposed facility, or a suitable modification thereof, upon the natural and socioeconomic environments compared to the effects of not building the facility;

c. the effects of the proposed facility, or a suitable modification thereof, in inducing future development; and

d. the socially beneficial uses of the output of the proposed facility, or a suitable modification thereof, including its uses to protect or enhance environmental quality; and that

4. it has not been demonstrated on the record that the design, construction, operation or retirement of the proposed facility will fail to comply with those relevant policies, rules and

regulations of other state and federal agencies and local governments.

§ 2.1121 Contents of application.

A. An application for a certificate of need shall provide all information required by 6 MCAR §§ 2.1131 through 2.1135 and, optionally, 2.1186. An application shall also provide information for specific types of facilities as indicated below.

1. An applicant for a fuel conversion facility shall refer to 6 MCAR §§ 2.1141 through 2.1144 for the additional information required.

2. An applicant for a coal slurry or coal liquids pipeline shall refer to 6 MCAR §§ 2.1145 through 2.1149 for the additional information required.

3. An applicant for a nuclear fuel processing facility shall refer to 6 MCAR §§ 2.1151 through 2.1154 for the additional information required.

4. An applicant for a nuclear waste storage or disposal facility shall refer to 6 MCAR §§ 2.1155 through 2.1159 for the additional information required.

5. An applicant for any facility other than those listed in 6 MCAR § 2.1121 A 1 through 4 or specifically covered by 6 MCAR §§ 2.0601 - 2.641, 2.0701 - 2.0791, 2.0801 - 2.0881, 2.0901 - 2.0981, or 2.1001 - 2.1091 shall refer to 6 MCAR § 2.1181 for the additional information required.

B. Joint application. If an application for a certificate of need is jointly submitted by two or more persons, then each such person shall submit separate information in response to the general information section (6 MCAR § 2.1131), the conservation programs section (6 MCAR § 2.1135), and the appropriate historical data and forecast section (6 MCAR § 2.1143, 2.1148, 2.1153, or 2.1158).

C. Multi-party ownership and use. An application for

a certificate of need for a facility which would be owned and used by two or more persons shall be considered as a joint application for purposes of these rules.

§ 2.1131 General information. Each application shall include the following general information:

A. the applicant's complete name and address, telephone number, and standard industrial classification code(s);

B. the complete name, title, address and telephone number of the official or agent to be contacted concerning the applicant's filing;

C. a brief description of the nature of the applicant's business and of the products which are manufactured, produced, or processed, or of the services rendered;

D. a brief description of the proposed facility and its planned use;

E. the total fee for the application as prescribed by 6 MCAR § 2.1105 and the amount of the fee submitted with the application; and

F. the signature(s) and title(s) of the applicant's officer(s) or executive(s) authorized to sign the application and the signature of the preparer of the application if prepared by an outside agent.

§ 2.1132 Schedule of other filings. Each application shall contain a schedule listing all known federal, state, and local agencies or authorities with which the applicant must file for the proposed facility. The following information shall be included on the schedule:

A. the names of all known federal, state, or local authorities with which the applicant must file;

B. the title of each required permit or certificate issued by the authorities named in response to 6 MCAR § 2.1132 A and needed by the applicant;

C. for each permit or certificate listed in response to 6 MCAR § 2.1132 B, the date an application was filed or the projected date of future application;

D. for each permit or certificate listed in response to 6 MCAR § 2.1132 B, the actual date a decision was made on the application, or the anticipated decision date; and

E. for each permit or certificate listed in response to 6 MCAR § 2.1132 B for which an application was filed, the disposition or status of the permit or certificate.

§ 2.1133 Need summary. Each application shall contain a summary of the major factors which justify the need for the proposed facility. Except upon prior approval of the director, this summary shall not exceed 15 pages, including text, tables, graphs and figures.

§ 2.1134 Additional considerations. Each application shall contain an explanation of the relationship of the proposed facility to each of the following socioeconomic considerations:

A. socially beneficial uses of the output of the facility, including its uses to protect or enhance environmental quality;

B. promotional activities which may have given rise to the demand for the facility; and

C. the effects of the facility in inducing future development.

§ 2.1135 Conservation programs. Each application shall include the following information:

A. the name of the committee, department or individual responsible for the applicant's energy conservation and efficiency programs;

B. a list of the applicant's energy conservation and efficiency goals and objectives;

C. a description of the specific energy conservation

and efficiency programs the applicant has considered, a list of those which have been implemented, and the reasons why the other programs have not been implemented;

D. a description of the major accomplishments which have been made with respect to energy conservation and efficiency;

E. a description of the applicant's future plans through the forecast years with respect to energy conservation and efficiency; and

F. a quantification of the manner by which these programs affect or help determine the applicant's forecast of demand, a list of the total costs by program, and a discussion of the expected effects in reducing the need for new large energy facilities.

§ 2.1141 Description of proposed fuel conversion facility. Each application for a fuel conversion facility shall contain the following information:

A. a physical description of the facility, including:

1. its location, to the fullest extent known;

2. an estimate of the required land area and the height of the tallest structures;

3. its design capacity in tons per hour of input material;

4. a schematic drawing showing major components of the facility; and

5. a map showing the planned location of the facility and its interconnections with energy transportation systems;

B. data regarding design and construction of the facility, including:

1. if known, the complete name and business address of the engineer and firm that would be responsible for the design of the facility;

2. if known, the complete name and business address

of the company which would construct the facility;

3. the proposed date for commencing construction and the proposed in-service date;

4. the estimated installed cost of the facility in current dollars; and

5. the estimated economic life of the facility; and

C. data regarding operation of the facility, including:

1. a narrative description of the steps of the process;

2. the types and sources of input materials that would be processed by the facility and the energy content of each in Btu per appropriate unit of measure;

3. the types of output products, the amount of each, and the energy content of each in Btu per appropriate unit of measure;

4. the projected annual operating and maintenance costs in current dollars for each of the first five calendar years of operation;

5. a description of the methods that would be used to transport input and output materials to and from the facility;

6. the estimated amounts and types of energy products that would be consumed during operation at the design capacity;

7. the expected average percentage of use of the full design capacity for each of the first five calendar years of operation; and

8. a discussion of the maintenance requirements of the facility, including the estimated impact on production.

§ 2.1142 Alternatives. Each application for a fuel conversion facility shall contain a description of alternatives available to the applicant which differ significantly from the proposed

facility with respect to location, size, timing, or design. The description of each alternative shall include the following information, if applicable:

A. the location of the facility, to the fullest extent known;

B. the design capacity of the facility;

C. a schematic drawing showing major components of the facility;

D. a map showing the planned location of the facility and its interconnections with energy transportation systems;

E. the probable date for commencing construction and the probable in-service date;

F. the estimated installed cost of the alternative in current dollars;

G. the estimated economic life of the facility;

H. the input materials that would be processed by the facility and the products that would be produced;

I. the projected annual operating and maintenance costs in current dollars for each of the first five calendar years of operation;

J. a description of the methods that would be used to transport input and output materials to and from the facility;

K. the estimated amounts and types of energy products that would be consumed during operation of the facility at the design capacity;

L. the expected average percentage of use of the full design capacity for each of the first five calendar years of operation;

M. a discussion of the maintenance requirements of the facility, including the estimated impact on production; and

N. the reason(s) why the alternative was rejected.

§ 2.1143 Historical and forecast data. Each applicant for a fuel conversion facility shall provide five years of historical

energy data, as well as a forecast of demand through the forecast years. If the fuel conversion facility is designed primarily to provide energy for the applicant's own use, data shall be submitted in response to 6 MCAR § 2.1143 A. If the facility is designed to produce pipeline quality gas for sale by either a utility or a pipeline company, data shall be submitted in response to 6 MCAR § 2.1143 B. In all other cases, data shall be submitted in response to 6 MCAR § 2.1143 C.

A. The applicant shall submit the following information about its historical and projected use of energy products:

1. for each of the energy products which would be produced by the proposed facility, the amount of that product consumed by the applicant during each of the five preceding calendar years;

2. the amounts of any other energy products consumed by the applicant during each of the five preceding calendar years;

3. the amounts of those energy products listed in response to 6 MCAR § 2.1143 A 1 and 2 which were consumed at the applicant's Minnesota location(s);

4. for the first six forecast years, the eleventh forecast year (the tenth year after the year of application), and the sixteenth forecast year, the projected demand by the applicant for each of the energy products named in response to 6 MCAR § 2.1143 A 1 and 2 and the projected demand for each at the applicant's Minnesota location(s);

5. a discussion of the methodology, statistical techniques, and data bases used in providing the forecast data required by 6 MCAR § 2.1143 A 4;

6. any major assumptions made in providing the forecast data required by 6 MCAR § 2.1143 A 4, and a discussion of the sensitivity of the projections to changes in the assumptions; and

7. any other known large energy facilities which

may be constructed during the forecast years for use by the applicant.

B. A gas utility or pipeline company shall submit the following information:

1. for each of the ten preceding calendar years, the first six forecast years, the eleventh forecast year (the tenth year after the year of application), and the sixteenth forecast year, annual gas consumption by ultimate consumers and the number of such customers within the applicant's system in each of the following categories:

a. residential firm (when gas is supplied through a single meter for both residential and commercial uses, it should be reported according to its principal use, and apartment buildings shall be reported as residential even if not metered separately);

b. commercial firm who use less than 200 Mcf on peak day;

c. commercial firm with a peak day requirement equal to or greater than 200 Mcf;

d. industrial firm who use less than 200 Mcf on peak day;

e. industrial firm with a peak day requirement equal to or greater than 200 Mcf;

f. commercial and industrial interruptible;

g. other (this category shall include storage gas and other sales or deliveries not covered in categories a through f);

h. unaccounted for; and

i. the sum of categories a through h;

2. if the applicant's service area includes consumers outside of Minnesota, annual gas consumption by ultimate consumers within the applicant's Minnesota service area for each of the years given in 6 MCAR § 2.1143 B 1;

3. for each of the years given in 6 MCAR § 2.1143

B 1 and for each of the categories listed in 6 MCAR § 2.1143 B 1 a through i, an estimate of the daily demand for gas by ultimate consumers in the applicant's system at the time of system peak demand;

4. for each of the years given in 6 MCAR § 2.1143 B 1, the applicant's system peak demand by month;

5. a discussion of methodology, statistical techniques, and data bases used in providing the forecast data required by 6 MCAR § 2.1143 B 1 through 4;

6. a discussion of the assumptions made by the applicant with respect to the availability of alternate sources of energy, the expected conversion from other fuels to gas or vice versa, the future prices of gas for customers in the applicant's system and the effect that such prices will likely have on the applicant's system demand, the effect of existing energy conservation programs under federal or state legislation on long-term gas demand, and any other factor considered important by the applicant;

7. a discussion of the sensitivity of the forecast to changes in the assumptions;

8. for a gas utility only, for the last calendar year, the current calendar year, the first full calendar year before the proposed facility is expected to be in operation, and the first full calendar year of operation of the proposed facility, an annual supply curve consisting of a single graph for each year and showing the contributions from:

a. pipeline contract demand;

b. gas from storage;

c. synthetic gas other than propane;

d. liquefied natural gas;

e. propane peak-shaving gas; and

f. the proposed facility;

9. for a gas pipeline company only, for the last calendar year, the current calendar year, the first full

calendar year before the proposed facility is expected to be in operation, and the first full calendar year of operation of the proposed facility, an annual supply curve consisting of a single graph for each year and showing the contributions from:

a. own production;

b. committed purchases from other gas producers;

c. gas from storage;

d. emergency purchases (historical year only);

e. other sources; and

f. the proposed facility; and

10. any other known large energy facilities which may be constructed during the forecast years for use by the applicant.

C. The applicant shall submit the following information about its consumption and sales of energy products:

1. for each of the energy products which would be produced by the proposed facility, the amount sold or transported by the applicant during each of the five preceding calendar years;

2. the amounts of those energy products listed in response to 6 MCAR § 2.1143 C 1 that were sold or transported by the applicant in its Minnesota service area;

3. for each of the energy products consumed by the applicant and for each of the five preceding calendar years, the total amount consumed and the amount consumed at the applicant's Minnesota locations;

4. for the first six forecast years, the eleventh forecast year (the tenth year after the year of application), and the sixteenth forecast year, the projected total demand for products produced by the proposed facility within the applicant's service area and the projected demand within its Minnesota service area;

5. a discussion of the methodology, statistical

techniques, and data bases used in providing the forecast data required by 6 MCAR § 2.1143 C 4;

6. any assumptions made in supplying the projections made in response to 6 MCAR § 2.1143 C 4, and a discussion of the sensitivity of the projections to changes in the assumptions; and

7. any other known large energy facilities which may be constructed during the forecast years for use by the applicant.

§ 2.1144 Environmental data. Each applicant shall provide environmental data for the proposed facility and for each alternative facility described in response to 6 MCAR § 2.1142. The following information relating to construction and operation of each of these facilities shall be provided, to the extent that such information is reasonably available to the applicant and applicable to the particular alternative:

A. a description of each alternative site, including:

1. the nature of the terrain at the site;

2. the general soil and bedrock type(s) at the site;

3. the depth to groundwater at the site;

4. the types of vegetation (forest, brush, marsh, pasture, and cropland) on the site, and the approximate percentage of each;

5. the predominant types of land use (such as residential, forest, agricultural, commercial, and industrial) within five miles of the site, and the approximate percentage of each;

6. lakes, streams, wetlands or drainage ditches within five miles of the site and any other lakes, streams, wetlands, drainage ditches, wells or storm drains into which liquid contaminants could flow;

7. trunk highways and airports within five miles of the site;

8. national natural landmarks, national wilderness areas, national wildlife refuges, national wild and scenic rivers, national parks, national forests, national trails, and national waterfowl production areas within five miles of the site, as mapped on the Inventory of Significant Resources by the State Planning Agency;

9. state critical areas, state wildlife management areas, state scientific and natural areas, state wild, scenic and recreational rivers, state parks, state scenic wayside parks, state recreational areas, state forests, state trails, state canoe and boating rivers, state zoo, designated trout streams, and designated trout lakes within five miles of the site, as mapped on the Inventory of Significant Resources by the State Planning Agency;

10. national historic sites and landmarks, national monuments, National Register Historic Districts, registered state historic or archaeological sites, state historical districts, sites listed on the National Register of Historic Places, and any other Cultural Resources within five miles of the site, as indicated by the Minnesota Historical Society; and

11. areas designated by regional or local authorities as having recreational, cultural, historical, or scientific significance, as indicated by local units of government;

B. data on wastes and emissions associated with construction or operation of the facility, including:

1. the types and estimated amounts of solid and liquid wastes, including aromatic compounds, that would be produced by the facility;

2. the types and estimated amounts of gaseous and particulate emissions into the air that would occur during full operation from each emission source, and the location and nature of the release point;

3. locations which may be sources of fugitive dust and the nature of each source;

4. the locations, routes and final receiving waters for any discharge points, and for each discharge point the source, the amount and the nature of the discharge;

5. any area from which runoff may occur, potential sources of contamination in the area, and receiving waters for any runoff;

6. the sources and estimated amounts of heat rejected from the facility; and

7. the maximum noise levels (in decibels, A scale) expected at the property boundary and the expected maximum increase over ambient noise levels;

C. data regarding pollution control and safeguards equipment, including:

1. the methods that would be used to recycle or dispose of solid or liquid wastes;

2. the types of emission control devices and dust control measures that would be used;

3. the types of water pollution control equipment and runoff control measures that would be used;

4. the measures that would be taken to prevent spills of pollutants or to minimize the environmental effect of a spill on surface waters and groundwaters;

5. the methods that would be used to reduce the effects of heat rejected by the facility;

6. any other equipment or measures, including noise control or erosion control, that would be used to reduce the impact of the facility; and

7. the types of environmental monitoring that are planned for the facility, if any, and a description of any relevant environmental monitoring data already collected; and

D. estimates of induced developments, including:

1. the types and amounts of vehicular traffic that would be generated by the facility due to construction activity and, later, to operational needs;

2. the work forces required for construction and for operation of the facility;

3. the extent to which the facility would create or add to the need for expanded utility or public services, including high voltage transmission lines, access roads, and the like;

4. the amount of water which would be appropriated and the amount which would be consumed by the facility, the expected source of the water, and the uses for the water;

5. the amount of agricultural land, including pasture land, that would be removed from agricultural use if the facility were constructed, and known circumstances associated with the facility that could lead to reduced productivity of surrounding agricultural land; and

6. the number of people that would have to relocate if the facility were constructed.

§ 2.1146 Description of proposed coal slurry or coal liquids pipeline. Each application for a coal slurry or coal liquids pipeline shall contain the following information:

A. a physical description of the facility, including:

1. a pipeline system map showing the planned route, mileages, and locations of pumping stations, mainline valves, dump basins or storage facilities, and interconnections with other energy transportation systems;

2. the diameter and the expected length within Minnesota;

3. the design throughput in tons per day of coal (coal slurry pipeline) or in barrels per day (coal liquids pipeline);

4. to the extent known, specifications for the pipe (diameter, length, wall thickness, and grade) and the valves (diameter and American National Standards Institute rating) with the maximum allowable operating pressure for each;

5. to the extent known, specifications for the pumps (diameter, maximum allowable operating pressures, and maximum capabilities); and

6. to the extent known, specifications for the prime movers (type, maximum power capacity in horsepower, efficiency, allowable maximum and minimum operating temperatures, and energy requirement in Btu per ton of coal or barrel of coal liquids pumped);

B. data regarding design and construction of the facility, including:

1. if known, the complete name and business address of the engineer and firm that would be responsible for the design;

2. if known, the complete name and business address of the company which would construct the facility;

3. the proposed date for commencing construction and the proposed in-service date;

4. the estimated installed cost of the facility in current dollars; and

5. the estimated economic life of the facility; and

C. data regarding operation of the facility, including:

1. a list of expected sources of supply for transportation during the first five calendar years of operation, designated as in-state or as out-of-state, the expected dates and durations of the contracts with the suppliers, and the quantities expected to be involved;

2. a list of expected recipients of the transported slurry or coal liquids during the first five calendar years of operation, designated either as in-state or as out-of-state, the expected dates and durations of the contracts with the 25 largest recipients, and the quantities expected to be involved;

3. the expected maximum operating pressure and capacity of the facility at the time of peak demand;

4. the expected power requirement from the prime movers at each station at the time of peak demand (in kilowatts, thousands of cubic feet per hour, or gallons per hour);

5. the expected average percentage of use of the

full design capacity for each of the first five calendar years of operation;

6. the estimated tariffs or transportation costs for the pipeline for each of the first five calendar years of operation; and

7. for a coal slurry pipeline, a description of what would be done with the slurry water or other carrier after it had been used to transport coal.

§ 2.1147 Alternatives. Each application for a coal slurry or coal liquids pipeline shall contain a description of alternatives available to the applicant which differ significantly from the proposed facility with respect to location, size, timing, or design.

A. If the alternative is another pipeline, all of the information required by 6 MCAR § 2.1146 A through C shall be submitted for the alternative. The applicant shall also indicate the reason(s) for rejecting the alternative.

B. If the alternative is not a pipeline, the description of the alternative shall include the following information, if applicable:

1. the location of the alternative, to the fullest extent known;

2. the dimensions and design capacity of the alternative;

3. a schematic drawing showing major components of the alternative;

4. a map showing the planned location of the facility and its interconnections with energy transportation systems;

5. the probable date for commencing construction and the probable in-service date;

6. the estimated installed cost of the alternative in current dollars;

7. the estimated maintenance requirements of the alternative;

8. the estimated economic life of the alternative; and

9. the reason(s) why the alternative was rejected.

§ 2.1148 Historical and forecast data. Each applicant for a coal slurry or coal liquids pipeline shall provide five years of historical energy data, as well as a forecast of demand through the forecast years. If the proposed pipeline is designed primarily to provide energy for the applicant's own use, data shall be submitted in response to 6 MCAR § 2.1148 A. If the proposed pipeline is designed primarily to transport or distribute energy to be used by others, data shall be submitted in response to 6 MCAR § 2.1148 B.

A. The applicant shall submit the following information about its historical and projected use of energy products:

1. for each of the energy products which would be transported by the proposed facility, the amount of that product consumed by the applicant during each of the five preceding calendar years;

2. the amounts of any other energy products consumed by the applicant during each of the five preceding calendar years;

3. the amounts of those energy products named in response to 6 MCAR § 2.1148 A 1 and 2 which were consumed at the applicant's Minnesota locations;

4. for the first six forecast years, the eleventh forecast year (the tenth year after the year of application), and the sixteenth forecast year, the projected demand by the applicant for each of the energy products named in response to 6 MCAR § 2.1148 A 1 and 2 and the projected demand for each at the applicant's Minnesota locations;

5. a discussion of the methodology, statistical techniques, and data bases used in providing the forecast data required by 6 MCAR § 2.1148 A 4;

6. any major assumptions made in providing the forecast data required by 6 MCAR § 2.1148 A 4, and a discussion of the sensitivity of the projections to changes in the assumptions; and

7. any other known large energy facilities which may be constructed during the forecast years for use by the applicant.

B. The applicant shall submit the following information about its transportation and distribution of energy products;

1. a list of the energy products transported or distributed in its service area during each of the five preceding calendar years;

2. for each energy product listed in response to 6 MCAR § 2.1148 B 1, the annual and peak-day quantities transported or distributed for each of the five preceding calendar years in the appropriate units of measure;

3. a list of sources of supply of energy products for transportation or distribution during the five preceding calendar years, designated as either in-state or out-of-state, the dates and durations of the contracts with the suppliers or shippers, and the quantities of each energy product involved;

4. for each of the five preceding calendar years and for each energy product, the percentage of in-state delivery of the annual amounts given in response to 6 MCAR § 2.1148 B 2;

5. a list of each storage facility, pipeline, or other major facility owned or operated by the applicant and associated with the transportation and distribution of the energy products given in response to 6 MCAR § 2.1148 B 1, and the average percentage of use of each such facility during the summer season and during the winter season;

6. a list of the energy products the applicant expects to transport or distribute in its service area during the first six forecast years, the eleventh forecast year

(the tenth year after the year of application), and the sixteenth forecast year, and the annual and peak-day quantities expected in the appropriate units of measure;

7. a discussion of the methodology, statistical techniques, and data bases used in providing the forecast data required by 6 MCAR § 2.1148 B 6;

8. a discussion of the methods, assumptions and factors employed for purposes of estimation in response to 6 MCAR § 2.1148 B 6;

9. a discussion of the sensitivity of the forecast to changes in the assumptions; and

10. any other known large energy facilities which may be constructed during the forecast years for use by the applicant.

§ 2.1149 Environmental data. Each applicant shall provide environmental data for the proposed facility and for each alternative facility described in response to 6 MCAR § 2.1147. Environmental data for each pipeline considered shall conform to the format given in subdivisions A through D of 6 MCAR § 2.1149. Environmental data for any other alternative shall include a list of the natural and cultural resources, as given in items 7 through 12 of 6 MCAR § 2.1149 A, that would be directly affected, and a discussion of those applicable areas of environmental concern that are detailed in subdivisions B through D of 6 MCAR § 2.1149. The applicant shall provide:

A. a description of each alternative route, including:

1. the names of cities or population centers through which the route passes;

2. the number of miles of the route which passes through, respectively, federal lands, state lands, county or tax-forfeit lands, incorporated areas, and private land outside corporate areas;

3. the general soil types along the route and the approximate percentage of each;

4. the general bedrock types along the route and the

approximate percentage of each;

5. the general terrain along the route;

6. the types of vegetation along the route (forest, brush, marsh, pasture, and cropland) and the approximate percentage of each;

7. the predominant types of land use along the route (such as residential, forest, agricultural, commercial, and industrial) and the approximate percentage of each;

8. the names of major lakes or streams and the number of wetlands of five acres or more through which the route passes, as well as any others into which liquid contaminant from the pipeline could flow;

9. trunk highways, airports, or railroad lines under which the route passes;

10. national natural landmarks, national wilderness areas, national wildlife refuges, national wild and scenic rivers, national parks, national forests, national trails, and national waterfowl production areas through which the route passes, as mapped on the Inventory of Significant Resources by the State Planning Agency;

11. state critical areas, state wildlife management areas, state scientific and natural areas, state wild, scenic and recreational rivers, state parks, state scenic wayside parks, state recreational areas, state forests, state trails, state canoe and boating rivers, state zoo, designated trout streams, and designated trout lakes through which the route passes, as mapped on the Inventory of Significant Resources by the State Planning Agency; and

12. national historic sites and landmarks, national monuments, National Register Historic Districts, registered state historic or archaeological sites, state historical districts, sites listed on the National Register of Historic Places, and any other Cultural Resources through which the route passes, as indicated by the Minnesota Historical Society;

B. data on wastes and emissions associated with construction or operation of the facility, including:

1. the types and estimated amounts of solid and liquid wastes that would be produced;

2. the types and estimated amounts of gaseous and particulate emissions into the air that would occur during full operation of the pipeline from each emission source, and the location and nature of the release point;

3. locations which may be sources of fugitive dust and the nature of each source;

4. the locations, routes and final receiving waters for any discharge points, and for each discharge point the source, the amount and the nature of the discharge;

5. any area from which runoff may occur, potential sources of contamination in the area, and receiving waters for any runoff; and

6. the maximum noise levels (in decibels, A scale) expected along the route and the expected maximum increase over ambient noise levels;

C. data regarding pollution control and safeguards equipment, including:

1. the types of emission control devices and dust control measures that would be used, including provisions for controlling coal dust left in evaporated dump basins;

2. the types of water pollution control equipment and runoff control measures that would be used, including methods to treat any residual slurry water that may enter freshwater bodies;

3. the measures that would be taken to prevent slurry or coal liquids spills or to minimize the environmental effect of a spill on surface waters and groundwaters;

4. any other equipment or measures, including noise control or erosion control, that would be used to reduce the impact of the facility; and

5. the types of environmental monitoring that are planned for the facility, if any, and a description of any relevant environmental monitoring data already collected; and

D. estimates of induced developments, including:

1. the extent to which the facility would create or add to the need for expanded utility or public services;

2. the work forces required for construction and for operation of the facility;

3. the amount of water which would be appropriated and the amount which would be consumed by the facility, the expected source of the water, and the use(s) for the water;

4. a discussion of the effects on agricultural operations, including the number of farms and the number of acres of cropland and pasture land that would be affected by construction of the pipeline, the number of drainage ditches that would be affected, and the efforts that would be used to mitigate effects on production (e.g., segregating topsoil, avoiding soil compaction, providing adequate depth of cover); and

5. the number of people who would have to relocate if the facility were constructed.

§ 2.1151 Description of proposed nuclear fuel processing facility. Each application for a nuclear fuel processing facility shall contain the following information:

A. a physical description of the facility, including:

1. its location, to the fullest extent known;

2. the required land area, the height of the tallest structures, and, if applicable, the depth and size of any underground caverns;

3. its design capacity in tons per year of input material; and

4. a schematic drawing showing major components of the facility;

B. data regarding design and construction of the facility, including:

1. if known, the complete name and business address of the engineer and firm that would be responsible for the design of the facility;

2. if known, the complete name and business address of the company which would construct the facility;

3. the proposed date for commencing construction and the proposed in-service date;

4. the estimated installed cost of the facility in current dollars; and

5. the estimated economic life of the facility;

C. data regarding operation of the facility, including:

1. a narrative description of the steps of the process;

2. the types, amounts, and sources of input materials that would be processed by the facility during operation at the design capacity and the method(s) of transporting these materials to the facility;

3. the types and amounts of output materials from the processing facility during operation at the design capacity and the method(s) of transporting or disposing of these materials;

4. the projected annual operating and maintenance costs in current dollars for each of the first five calendar years of operation;

5. the projected types and amounts of energy products that would be consumed during operation at the design capacity;

6. the expected average percentage of use of the full design capacity for each of the first five calendar years of operation; and

7. a discussion of the maintenance requirements of the facility, including the estimated impact on production.

§ 2.1152 Alternatives. Each application for a nuclear fuel processing facility shall contain a description of alternatives available to the applicant which differ significantly from the proposed facility with respect to location, size, timing, or design. The description of each alternative shall include the

following information, if applicable:

A. the location of the facility, to the fullest extent known;

B. the required land area, the height of the tallest structures and, if applicable, the depth and size of any underground caverns;

C. its design capacity in the appropriate units of measure;

D. a schematic drawing showing major components of the facility;

E. the probable date for commencing construction and the probable in-service date;

F. the estimated installed cost of the alternative in current dollars;

G. the estimated economic life of the facility;

H. the input materials that would be processed by the facility and the products that would be produced;

I. the projected annual operating and maintenance costs in current dollars for each of the first five calendar years of operation;

J. the methods that would be used to transport materials to and from the facility;

K. the projected types and amounts of energy products that would be consumed during operation at the design capacity;

L. the estimated average percentage of use of the full design capacity for each of the first five years of operation;

M. a discussion of the maintenance requirements of the facility, including the estimated impact on production; and

N. the reason(s) why the alternative was rejected.

§ 2.1153 Historical and forecast data. Each applicant for a nuclear fuel processing facility shall provide five years of historical data, as well as a forecast of demand through the forecast years. The following information shall be included:

A. the amount of each input material, in tons per year, produced nationally and the amount produced within Minnesota during each of the last five calendar years preceding the year of application;

B. for each of the last five calendar years preceding the year of application, the year-end capacity within Minnesota and within the United States, in tons of input material per year, to process the materials listed in response to 6 MCAR § 2.1153 A;

C. an estimate of the amount of each input material expected to be produced nationally (including, if applicable, spent fuel from foreign reactors which use uranium supplied by the United States) and within Minnesota during the first six forecast years, the eleventh forecast year (the tenth year after the year of application), and the sixteenth forecast year;

D. a discussion of the methodology, statistical techniques, and data bases used in providing the forecast data required by 6 MCAR § 2.1153 C;

E. a list of known facilities to be added in the United States during the forecast years, including locations, in-service dates, and design capacities, for processing the same types of materials that would be processed by the proposed facility; and

F. any major assumptions made in supplying the information required by 6 MCAR § 2.1153 A through D, and a discussion of the sensitivity of the information to changes in the assumptions.

§ 2.1154 Environmental data. Each applicant shall provide environmental data for the proposed facility and for each alternative facility described in response to 6 MCAR § 2.1152. The following information relating to construction and operation of each of these facilities shall be provided, to the extent that such information is reasonably available to the applicant and applicable to the particular alternative:

A. a description of each alternative site, including:

1. the nature of the terrain at the site;

2. the general soil type(s) at the site;

3. the type(s) and depth(s) of bedrock underlying the site;

4. the depth to groundwater at the site;

5. the types of vegetation (forest, brush, marsh, pasture, and cropland) on the site, and the approximate percentage of each;

6. the predominant types of land use (such as residential, forest, agricultural, commercial, and industrial) within five miles of the site, and the approximate percentage of each;

7. lakes, streams, wetlands or drainage ditches within five miles of the site and any other lakes, streams, wetlands, drainage ditches, wells or storm drains into which liquid contaminants from the site could flow;

8. trunk highways, airports, and air traffic corridors within five miles of the site;

9. national natural landmarks, national wilderness areas, national wildlife refuges, national wild and scenic rivers, national parks, national forests, national trails, and national waterfowl production areas within five miles of the site, as mapped on the Inventory of Significant Resources by the State Planning Agency;

10. state critical areas, state wildlife management areas, state scientific and natural areas, state wild, scenic and recreational rivers, state parks, state scenic wayside parks, state recreational areas, state forests, state trails, state canoe and boating rivers, state zoo, designated trout streams, and designated trout lakes within five miles of the site, as mapped on the Inventory of Significant Resources by the State Planning Agency;

11. national historic sites and landmarks, national monuments, National Register Historic Districts, registered state historic or archaeological sites, state historical districts, sites listed on the National Register of Historic

Places, and any other Cultural Resources within five miles of the site, as indicated by the Minnesota Historical Society; and

12. areas designated by regional or local authorities as having recreational, cultural, historical, or scientific significance, as indicated by local units of government;

B. data on wastes and emissions associated with construction or operation of the facility, including:

1. the types and estimated amounts of solid, liquid, and gaseous radioactive wastes that would be produced by the facility, and the level of radioactivity of each in curies per year;

2. an analysis of human exposure to ionizing radiation attributable to operation of the facility, taking account of the pathways of radioactive releases to man;

3. the types and estimated amounts of nonradioactive solid and liquid wastes that would be produced;

4. the types and estimated amounts of nonradioactive gaseous and particulate emissions into the air that would occur during full operation from each emission source, and the location and nature of the release point;

5. locations which may be sources of fugitive dust and the nature of each source;

6. the nature and estimated amount of nonradioactive discharges to water, and the locations, routes and final receiving waters for any discharge points;

7. any area from which runoff may occur, potential sources of contamination in the area, and receiving waters for any runoff;

8. the sources and estimated amounts of heat rejected by the facility; and

9. the maximum noise levels (in decibels, A scale) expected at the property boundary and the expected maximum increase over ambient noise levels;

C. data regarding pollution control and safeguards equipment, including:

1. the provisions that would be made for management of radioactive materials;

2. a description of contingency plans to reduce the effects of an accidental release of radioactive materials;

3. the methods that would be used to recycle or dispose of solid or liquid wastes;

4. the types of emission control devices and dust control measures that would be used;

5. the types of water pollution control equipment and runoff control measures that would be used;

6. the measures that would be taken to prevent spills or leaks of pollutants, or to minimize the effects of spills or leaks on the environment;

7. the methods that would be used to reduce the effects of heat rejected by the facility;

8. any other equipment or measures, including noise control or erosion control, that would be used to reduce the effects of the facility on the environment; and

9. the types of environmental monitoring, if any, that are planned for the facility and a description of any relevant environmental monitoring data already collected; and

D. estimates of induced developments, including:

1. the types and amounts of vehicular traffic that would be generated by the facility due to construction activity and, later, to operational needs;

2. the work forces required for construction and for operation of the facility;

3. the extent to which the facility would create or add to the need for expanded utility or public services, including high voltage transmission lines, access roads, and the like;

4. the amount of water which would be appropriated and the amount which would be consumed by the facility, the expected source of the water and the use(s) for the water;

5. the amount of agricultural land, including pasture land, that would be removed from agricultural use if the facility were constructed, and known circumstances associated with the facility that could lead to reduced productivity of surrounding agricultural land; and

6. the number of people that would have to relocate if the facility were constructed.

§ 2.1156 Description of proposed nuclear waste or disposal facility. Each application for a nuclear waste storage or disposal facility shall contain the following information:

A. a physical description of the facility, including:

1. its location, to the fullest extent known;

2. the required land area, the height of the tallest structures and, if applicable, the depth and size of any underground caverns;

3. its design capacity in cubic metres; and

4. a schematic drawing showing major components of the facility;

B. data regarding design and construction of the facility, including:

1. if known, the complete name and business address of the engineer and firm that would be responsible for the design of the facility;

2. if known, the complete name and business address of the company which would construct the facility;

3. the proposed date for commencing construction and the proposed in-service date;

4. a description of the construction techniques;

5. the estimated installed cost of the facility in current dollars; and

6. the estimated economic life of the facility; and

C. data regarding operation of the facility, including:

1. a narrative description of the steps of the storage or disposal process, starting at the point the nuclear wastes are produced;

2. the sources, types, and amounts of nuclear waste products that would be stored, the method(s) of transporting these materials to the facility, and the level of radioactivity of each in curies per year;

3. if the facility is only for temporary storage, the length of time material would be stored there and the method of transporting the material to its disposal site; and

4. the expected maintenance requirements of the facility, if any.

§ 2.1157 Alternatives. Each application for a nuclear waste storage or disposal facility shall contain a description of alternatives available to the applicant which differ significantly from the proposed facility with respect to location, size, timing or design. The description of each alternative shall include the following information, if applicable:

A. the location of the facility, to the fullest extent known;

B. the required land area, the height of the tallest structures and, if applicable, the depth and size of any underground caverns;

C. its design capacity in the appropriate units of measure;

D. a schematic drawing showing major components of the facility;

E. the probable date for commencing construction and the probable in-service date;

F. the estimated installed cost of the alternative in current dollars;

G. the sources, types, and amounts of nuclear waste products that would be involved in the alternative, the method(s) of transporting these materials, and the level of radioactivity of each in curies per year;

H. the estimated maintenance requirements of the alternative;

I. the estimated economic lives of the facilities involved in the alternative; and

J. the reason(s) why the alternative was rejected.

§ 2.1158 Historical and forecast data. Each applicant for a nuclear waste storage or disposal facility shall provide five years of historical data, as well as a forecast of demand through the forecast years. The following information shall be included:

A. for each material that would be stored in the proposed facility, the amount (in cubic metres) produced nationally and within Minnesota during each of the last five calendar years preceding the year of application;

B. for each of the last five calendar years preceding the year of application, the year-end capacity (in cubic metres) within Minnesota and within the United States to store the materials listed in response to 6 MCAR § 2.1158 A;

C. an estimate of the amount (in cubic metres) of each material listed in response to 6 MCAR § 2.1158 A expected to be produced nationally and within Minnesota during the first six forecast years, the eleventh forecast year (the tenth year after the year of application), and the sixteenth forecast year;

D. a list of known facilities to be added in the United States during the forecast years, including locations, design capacities (in cubic metres), and in-service dates, for storing the same types of materials that would be stored in the proposed facility;

E. the expected years during which the material stored in the proposed facility would reach 10 percent, 25 percent, 50 percent, and 100 percent of the capacity of the facility;

F. a discussion of the methodology, statistical techniques, and data bases used in providing the forecast data required by 6 MCAR § 2.1158 C and E; and

G. any major assumptions made in supplying the information required by 6 MCAR § 2.1158 A through E, and a discussion of the sensitivity of the information to changes in the assumptions.

§ 2.1159 Environmental data. Each applicant shall provide environmental data for the proposed facility and for each alternative facility described in response to 6 MCAR § 2.1157. The following information relating to construction and operation of each of these facilities shall be provided to the extent that such information is reasonably available to the applicant and applicable to the particular alternative:

A. a description of each alternative site, including:

1. the nature of the terrain at the site;

2. the general soil type(s) at the site;

3. the type(s) and depth(s) of bedrock underlying the site;

4. the depth to groundwater at the site;

5. the types of vegetation (forest, brush, marsh, pasture, and cropland) on the site, and the approximate percentage of each;

6. the predominant types of land use (such as residential, forest, agricultural, commercial, and industrial) within five miles of the site, and the approximate percentage of each;

7. lakes, streams, wetlands or drainage ditches within five miles of the site and any other lakes, streams, wetlands, drainage ditches, wells or storm drains into which liquid contaminants from the site could flow;

8. trunk highways, airports, and air traffic corridors within five miles of the site;

9. national natural landmarks, national wilderness areas, national wildlife refuges, national wild and scenic rivers, national parks, national forests, national trails, and national waterfowl production areas within five miles of the site, as mapped on the Inventory of Significant Resources by the State Planning Agency;

10. state critical areas, state wildlife management areas, state scientific and natural areas, state wild, scenic and recreational rivers, state parks, state scenic wayside parks, state recreational areas, state forests, state trails, state canoe and boating rivers, state zoo, designated trout streams, and designated trout lakes within five miles of the site, as mapped on the Inventory of Significant Resources by the State Planning Agency;

11. national historic sites and landmarks, national monuments, National Register Historic Districts, registered state historic or archaeological sites, state historical districts, sites listed on the National Register of Historic Places, and any other cultural resources within five miles of the site, as indicated by the Minnesota Historical Society; and

12. areas designated by regional or local authorities as having recreational, cultural, historical, or scientific significance, as indicated by local units of government;

B. data on wastes and emissions associated with construction or operation of the facility, including:

1. the types and estimated amounts of solid, liquid, and gaseous radioactive wastes that would be produced by the facility, and the level of radioactivity of each in curies per year;

2. an analysis of human exposure to ionizing radiation

attributable to operation of the facility, taking account of the pathways of radioactive releases to man;

3. the types and estimated amounts of nonradioactive solid and liquid wastes that would be produced;

4. the types and estimated amounts of nonradioactive gaseous and particulate emissions into the air that would occur during full operation from each emission source, and the location and nature of the release point;

5. locations which may be sources of fugitive dust and the nature of each source;

6. the nature and estimated amount of nonradioactive discharges to water, and the locations, routes and final receiving waters for any discharge points;

7. any area from which runoff may occur, potential sources of contamination in the area, and receiving waters for any runoff;

8. the sources and estimated amounts of heat rejected by the facility; and

9. the maximum noise levels (in decibels, A scale) expected at the property boundary and the expected maximum increase over ambient noise levels;

C. data regarding pollution control and safeguards equipment, including:

1. the provisions that would be made for management of radioactive materials;

2. a description of contingency plans to reduce the effects of an accidental release of radioactive materials;

3. the methods that would be used to recycle or dispose of solid or liquid wastes;

4. the types of emission control devices and dust control measures that would be used;

5. the types of water pollution control equipment and runoff control measures that would be used;

6. the measures that would be taken to prevent spills or leaks of pollutants, or to minimize the effects of spills or leaks on the environment;

7. the methods that would be used to reduce the effects of heat rejected by the facility;

8. any other equipment or measures, including noise control or erosion control, that would be used to reduce the effects of the facility on the environment; and

9. the types of environmental monitoring, if any, that are planned for the facility and a description of any relevant environmental monitoring data already collected; and

D. estimates of induced developments, including:

1. the types and amounts of vehicular traffic that would be generated by the facility due to construction activity and, later, to operational needs;

2. the work forces required for construction and for operation of the facility;

3. the extent to which the facility would create or add to the need for expanded utility or public services, including high voltage transmission lines, access roads, and the like;

4. the amount of water which would be appropriated and the amount which would be consumed by the facility, the expected source of the water and the use(s) for the water;

5. the amount of agricultural land, including pasture land, that would be removed from agricultural use if the facility were constructed, and known circumstances associated with the facility that could lead to reduced productivity of surrounding agricultural land; and

6. the number of people that would have to relocate if the facility were constructed.

§ 2.1181 Other facilities.

A. Any applicant for certification of a large energy facility other than those specifically covered by the foregoing rules or by other Agency rules (that is, 6 MCAR §§ 2.0601 - 2.0641, 2.0701 - 2.0791, 2.0801 - 2.0881, 2.0901 - 2.0981, or 2.1001 - 2.1091) shall comply with this rule as to substantive content of the application. The need for that facility will be assessed by the criteria stated in 6 MCAR § 2.1111.

B. An application submitted pursuant to this rule shall contain at least four data sections in addition to the information required by 6 MCAR § 2.1121 A. Those sections shall be, respectively, a description of the proposed facility, a description of alternatives to the proposed facility, historical and forecast data, and environmental data. The specific data requirements shall be requested of the director by the prospective applicant in a written request which shall contain a general description of the proposed facility. The director shall respond to the request within 30 days of receipt by supplying to the prospective applicant an express listing of the specific data requirement for the four sections. Following receipt of that listing, the prospective applicant may elect to follow the provisions of 6 MCAR § 2.1103 H.

§ 2.1186 Other data filed with the application. In addition to the information required by these rules, an applicant may file additional data if it believes that such data is relevant to the director's decision.

§ 2.1191 Certificate of need modifications.

A. Issuance of a certificate of need may be made contingent upon modifications specified by the director.

B. The following changes in a facility previously certified by the director shall not require recertification:

1. capacity additions or subtractions of less than ten (10) percent of the capacity approved by the director; and

2. changes of less than two years in the in-service date.

C. If an applicant determines that a change greater or other than those specified by 6 MCAR § 2.1191 B is necessary or desirable, it shall inform the director of the desired change, accompanied by a written statement detailing the reasons for the proposed change. The director shall evaluate these reasons and within 45 days of receipt of said statement notify the applicant whether the proposed change is acceptable without recertification.

STATE OF MINNESOTA

MINNESOTA ENERGY AGENCY

In the Matter of the Proposed Adoption of Rules of the Minnesota Energy Agency Governing Contents of Applications for Certificates of Need and Criteria for Assessment of Need for Fuel Conversion Facilities, Coal Slurry or Coal Liquids Pipelines, Nuclear Fuel Processing Facilities and Nuclear Waste Storage or Disposal Facilities, 6 MCAR §§ 2.1101-2.1191.	Docket No. EA-78-003-WS STATEMENT OF NEED AND EVIDENCE

STATEMENT OF EVIDENCE

Agency Staff will introduce the following evidence: Minn. Regs. EA 301 et seq.; Minn. Regs. EA 501 et seq.; Minn. Regs. EA 601 et seq.; proposed Minn. Regs. EA 701 et seq.; 6 MCAR § 2.0801 et seq.; 6 MCAR § 2.0901 et seq.; proposed amended Minn. Regs. EA 1001 et seq.; and draft 6 MCAR § 2.1101 et seq. The following comments on the draft 6 MCAR § 2.1101 et seq. will also be introduced: memorandum dated January 3, 1978, from Nancy Salustro of the EQB Staff; letter dated December 23, 1977, from Richard L. Wade of the Minnesota Department of Health; memorandum dated February 1, 1978, from C. A. Johannes of the Minnesota Pollution Control Agency; letter dated February 3, 1978, from Sandra S. Gardebring, Executive Director of the Minnesota Pollution Control Agency; letter dated December 27, 1977, from Joseph D. Bizzano, Jr.; letter dated January 27, 1978, from Glenn G. C. Olson of Northern States Power Company; letter dated January 26, 1978, from James U. Dickson of Burlington Northern; and draft position of the Minnesota Department of Transportation regarding coal slurry pipelines, received February 1, 1978.

One or more of the following expert witnesses employed by the Minnesota Energy Agency may be called upon to testify: David L. Jacobson, Acting Manager, Certificate of Need Activity; Dr. Leticia A. Chard, Energy Facility Analyst; Karen R. Cole, Environmental Coordinator; Dr. Arthur L. Adiarte, Energy Facility

analyst; and Dr. Richard A. Wallen, Manager, Policy Analysis Activity. The named individuals played a substantial role in developing the proposed rules or have experience in the implementation of the other Agency rules. They will be available to testify on the need for and reasonableness of the proposed rules.

The following statutes and laws will be cited: Minn. Stat. ch. 116H (especially, but not exclusively, § 116H.13); Minn. Stat. ch. 116D; Minn. Stat. § 16A.128 (1976); Minn. Stat. §§ 117.48 - .49 (1976); Minn. Stat. §§ 116C.71-.74 (Supp. 1977); and Minn. Laws 1977 ch. 381 § 8.

Notices of Intent to Solicit Outside Opinion on the subject matter of the proposed rules were published in the State Register at 2 S.R. 950 and at 2 S.R. 1270-1271.

STATEMENT OF NEED

The above-captioned rules are not amendments to existing rules of the Minnesota Energy Agency. They are being proposed for initial adoption at this time.

The need to adopt rules specifying criteria for assessment of need and governing the contents of applications for certificates of need arises, in part, from legislative mandate.

It shall be the duty of the director to:

. . .

(f) Require certificate of need for construction of large energy facilities . . . .

Minn. Stat. § 116H.07 subd. 1(f) (1976).

> Subdivision 1. The director shall, pursuant to chapter 15 and sections 116H.01 to 116H.15, promulgate assessment of need criteria to be used in the determination of need for large energy facilities pursuant to this section . . . .
>
> Subd. 2. On and after the effective date of the assessment of need criteria adopted pursuant to subdivision 1, no large energy facility shall be sited or constructed in Minnesota without the issuance of a certificate of need by the director pursuant to sections 116H.01 to 116H.15 and consistent with the criteria for assessment of need.

Minn. Stat. § 116H.13 subds. 1-2 (1976). (Emphasis added.)

It is further provided in the Rules of Procedure Governing Certificate of Need Program that

> any person desiring to construct a new large energy facility in Minnesota shall submit an application for a certificate of need for said facility to the director prior to commencing construction of said facility . . . . The application shall contain the information required in the applicable substantive rules . . . .

Minn. Reg. EA 502(a). "Large energy facility" is defined to include

> . . .
>
> (d) Any pipeline greater than six inches in diameter and having more than 50 miles of its length in Minnesota used for the transportation of coal, crude petroleum or petroleum fuels or oil or their derivatives;
>
> . . .
>
> (j) Any nuclear fuel processing or nuclear waste storage or disposal facility; and
> (k) Any facility intended to convert any material into any other combustible fuel and having the capacity to process in excess of 25 tons of the material per hour.

Minn. Stat. § 116H.02 subd. 5 (1976), as amended by Minn. Laws 1977 ch. 381 § 8.

The need to adopt a rule providing for inclusion of environmental data in applications for certificates of need arises from legislative mandate in the Energy Agency Act, Minnesota Statutes chapter 116H, and the Minnesota Environmental Policy Act, Minnesota Statutes chapter 116D, which read, in part, as follows:

> FINDINGS AND PURPOSE. The legislature finds and declares that the present rapid growth in demand for energy is in part due to unnecessary energy use; that a continuation of this trend will result in serious depletion of finite quantities of fuels, land and water resources, and threats to the state's environmental quality; that the state must insure consideration of urban expansion, transit systems, economic development, energy conservation and environmental protection in planning for large energy facilities; that there is a need to carry out energy conservation measures; and that energy planning, protection of environmental values, development of Minnesota energy sources, and conservation of energy require

expanded authority and technical capability and a unified, coordinated response within state government.

The legislature seeks to encourage thrift in the use of energy, and to maximize use of energy-efficient systems, thereby reducing the rate of growth of energy consumption, prudently conserving energy resources, and assuring statewide environmental protection consistent with an adequate, reliable supply of energy.

Minn. Stat. § 116H.01 (1976).

No proposed large energy facility shall be certified for construction unless the applicant has justified its need. In assessing need, the director shall evaluate:

. . . .

(5) Socially beneficial uses of the output of this facility, including its uses to protect or enhance environmental quality;
(6) The effects of the facility in inducing future development;
(7) Possible alternatives for satisfying the energy demand including but not limited to potential for increased efficiency of existing energy generation facilities;
(8) The policies, rules and regulations of other state and federal agencies and local governments.

Minn. Stat. § 116H.13 subd. 3 (1976).

ACTION BY STATE AGENCIES. Subdivision 1. The legislature authorizes and directs that, to the fullest extent practicable the policies, regulations and public laws of the state shall be interpreted and administered in accordance with the policies set forth in sections 116D.01 to 116D.06.

Subd. 2. All departments and agencies of the state government shall:

. . . .

(c) Identify and develop methods and procedures that will ensure that environmental amenities and values, whether quantified or not, will be given at least equal consideration in decision making along with economic and technical considerations;
(d) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;
(e) Recognize the worldwide and long range character of environmental problems and, where consistent with the policy of the state, lend appropriate support to initiatives, resolutions, and programs designed to maximize interstate, national and international cooperation in antici-

> pating and preventing a decline in the quality of mankind's world environment;
> (f) Make available to the federal government, counties, municipalities, institutions, and individuals, information useful in restoring, maintaining, and enhancing the quality of the environment, and in meeting the policies of the state as set forth in Laws 1973, Chapter 412;
> (g) Initiate the gathering and utilization of ecological information in the planning and development of resource oriented projects . . . .

Minn. Stat. § 116D.03 (1976).

The rules are needed to inform each person applying for a certificate of need for a fuel conversion facility, a coal slurry or coal liquids pipeline, a nuclear fuel processing facility, or a nuclear waste storage or disposal facility of the application procedures, the filing fees which must accompany the application, the criteria by which the need for the proposed facility shall be assessed, and the data elements which must appear in the application.

The justification of the need for and reasonableness of each of the rules is as follows:

6 MCAR § 2.1101 Purpose of Rules:

This rule states the purpose of rules 6 MCAR §§ 2.1101-2.1191. The following citations from Minnesota Statutes serve to further justify the need for and reasonableness of the rules:

> The director shall . . . promulgate assessment of need criteria to be used in the determination of need for large energy facilities . . . .

Minn. Stat. § 116H.13 subd. 1 (1976).

> After promulgation of the criteria for assessment of need, any person proposing to construct a large energy facility shall apply for a certificate of need prior to construction of the facility. The application shall be on forms and in a manner established by the director. In reviewing each application the director shall hold at least one public hearing pursuant to Chapter 15.

Minn. Stat. § 116H.13 subd. 4 (1976), as amended by Minn. Laws 1977 ch. 381 § 19.

This rule states that 6 MCAR §§ 2.1101-2.1191 shall be

used to provide the contents of applications for certificates of need and the criteria for assessment of need for all facilities not specifically covered by these rules or by any other set of Agency rules. This provision would prevent persons from using delays created by the rule-making process to avoid application for certificates of need for large energy facilities. The legislature has required that the criteria for assessment of need must be promulgated. With regard to specific data requirements, the statute provides only that "(t)he application shall be on forms and in a manner established by the director." Minn. Stat. § 116H.13 subd. 4 (Supp. 1977).

6 MCAR § 2.1102 Applicability of Rules:

This proposed rule identifies the certificate of need applicants who, based upon the type of facilities proposed by the applicants, must comply with these rules.

Subdivision A identifies the types of large energy facilities governed by the rules: new fuel conversion facilities, new coal slurry or coal liquids pipelines, new nuclear fuel processing facilities, new nuclear waste storage or disposal facilities, certain expansions of these large energy facilities, and any large energy facilities not specifically covered by these or other Agency rules.

Minn. Stat. § 116H.02 subd. 9 (1976) defines construction as a "significant physical alteration of a site to install or enlarge a large energy facility." In the opinion of the Agency staff, construction, as it relates to the aforementioned facilities, would be any new facility or significant physical alteration of a site or sites which increases the capacity of a facility above a certain threshold.

For a fuel conversion facility, the certificate of need requirement applies if the proposed project would expand the capacity of an existing facility by 25 tons per hour of input material and if such expansion would take place within a two-year period. Twenty-five tons is the statutory threshold for

a new fuel conversion facility, and it is reasonable that the same threshold should apply to an expansion. The time period during which the expansion would take place must be specified to remove an element of ambiguity. If the period were not specified, the capacity of an existing facility could theoretically be increased manyfold without going through the certificate of need process.

For a coal slurry pipeline, the certificate of need requirement applies if the proposed project would expand the throughput of an existing coal slurry pipeline by 1000 tons of coal per day and if such expansion would take place within a period of two years. The Agency staff believes that the threshold should be approximately the same as the capacity of a six-inch pipeline. Staff calculations place the capacity of a six-inch pipeline at roughly 1000 tons of coal per day.

For a coal liquids pipeline, the certificate of need requirement applies if the proposed project would expand the throughput of an existing coal liquids pipeline by 15,000 barrels per day and if such expansion would take place within a period of two years. The Agency staff used 10,000 barrels per day as the threshold for large petroleum pipelines in its proposed amendment of Minn. Regs. EA 1001-1091. The staff believes that 15,000 barrels per day is a reasonable threshold for coal liquids pipelines, given the fact that many coal liquids have lower Btu values per gallon than petroleum.

For either a nuclear fuel processing facility or a nuclear waste storage or disposal facility, the certificate of need requirement applies if the proposed project would expand the capacity of an existing facility by at least twenty percent and if such expansion would take place within a period of two years. The threshold of twenty percent of existing capacity was drawn in analogy to the threshold for oil storage expansions:

> . . . unless the facility would be at an existing petroleum storage site and would constitute an increase of less than 20 percent in the storage capacity at that site . . .

Minn. Stat. § 116H.02 subd. 5 (c) (Supp. 1977).

Subdivision B exempts persons who have begun or completed construction of a large energy facility prior to the effective date of these rules, pursuant to Minn. Stat. § 116H.13 subd. 2 (1976). Also exempted is a nuclear waste storage facility certified as an associated facility of a nuclear generating plant. The third exemption takes account of Minn. Stat. §§ 116C.71-.74 (Supp. 1977), which prohibit construction of a "radioactive waste management facility," unless expressly authorized by the legislature.

6 MCAR § 2.1103 Application Procedures and Timing:

This proposed rule responds to the statutory mandate that applications for certificates of need "shall be on forms and in a manner established by the director." Minn. Stat. § 116H.13 subd. 4. The rule provides the basic form and manner of application. It prescribes the number of copies of an application which are required, the form and size of documents filed, cover letter requirements, correction procedures, maximum processing duration, and procedures for applications which are not substantially complete.

Since the Agency has only six months to review and approve or deny an application for a certificate of need, it is important that the form and content of the application are clearly defined, that an adequate number of copies are filed, and that the application as filed is substantially complete. These requirements will help to avoid untimely delays due to a lack of understanding of what is expected from the applicant. Further, they will standardize the applications, thereby reducing the time required by the Agency to review and become familiar with the applicant's request.

6 MCAR § 2.1104 Definitions:

This proposed rule defines certain terms which are used within the rules. Many of the definitions have been taken from Minn. Stat. § 116H.02 or from previously promulgated rules. Statutory language is duplicated in the rules only where comprehension of the meaning and effect of a rule is crucial to potential applicants or other persons affected by the rules.

The key definitions are: "coal liquids pipeline" (6 MCAR § 2.1104 F), "coal slurry pipeline" (6 MCAR § 2.1104 G), "fuel conversion facility" (6 MCAR § 2.1104 O), "Mbpd-mile" (6 MCAR § 2.1104 R), "Mton-mile" (6 MCAR § 2.1104 U), "nuclear fuel processing facility" (6 MCAR § 2.1104 V), and "nuclear waste storage or disposal facility" (6 MCAR § 2.1104 W).

The definitions for "coal liquids pipeline," "coal slurry pipeline," and "fuel conversion facility" have been taken or adapted from Minn. Stat. § 116H.02 subd. 5 (Supp. 1977). The phrase "excepting fissile, fertile, or fissionable nuclear material" in 6 MCAR § 2.1104 O was suggested by the Johannes memorandum; it is needed to prevent possible overlap with a nuclear fuel processing facility.

The Olson letter stated that coal beneficiation should be explicitly excluded from the definition of "fuel conversion facility." The basis for this statement was that "Coal beneficiation does not convert coal to another combustible fuel but rather merely eliminates some of the undesirables contained in coal such as pyrites and ash." It is the understanding of the Agency staff, however, that "coal cleaning" covers a wide variety of procedures, some designed to remove pyrites and ash and others designed to remove organic sulfur. In some cases, very minor changes would occur in the input fuel product; in other cases, when chemical methods would be used to remove organic sulfur, the input product would be altered considerably. Solvent refining of coal, for example, would produce

either a black, pitch-like solid quite different from coal, or a liquid. While the changes would be minor with some processes, all coal-cleaning processes would alter the input product. The Agency staff does not see how the various cases could be logically isolated by the rules. The staff therefore believes that coal beneficiation or cleaning should be covered by the definition. This belief is bolstered by the fact that coal beneficiation has both energy and environmental implications. Some impacts are positive and others negative. All of these factors should be weighed through the public certificate of need process.

"Nuclear fuel processing facility" is not defined by the statutes. The Agency staff believes the proposed definition is reasonable, because nuclear fuel probably would only be processed or reprocessed in Minnesota for use in a nuclear reactor.

"Nuclear waste storage or disposal facility" is also not defined by the statutes. The Agency staff believes the proposed definition is reasonable. The definition is restrictive in that it only applies to nuclear waste from large energy facilities. The Johannes memorandum suggested that the definition should also exclude "low-level wastes" that normally are sent to commercial radioactive waste burial grounds. The memorandum suggested deleting the words "produced by a nuclear reactor or a nuclear fuel processing facility" and inserting the words "associated with spent nuclear reactor fuel." The Agency staff is not convinced that the substitute language correctly expresses the intent of the legislature. The staff believes this matter should be addressed at the public hearing on these proposed rules.

"Mbpd-mile" and "Mton-mile" are proposed as the units for measuring the sizes of pipelines governed by these rules. The definitions are required because the proposed fee assessments for pipelines are based upon them.

The definition of "expansion" has been proposed to clarify those situations for which a certificate of need is required. Essentially, an expansion occurs whenever the capacity of a facility is increased by adding to or modifying the facility. A certificate of need is required when the capacity increase resulting from the expansion is of sufficient size and occurs within a designated time frame, as specified by 6 MCAR § 2.1102 A.

The definition of "promotional practices" has been proposed because the term is used both in the statutes and in these rules. Questions have arisen in the past over the meaning and implications of this term. As defined by these rules, promotional practices would include any actions or policies which would help determine the demand for the applicant's products or services. No attempt is made in these rules to specify which practices should be allowed or not be allowed. The Agency staff believes the propriety of specific promotional practices is a topic for public hearings held pursuant to these rules or for a separate set of Agency rules.

The remaining terms defined by this rule are commonly used in the energy industry, identify the participants or documents in certificate of need cases, or clarify the forecasting requirements.

6 MCAR § 2.1105 Filing Fees and Payment Schedule:

The authority to assess fees for processing applications is given to the director of the Agency in Minn. Stat. § 116H.13 subd. 6 (1976). Subdivision 6 provides two general factors to be considered in establishing a fee schedule: (1) the size or output of the facility and (2) the difficulty of assessment of need. In addition, Minn. Stat. § 16A.128 (1976) requires that the fee schedule be set so that the total fees received approximate the amount appropriated by the legislature, which implies that the certificate of need program must be self-

supporting. Therefore, the fee charged for a certificate of need application should approximate the cost of processing it.

Based on experience to date, the minimum cost of a public hearing is $700 if the application is not contested, and $5,000 is the application is contested. The probability of an application being contested depends upon the perceived impact of, and consensus of the need for, the proposed facility. The Agency staff believes that applications for the nuclear facilities are certain to be contested. The staff estimates that the minimum hearing costs will be $10,000 for a nuclear waste storage facility and $15,000 for a nuclear fuel processing facility.

The numbers of staff hours required to process applications subject to these rules are estimated to be:

	Pre-hearing	Hearing	Post-hearing	Total
fuel conversion facility	75-300	32-320	42- 90	149-710
coal slurry or coal liquids pipeline	75-300	16-160	42- 90	133-550
nuclear fuel processing facility	150-400	80-480	80-120	310-1000
nuclear waste storage or disposal facility	100-300	48-320	80-120	228-740

At a direct staff charge rate of $35/hour, the minimum costs of processing applications submitted pursuant to these rules are estimated to be: $5915 (149 hours x $35/hour + $700) for a fuel conversion facility; $5355 (133 hours x $35/hour + $700) for a coal slurry or coal liquids pipeline; $25,850 (310 hours x $35/hour + $15,000) for a nuclear fuel processing facility; and $17,980 (228 hours x $35/hour + $10,000) for a nuclear waste storage or disposal facility. The corresponding minimum fees under 6 MCAR § 2.1105 A are $6250 for a fuel conversion

facility, $5500 for a coal slurry pipeline, $5750 for a coal liquids pipeline, $25,000 for a nuclear fuel processing facility (assuming a 20 percent expansion of facility with an annual capacity of 500 tons), and $20,000 for a nuclear waste storage or disposal facility.

The Agency staff believes that the fee schedule will reasonably approximate the application processing expenses for all levels of capacity. However, for applications that cost substantially more to process than the fee schedule indicates, there must be a provision, as in 6 MCAR § 2.1111 B, which allows the Agency to recover those costs from the applicant. This is particularly true for nuclear waste storage or disposal facilities, for which a flat fee of $20,000 would be collected. The staff believes that processing costs for a nuclear waste facility application will primarily be related to factors other than the capacity of the facility.

The proposed unit of pipeline size, on which the fee schedule is based, takes into consideration both the "output or capacity of the facility and the difficulty of assessment of need." Minn. Stat. § 116H.13 subd. 6 (1976). The new or additional capacity would be multiplied by a "complexity" factor. Agency staff suggests that this complexity factor be the length of the new (sections of) pipeline, or 50 if the capacity would be expanded by adding power. The longer the pipeline, the greater the impact on the natural and socioeconomic environments and thus the more difficult the assessment of need. Similarly, adding power brings into play questions of efficient use of resources.

6 MCAR § 2.1111 Criteria for Assessment of Need:

The need to adopt a rule specifying criteria for assessment of need for proposed large energy facilities arises from legislative mandate.

> Subdivision 1. The director shall, pursuant to chapter 15 and sections 116H.01 to 116H.15, promulgate assessment of need criteria to be used in the determination of need for large energy facilities pursuant to this section. . . .
>
> Subd. 2. On and after the effective date of the assessment of need criteria adopted pursuant to subdivision 1, no large energy facility shall be sited or constructed in Minnesota without the issuance of a certificate of need by the director pursuant to sections 116H.01 to 116H.15 and consistent with the criteria for assessment of need.

Minn. Stat. § 116H.13 subds. 1-2 (1976). (Emphasis added.) Criteria is generally defined to mean standards on which a judgment or decision may be based or standards by which to judge the correctness of a judgment or conclusion. The listing in Minn. Stat. § 116H.13 subd. 3 (1976) of eight items which the director shall evaluate in assessing need is a nonexclusive listing of factors which can be, and have been, incorporated into the certificate of need process.

The need to include environmental considerations in the criteria arises from legislative mandate in the Energy Agency Act (Minnesota Statutes chapter 116H) and the Minnesota Environmental Policy Act (Minnesota Statutes chapter 116D) which were cited on pages 3 through 5 of this statement.

Proposed rule 6 MCAR § 2.1111 establishes four criteria or standards upon all of which the director must make an affirmative determination before a certificate of need may be granted. The standards expressed in the criteria were developed after numerous discussions between the certificate of need staff and the director, after reflecting upon the experience gained in the prior certificate of need hearings, and after a careful examination of the statutes cited above. They include and reflect the eight statutory factors, listed in Minn. Stat. § 116H.13 subd. 3 (1976), that the director must evaluate in determining the need for the proposed facility and other factors the director considers relevant to the determination of need for a proposed facility.

Subdivision A states the purpose of the criteria and provides that the factors listed under each shall be evaluated to the extent that they are applicable and pertinent to the proposed facility. This provision is needed so that if a factor is neither applicable nor relevant, then lack of its evaluation would not indicate an inadequate determination of need. However, the director is required by this subdivision to make a specific written finding with respect to each criterion.

Subdivision B provides that the director shall consider only those alternatives proposed before the close of the public hearing and for which substantial evidence exists on the record with respect to each of the criteria. This is needed because an application could be denied if a more reasonable or more prudent alternative to the proposed facility can be demonstrated. The alternative should be subjected to the same criteria and scrutiny of public hearings as the facility being proposed.

The first criterion provides the standard which the director will use to measure the validity of the applicant's asserted need for a new energy facility. Part of the Minnesota Energy Agency's charge from the legislature is to " . . . maximize use of energy-efficient systems, thereby . . . assuring statewide environmental protection consistent with an adequate, reliable supply of energy." Minn. Stat. § 116H.01 (1976). (Emphasis added.)

In addition to items (1), (2), and (4), of subd. 3 of section 116H.13 which appear in the rule as factors (a), (b), and (c), the director deems it important to consider two other factors in determining need. Factor (d), the ability of current facilities and planned facilities not requiring a certificate of need to meet future demand, has been, and, in the opinion of Agency staff, will continue to be, a major factor considered in determining the need for proposed large energy facilities. Factor (e) follows from a close

reading of sections 116H.01 and 116D.03. In addition, it allows the director to consider arguments for the granting of a certificate not related to adequacy of supply. The Agency foresees, for example, applications for facilities needed to meet pollution control requirements and for facilities to replace outmoded, less efficient ones.

The second criterion is based upon Minn. Stat. § 116H.13 subd. 3(7) (1976) which requires the director to evaluate "(p)ossible alternatives for satisfying the energy demand . . . ." If there is an alternative more reasonable or prudent than the proposed facility, such a showing must be made on the record by parties other than the applicant. The director could deny a certificate of need or require modifications based upon such a showing.

In examining whether or not a more reasonable and prudent alternative has been demonstrated, the proposed rule requires the director to consider four factors. Each of these factors deals with the reasonableness of alternatives compared to the proposed facility. All four have been points of contention in previous certificate of need proceedings and are foreseen to be objects of contention in proceedings pursuant to these rules.

Factor (a) deals with characteristics of the proposed facility that the director may choose to modify, pursuant to Minn. Stat. § 116H.13 subd. 5 (1976). The other three factors are based upon a close reading of Minn. Stat. § 116H.01.

The third criterion is met if the director determines that the consequences of granting the certificate of need are more favorable than the consequences of denying the certificate.

Under the third criterion, the director is required to consider four factors. The first, third and fourth factors correspond respectively to items (3), (6) and (5) of Minn.

Stat. § 116H.13 subd. 3 (1976). The second factor requires that the effect of the proposed facility on the natural and socioeconomic environments be compared to the effect of not building the facility. This factor is based, to a large extent, upon a close reading of sections 116H.01 and 116D.03. Specifically, subdivision 2 of section 116D.03 states, "All departments and agencies of the state government shall: . . . (c) identify and develop methods and procedures that will ensure that environmental amenities and values, whether quantified or not, will be given at least equal consideration in decision making along with economic and technical considerations . . . ."

The fourth criterion requires that the director find that granting the certificate is consistent with policies, rules, and regulations of other state and federal agencies and local governments which have been considered during the hearing process. Obviously, the director will not grant a certificate of need if it is known to be inconsistent with applicable rules and regulations. However, all necessary information to make this determination may not be available at the certificate of need stage. In addition, the director has no authority to grant certificates subject to unknown or later-developed requirements. Therefore, the director can only ascertain whether the granting of the certificate is consistent with the applicable rules and regulations considered during the certificate of need process.

In last year's certificate of need rules hearing on amendments to Agency rules pertaining to large high voltage transmission lines and large electric generating plants, essentially the same four criteria as proposed here were recommended for adoption. The third criterion evoked the most negative response from the regulated utilities. The main objection was that the proposed formulation:

> . . . the consequences of granting the certificate of need are more favorable than the consequences of denying the certificate . . .

was not objective enough. As finally adopted in the Agency's Chapter Six rules, the third criterion reads:

> . . . it has been demonstrated by a preponderance of the evidence on the record that the proposed facility, or a suitable modification thereof, will provide benefits to society in a manner compatible with protection of the natural and socioeconomic environments, including human health . . .

Minn. Reg. EA 611 C 3.

Agency Staff submits that a criterion should not only be objective, it should also be comprehensive yet concise. The factors listed under the third criterion relate to evaluating the outcome of having the proposed facility versus not having it. While they could be apportioned between the first and the second criteria, Agency staff avers that it is important to determine separately whether the demand that would be met by the facility exists, apart from whether society would be better off having the facility (giving due consideration to benefits, risks and costs).

The federal government's space exploration program illustrates the importance of having a separate third criterion. Shortly after the Russians launched the first man-made satellite, the U.S. had to demonstrate technological parity with, if not superiority over, the Russians. At that time, "need" was paramount, "cost" secondary. The smaller proportion of the budget allocated to the program now could just as well be attributed to society's changing priorities as to the attainment of the original objective to land man on the moon.

It is not sufficient only to compare the costs with the benefits of having the facility, especially if those who benefit from the facility do not bear all of the burden associated with it--the issue of what economists label "external costs." One way of incorporating external costs is to make

"benefits of having the facility" include "costs of not having the facility" and "costs of having the facility" include "benefits of not having the facility." The position of the Agency is that the third criterion as proposed more clearly and more concisely expresses the determination that must be made.

Essentially, the four criteria are equivalent to answering the following questions:

(1) Does a social want exist, and can the proposed facility fill it?

(2) Is there no better means of filling the apparent social want?

(3) Will society be better off if the apparent social want is filled?

(4) Is the proposed facility legal and consistent with public policy?

Procedurally, the third question should be asked before the second.

6 MCAR § 2.1121 Contents of Application:

Subdivision A directs the applicant to the rules which require responses from all applicants. Subdivision B requires each person in a joint application to submit individual responses when directed to do so. Subdivision C requires each person who owns or uses a facility with other persons to comply with the requirements for joint applicants.

The requirement for specific responses from persons in joint applications of multi-party ownership and use facilities is necessary because combined data may obscure information that would be apparent from separate responses. This is particularly true of the data required on historical energy use and forecasted energy use. To accurately evaluate this data the director must obtain information from each of the

individual persons involved in ownership and/or use of the facility.

6 MCAR § 2.1131 General Information:

This proposed rule requires the applicant to provide general information about itself. It also requires the applicant to provide summary information about the proposed facility, including a brief description and how it would fit into the applicant's business. This information is needed to provide a reader with a quick summary of who is applying and what the application is for. The applicant is also required to provide the name of the contact person to whom questions concerning the application may be directed, which will facilitate and expedite communication between the Agency and the applicant. Finally, this rule requires the applicant to give the application fee, which will allow the Agency to quickly determine whether the applicant has correctly computed the fee.

6 MCAR § 2.1132 Schedule of Other Filings:

This proposed rule requests a list of the other agencies or authorities with which the applicant must file and the present status of those filings. This will provide the Agency with a better understanding of the applicant's timetable for the proposed facility. It may also identify required applications or permits which have been overlooked by the applicant.

6 MCAR § 2.1133 Need Summary:

This proposed rule will provide the applicant with an opportunity to summarize in one place the key factors favoring certification of need for the proposed facility. It will also enable a reader of the application to quickly gain a general understanding of those factors before reading the entire application.

6 MCAR § 2.1134 Additional Considerations:

The director in his assessment of need is required by Minn. Stat. § 116H.13 subd. 3 (1976) to consider "promotional activities" leading to demand for the proposed facility, "socially beneficial uses of the output of the facility," and "effects of the facility in inducing future development." This proposed rule requires the applicant to provide information on those three points, since specific information on them would not necessarily be provided in response to any other of the proposed rules. Subsections D of 6 MCAR §§ 2.1144, 2.1149, 2.1154 and 2.1159 do address "induced developments." However, the applicant may know of additional positive and negative effects of the facility that are not explicitly covered by the environmental data sections.

6 MCAR § 2.1135 Conservation Programs:

The director in his assessment of need is also required by Minn. Stat. § 116H.13 subd. 3 (1976) to consider the effect of existing or possible energy conservation programs. Data submitted in response to this rule will provide the director with an understanding of those specific conservation or energy efficiency programs which have been studied or implemented by the applicant. This information is needed by the director to help determine whether reasonable additional conservation measures by the applicant would affect the applicant's need for the proposed facility. The information would also aid the director in determining whether such measures would be economically justifiable.

6 MCAR §§ 2.1141, 2.1146, 2.1151 and 2.1156 Description of the Proposed Facility:

Information submitted in response to these rules would assist the director in understanding the use of the proposed

facility and its relationship to existing facilities. This would facilitate the director's evaluation of the proposed facility and its relationship to overall state energy needs, as required by Minn. Stat. § 116H.13 subd. 3 (1976).

Subdivision A requires a physical description of the proposed facility. The description would include the location, the required land area, the height of the tallest structures, the design capacity, and a drawing showing major components of the facility. For nuclear facilities the depth of underground caverns would be required. For fuel conversion facilities and pipelines, a description of interconnections with other large energy facilities would be required. For pipelines, a physical description of the pipe, pumps and prime movers would be required. These data elements are needed to provide the director with a frame of reference for determining the effect of the proposed facility upon Minnesota's energy supply and environment.

Subdivision B requires data pertaining to the design and construction of the proposed facility. This will facilitate access to the responsible designer or constructor, if necessary; evaluation of the construction impact duration, construction timetable reasonableness, and timeliness of the proposed facility compared to the same features of the alternate facilities considered; and evaluation of the economics of the proposed facility compared to the economics of the alternate facilities considered.

Subdivision C requires data on the expected operation of the proposed facility. This information would aid in the assessment of impacts on the adequacy, efficiency, reliability and economics of the energy supply for people served in or from Minnesota, pursuant to Minn. Stat. §§ 116H.01 and 116H.13. The data would also provide additional insight into possible effects of the proposed facility upon the environment.

6 MCAR §§ 2.1142, 2.1147, 2.1152 and 2.1157 Alternatives:

Minn. Stat. § 116H.13 subd. 3 (1976) requires the director to consider possible alternatives to the proposed facility in assessing need.

The director needs to know the capability of each possible alternative to meet the projected demand, as well as the associated costs and benefits. This information will be considered by the director in determining whether the proposed facility is the most reasonable and prudent alternative available.

The second criterion puts the burden of proof for showing an alternative superior to the proposed facility on parties other than the applicant. However, it is reasonable and necessary that the applicant present information it has available with respect to each alternative. To the extent possible, such information should parallel that given for the proposed facility.

6 MCAR §§ 2.1143, 2.1148, 2.1153 and 2.1158 Historical and Forecast Data:

This rule directs an applicant to provide (1) historical data on its consumption, sales or transportation of energy products; (2) its existing facilities for meeting the energy demand; (3) known future facilities which could be used by the applicant; (4) a forecast of its future consumption, sales or transportation of energy products; (5) a description of the techniques and data used in preparing the forecast; and (6) a discussion of key assumptions which entered into the forecast.

This information is needed by the director to determine the accuracy of the applicant's forecast, pursuant to Minn. Stat. § 116H.13 subd. 3 (1). Data on capacity and utilization of existing facilities will enable the director to ascertain whether alternative operating procedures or enhancement of existing facilities may be more favorable alternatives than the

proposed facility, pursuant to Minn. Stat. § 116H.13 subd. 3 (7).

For fuel conversion facilities, the data requirements have been split into three sections. A response to subsection A would be required of an applicant if the facility were designed primarily to provide energy for the applicant's own use. A response to subsection B would be required of an applicant if the facility were designed to provide pipeline-quality gas for sale by either a gas utility or pipeline company. A response to subsection C would be required of all other applicants, including petroleum suppliers. This breakdown of the rule is reasonable and necessary because the data that would be available and meaningful would depend upon the type of applicant.

For similar reasons, the data requirements of this rule for coal slurry or coal liquids pipelines have been split into two sections. Subsection A would apply to an applicant proposing a pipeline primarily to provide energy for its own use. Subsection B would apply to an applicant proposing a pipeline primarily to transport or distribute energy to others.

The Olson letter stated that the requirements of 6 MCAR § 2.1143 would not be applicable to a coal beneficiation facility. The Agency staff disagrees. The staff believes that each data requirement would not only be relevant but would also be necessary in evaluating an electric utility's need for a coal beneficiation facility for the reasons cited above.

6 MCAR §§ 2.1144, 2.1149, 2.1154 and 2.1159 Environmental Data:

These proposed rules are necessary because of the recognition that decisions made by the Director of the Energy Agency on the size, type and timing of large energy facilities have environmental implications. The proposed rules represent a response to the statutory mandates of the Environmental Policy Act and the Energy Agency Act that environmental values

be considered in the Agency's decision-making process.

A brief history of the origin of the environmental data sections is helpful in understanding the content and necessity of the sections. The Agency first proposed that environmental requirements be included in the certificate of need process in the rule-making proceedings on Minn. Regs. EA 801-881, 901-981, and 1001-1091. These rules cover contents of applications for certificates of need for oil storage facilities, petroleum pipelines, refineries, coal storage facilities, and coal transshipment facilities. The environmental data requirements of those rules represent contributions from various state agencies, including the Minnesota Pollution Control Agency, the Department of Natural Resources, the Department of Agriculture, the State Planning Agency, and the Energy Agency. The structure and content of the environmental data required by these proposed rules are nearly identical with those in the other Agency rules. The differences represent additions suggested by other persons, changes needed for clarity, consistency or style, or recognition of the differences between various facility types.

The proposed environmental rules require an applicant to submit data for the proposed facility and for each alternative considered, to the extent that such information is reasonably available and applicable to the particular alternative. This requirement is consistent with earlier statements herein that enough information should be made available to allow the Director to weigh each alternative against the proposed facility.

The proposed environmental rules are organized into four parts. Subsection A requires the applicant to describe each alternative site with respect to various natural or man-made resources or structures. The data submitted would allow the other state agencies to pinpoint the resources or structures

likely to be affected if the proposed facility were constructed. Other state agencies involved with the siting, construction or operation of large energy facilities are required to present their positions regarding need, pursuant to Minn. Stat. § 116H.13 subd. 7.

Subsection B requires information on the possible effects of the proposed facility with regard to state air and water resources. Subsection C requires an applicant to explain the actions that would be taken to mitigate the possible adverse effects of the proposed facility. Subsection D requires the applicant to discuss induced developments, which is one of the statutory factors that must be evaluated by the director in assessing need. Collectively, subdivisions B through D would allow other state agencies to determine the extent of environmental degradation, if any, that would occur as a result of construction or operation of the proposed facility.

Specific additions to the rules were made to account for the input of other agencies, individuals or companies. Each addition was agreed to by Agency staff and is deemed reasonable and necessary for the reasons stated or referred to hereafter. The requirement regarding bedrock types (6 MCAR §§ 2.1144 A 2, 2.1149 A 4, 2.1154 A 3 and 2.1159 A 3) was added because of a suggestion in the Gardebring memorandum. The requirement regarding trunk highways and airports (6 MCAR §§ 2.1144 A 7, 2.1149 A 9, 2.1154 A 8 and 2.1159 A 8) was added because of a Minnesota Department of Transportation (Mn/DOT) suggestion regarding earlier set of proposed rules. Mn/DOT also suggested that railroad lines be treated in the case of a proposed pipeline. The requirement regarding air traffic corridors (6 MCAR §§ 2.1154 A 8 and 2.1159 A 8) was added because of suggestions by the Gardebring letter and the Johannes memorandum. The requirement regarding areas of local or regional significance (6 MCAR §§ 2.1144 A 11, 2.1154 A 12 and 2.1159 A 12) was added because it was suggested by the Salustro memorandum. This requirement was omitted in the pipeline environmental data section because

of the great number of governments that would have to be contacted by an applicant.

The requirement regarding aromatic compounds (6 MCAR § 2.1144 B 1) was added as a result of Agency staff research. The requirements regarding levels of radioactivity of radioactive wastes (6 MCAR §§ 2.1154 B 1 and 2.1159 B 1) and analyses of human exposure to ionizing radiation (6 MCAR §§ 2.1154 B 2 and 2.1159 B 2) were added because of suggestions in the Gardebring letter and Johannes memorandum.

The requirement regarding heat rejected by the facility (6 MCAR §§ 2.1144 C 5, 2.1154 B 8, 2.1154 C 7, 2.1159 B 8 and 2.1159 C 7) were added because of a suggestion by the Agency's environmental coordinator. Reject heat is treated in the environmental section (Minn. Reg. EA 638) of the certificate of need rules governing contents of applications for large electric generating facilities and large high voltage transmission lines. Heat produced by the facility would also be a concern for fuel conversion facilities, nuclear fuel processing facilities, and nuclear waste storage or disposal facilities. The requirements regarding coal dust in dump basins (6 MCAR § 2.1149 C 1) and slurry water treatment (6 MCAR § 2.1149 C 2) were added as a result of comments in the Dickson letter. The requirement regarding management of radioactive materials (6 MCAR §§ 2.1154 C 1 and 2.1159 C 1) and contingency plans (6 MCAR §§ 2.1154 C 2 and 2.1159 C 2) were added as a result of comments in the Gardebring letter and Johannes memorandum.

The requirement regarding vehicular traffic (6 MCAR §§ 2.1144 D 1, 2.1154 D 1 and 2.1159 D 1) was added because of Mn/DOT's comments on an earlier set of proposed rules. Finally, the requirement regarding work forces (6 MCAR §§ 2.1144 D 2, 2.1149 D 2, 2.1154 D 2, and 2.1159 D 2) was added because of a suggestion by the Agency's environmental coordinator. Work forces are treated in Minn. Reg. EA 638.

The Gardebring letter and Johannes memorandum both state that, with respect to subdivision A of 6 MCAR §§ 2.1154 and 2.1159, five miles does not seem environmentally sound. While the Agency staff is not adverse to changing the "five miles," the staff believes that applicants must be given requirements that are definitive and can be easily understood. For these latter purposes, a numerical radius works quite well.

6 MCAR § 2.1181 Other Facilities:

This proposed rule is needed to specify as clearly as possible the data requirements for applications for facilities not specifically cited in these rules. Subsection A of this rule states that the need for each such facility will be assessed according to the criteria in 6 MCAR § 2.1111. Subsection B states that the information required by 6 MCAR § 2.1121 A and by four additional data sections would be required for each such facility and that the specific requirements could be obtained by contacting the Director.

Such procedures are necessary to prevent applicants from avoiding compliance with the certificate of need program because specific data requirements have not been promulgated. As previously mentioned, Minnesota Statutes section 116H.13 requires only that the criteria for assessment of need be promulgated--not the contents of applications.

6 MCAR § 2.1186 Other Data Filed with the Application:

This rule provides for a section within an application where the applicant may present additional data which has not been specifically required by these rules. Any data filed in this section will be considered by the Agency. The advantage of having this section is that it will allow the applicant to bring such additional data to the attention of the Agency.

6 MCAR § 2.1191 Certificate of Need Modifications:

This rule is needed to specify those situations when recertification is required by a change in a facility previously certified by the director.

Dated:

David L. Jacobson

David L. Jacobson
Acting Manager
Certificate of Need Program

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE MINNESOTA ENERGY AGENCY

In the Matter of the Proposed Adoption of Rules of the Minnesota Energy Agency Governing Contents of Applications for Certificates of Need and Criteria for Assessment of Need for Fuel Conversion Facilities, Coal Slurry or Coal Liquids Pipelines, Nuclear Fuel Processing Facilities and Nuclear Waste Storage of Disposal Facilities, 6 MCAR Sec. 2.1101 - 2.1191.

REPORT OF HEARING EXAMINER

The above-entitled matter came duly on for hearing before William Seltzer, Hearing Examiner, on the Fourth day of May, 1978, in Conference Room D, Veterans Service Building, Saint Paul, Minnesota, commencing at approximately 9:30 a.m.

Dwight Wagenius, Special Assistant Attorney General, appeared for and on behalf of the Minnesota Energy Agency Staff (hereinafter sometimes referred to as "Agency Staff or Staff") in support of the within considered proposed rules. Joseph Bizzano, Attorney at Law, 414 Nicollet Mall, Minneapolis, Minnesota, appeared for and on behalf of Northern States Power Company, and noted his appearance of record. Phillip Brick, Attorney at Law, appeared for and on behalf of Pickands Mather and Company and noted his appearance of record.

A panel from the Minnesota Energy Agency was in attendance to offer direct testimony and respond to questions from the public. The panel consisted of: David L. Jacobson, Manager, Certificate of Need activity; Dr. Leticia A. Chard, Energy Facility Analyst; Karen R. Cole, Environmental Coordinator; and Dr. Arthur L. Adiarte, Energy Facility Analyst.

All interested persons, representatives of individuals or associations, and other interested groups present at the hearing had an opportunity to present evidence and question witnesses.

The record of the proceedings remained open through the 25th day of May, 1978.

Pursuant to Minn. Stat. Sec. 15.0412, subd. 4 (1977 Supp.), this Report shall be available for review to all affected individuals upon request for at least five days. The Minnesota Energy Agency shall, if it proposes to adopt the rules as originally proposed or amended, submit the complete hearing record, including its Findings and Order to the Chief Hearing Examiner no earlier than ten days subsequent to the receipt of this Report. Such submission shall also clearly indicate any changes made to the rules as originally proposed and noticed for hearing in the State Register, preferably in the format that will be submitted to the State Register for publication. The

Chief Hearing Examiner shall complete his review and submit his report to the Minnesota Energy Agency on the issue of substantial changes, if any, in the proposed rules within ten calendar days after receipt of the Findings and Order of the Director of the Minnesota Energy Agency. Thereafter, the Minnesota Energy Agency shall be responsible for filing the rules with the Minnesota Attorney General.

The proposed rules were offered by Agency Staff on their belief that the proposed rules, if adopted, would establish the contents of applications for certificates and criteria for assessment of need for fuel conversion facilities, coal slurry or coal liquids pipelines, nuclear fuel processing facilities, and nuclear waste storage or disposal facilities. Agency Staff further asserted that the proposed rules would also specify the criteria for assessment of need for all large energy facilities not regulated by any other certificate of need rules promulgated by the Energy Agency. Agency Staff asserted that after assessment of need criteria as set forth in the within considered rules has been promulgated, no large energy facility covered by the within considered rules shall be sited or constructed in Minnesota without the issuance of a certificate of need by the Director of the Minnesota Energy Agency.

BACKGROUND

The within considered proposed rules establish a certificate of need process for the following large energy facilities: (1) fuel conversion facilities 1/; (2) coal slurry pipelines 2/; or coal liquids pipelines 3/; (3) nuclear fuel processing facilities 4/; and (4) nuclear waste storage facilities or disposal facilities 5/.

1/ A "fuel conversion facility" means any facility intended to convert coal, peat, wood, or any other material, excepting fissile, fertile, or fissionable nuclear material, into another combustible fuel and having the capacity to process 25 tons of the material per hour at its peak capacity. A fuel conversion facility includes any storage facility on the site needed for operation of the facility at the design capacity.

2/ A "coal slurry pipeline" is any pipeline greater than six inches in diameter and having more than 50 miles of its length in Minnesota used for the transportation of coal or any solid derivative thereof.

3/ A "coal liquids pipeline" is any pipeline greater than six inches in diameter and having more than 50 miles of its length in Minnesota used for the transportation of liquids derived from coal.

4/ A "nuclear fuel processing facility" is any facility designed for or capable of processing or reprocessing any material for use as a fuel in a nuclear reactor. A nuclear fuel processing facility shall include any radioactive or non-radioactive waste storage or disposal facility on the site needed for operation of the facility at the design capacity.

5/ A "nuclear waste storage or disposal facility" is any facility designed for or capable of serving as a temporary or permanent dispository for radioactive or non-radioactive wastes produced by a nuclear reactor or a nuclear fuel processing facility.

The hearing considered proposed Chapter 11 of Energy Agency rules 1101 through 1191.

Proposed EA 1101 sets forth the purpose of the rules. Proposed EA 1102 specifies those types of large energy facilities that are subject to the informational requirements of the rules and to the certificate of need process. Proposed EA 1103 sets forth the procedures and timing requirements for filing an application for a certificate of need. Proposed EA 1104 is the definitional section for the proposed Chapter 11 rules. Proposed EA 1105 sets forth the filing fees and payment schedule which must be adhered to by applicants. Proposed EA 1111 sets forth the criteria to be used by the director of the Energy Agency in making his determinations on an application for a certificate of need. Proposed EA 1121 specifies the information which an applicant must supply in its initial application for a certificate of need. Proposed EA 1131 specifies the general type of information which each applicant must file in its application for a certificate of need. Proposed EA 1132 requires an applicant to supply a schedule with its initial application specifying all known federal, state and local agencies or authorities with which the applicant must file to build and operate the proposed facility. Proposed EA 1133 requires an applicant to file a summary of the major factors which justify the need for the proposed facility. Proposed EA 1134 requires an applicant to explain the relationship of the proposed facility to certain specified socioeconomic considerations. Proposed EA 1135 requires an applicant to supply information concerning its energy conservation programs, if any. Proposed EA 1141, 1146, 1151 and 1156 require an applicant to supply information particularly describing the proposed facility. Proposed EA 1142, 1147, 1152, and 1157 require an applicant to supply information regarding alternatives available to the large energy facility requested. Proposed EA 1143, 1148, 1153, and 1158 require an applicant to supply information concerning such things as historical data on consumption of energy and future energy use forecast data. Proposed EA 1144, 1149, 1154, and 1159 require an applicant to supply information regarding the environmental effects of the proposed facility. Proposed EA 1181 pertains to "other facilities" not elsewhere covered in rules of the Minnesota Energy Agency. Proposed EA 1186 allows an applicant to supply additional data than that which is required if the applicant feels such additional information is relevant to the director's decision. Proposed EA 1191 concerns modifications to a requested certificate of need.

FINDINGS OF FACT

1. That the Order for Hearing issued on the 17th day of March, 1978, was in all respects proper in form, content, execution and filing.

2. That due, timely and adequate Notice of Hearing as ordered by the Minnesota Energy Agency was properly served and filed on the 17th day of March, 1978.

3. That in timely fashion, the following documents were filed and accepted by the Minnesota Office of Hearing Examiners as proper and correct as to form and content:

(a) Order for Hearing;
(b) Notice of Hearing;
(c) Affidavit of Receipt of the Secretary of State's list;
(d) Affidavit of Mailing;
(e) Secretary of State's Certificate and list;
(f) Statement of Need; and
(g) Statement of Evidence.

Said documents were available for inspection at the Minnesota Office of Hearing Examiners from the date of filing to the date of hearing.

All other relevant, substantive and procedural requirements of statute or rule have been complied with for the purpose of establishing jurisdiction of the subject matter to proceed to public hearing pursuant to law.

4. (EA 1101) No substantial comments or criticisms were made with respect to this proposed rule. However, in examining the proposed rule in light of the Minnesota Administrative Procedures Act, wherein an agency must make an affirmative presentation of facts establishing the need for and reasonableness of proposed rules; and in light of appropriate legal limiting factors upon actions emanating from administrative agencies, it is found that the following language should be deleted from proposed EA 1101, to wit:

> And all other large energy facilities not specifically covered by 6 MCAR Sections 2.0601 - 2.0641, 2.0701 - 2.0791, 2.0801 - 2.0881, 2.0901 - 2.0981, or 2.1101 - 2.1091.

With the above change, proposed EA 1101 would read as follows:

> The purpose of these rules is to specify the contents of applications for certificates of need and to specify criteria for assessment of need pursuant to Minnesota Statutes Section 116H.13 for fuel conservation facilities, coal slurry or coal liquids pipelines, nuclear fuel processing facilities, and nuclear waste storage or disposal facilities.

Specific findings regarding the necessity of dropping the originally proposed language of EA 1101 will be discussed hereinbelow at Paragraph No. 5. when discussing concomitant language originally contained in proposed EA 1102.

Aside from the exception specified in this Paragraph No. 4., proposed EA 1101 is found to be reasonable and necessary and should be adopted for the reasons set forth in the Statement of Need.

5. (EA 1102) Agency Staff suggested certain language changes at the time of hearing to proposed EA 1102 A. 2., 4., 5., 7. and 9. The reason given by Agency Staff for the suggested language changes was that the changes would more clearly and adequately address incremental expansions of large energy facilities. (Agency Ex. No. 7; Tr. pp. 15-16) A copy of the suggested changes is attached hereto and made a part hereof as "Attachment A". In part, the proposed changes delete language referring to expansions of large energy facilities within any two-year period, and amends the proposed language such that the proposed rules would be applicable to any qualifying expansion without reference to "two years" or any other time frame. However, the most recent rules hearing for the Energy Agency (aside from the within considered rules) contained provisions specifying exact time frames wherein the certificate of need process becomes applicable to expansions of large energy facilities (i.e., see, Minnesota Office of Hearing Examiners' Docket No. EA-78-002-WS). Such inconsistency as between various chapters of Energy

Agency rules should not cause any hardships or stand as a basis for rejection for lack of need and reasonableness. Nevertheless, the Director should examine the merit of permitting such apparent inconsistency.

It is found that Agency Staff failed to make an affirmative presentation of facts establishing the need for or reasonableness of proposed EA 1102 A. 10. This portion of proposed EA 1102 is a catch-all provision which brings within the purview of the certificate of need process any large energy facility which is not specifically regulated by lawfully adopted rules. The proposed rule requires a person to apply for a certificate of need and to supply the information required in Chapter 11 for:

> Any large energy facility or equivalent expansion other than those given by 6 MCAR Sec. 2.1102 A.1. through 9. or specifically covered by 6 MCAR Sections 2.0601 - 2.0641, 2.0701 - 2.0791, 2.0801 - 2.0881, 2.0901 - 2.0981, or 2.1001 - 2.1091.

First, it is found that the term "equivalent expansion" is ambiguous since there is no way of knowing what an equivalent expansion means. An examination of various chapters of Energy Agency rules pertaining to the certificate of need process does not show any specific uniformity regarding those expansions which qualify to fall under the certificate of need process. Furthermore, it is found to be inappropriate to attempt to regulate all large energy facilities not otherwise regulated. It is conceivable that the Legislature will include additional facilities as "Large Energy Facilities" under certificate of need legislation in the future. There is no way of knowing whether or not Chapter 11 and the criteria and information required thereunder would or could be applicable to any such newly designated large energy facilities. Additionally, it is impossible to show the reasonableness of the application of Chapter 11 to non-specified large energy facilities that may not even be so classified at this time. Administrative rules must be shown to be relevant and to reasonably accomplish administrative policy goals. The catch-all provision of proposed EA 1102 A. 10. cannot be shown to be either relevant or to reasonably accomplish administrative policy goals because it is directed to unknown large energy facilities. It is an attempt to administratively regulate facilities which may not yet be either regulated or defined as large energy facilities under existing legislation.

Northern States Power Company opposed the applicability of the within considered rules to nuclear waste storage or disposal facilities (commonly referred to as spent fuel pools) and expansions thereof. Northern States Power Company has two nuclear generating facilities in Minnesota. The Company's Prairie Island and Monticello Nuclear Generating Plants are powered by nuclear fuel assemblies. The fuel assemblies are typically 14 feet in length and approximately five inches square, or seven inches square, depending upon the type of reactor. The number of assemblies in the reactor are also a function of the type and power rating of each reactor. The Prairie Island pressurized water reactor employs 121 fuel assemblies, whereas the Monticello boiling water reactor employs 484 assemblies.

Each fuel assembly is made of slender zirconium alloy tubes containing ceramic pellets of uranium oxide. The number of rods (tubes) varies according

to the type of reactor and fuel design. NSP's fuel assemblies vary from 49 to 179 rods. The uranium oxide pellets contain two types of uraniums: Uranium-238 (U-238) and the fissile material, uranium-235 (U-235).

As the nuclear fuel is consumed in the nuclear reactor, the U-235 atoms are split in the nuclear fission process. As a byproduct of this process, plutonium-239, which readily fissions in the reactor, is also produced.

Approximately every 12 months, the nuclear reactor is shut down and one-third to one-fourth of the fuel assemblies are replaced with new fuel assemblies. Those spent fuel assemblies which are removed still contain approximately 30 percent of the U-235 which was originally placed in the fuel and a substantial amount of plutonium-239 has been created.

At that point, the fissile materials are depleted to the extent that full power operation can no longer be achieved because unavoidable fission products absorb too many neutrons. The ability to maintain full power operation depends upon the abundance of neutrons in the reactor.

Upon discharge from the nuclear reactor, spent fuel is transferred to a spent fuel pool. All fuel-handling operations are performed with the fuel underwater. Spent fuel pools differ in floor area, depending upon the number of reactors each serves and the type of fuel to be stored. The pools are typically about 40 feet deep.

Spent fuel pools provide four basic functions: Structural, shielding, cooling, and cleanup.

Structurally, the spent fuel pool holds the weight of the water, the storage structures, and the spent fuel. Also, the pool is designed to withstand the worst earthquake which could be postulated for the plant site.

The pool walls and the intervening water provide radiation shielding for workers in rooms outside of the pool walls.

The spent fuel pool cooling system removes the heat generated in the spent fuel assemblies. The radioactive decay of the materials accumulated in the spent fuel rods continues to generate heat after the fuel is removed from the reactor. The heat generation decays exponentially; i.e., the heat production drops rapidly when first removed from the reactor and then slows down with the passage of time.

While the fuel is in the reactor, radioactive corrosion products adhere to the surface of the fuel rods. These corrosion products can be knocked loose from the spent fuel during handling. The spent fuel cleanup system removes these corrosion products from the spent fuel pool water.

Storage structures, commonly referred to as racks or modules, are placed in the spent fuel pool to hold the spent fuel assemblies in a vertical position. These racks or modules assure: That the spent fuel is safely restrained under all conditions including earthquakes; that the cooling water cools the spent fuel; and that the subcriticality of the stored fuel is maintained. Subcriticality is a condition where the number of neutrons reaching the fissile material is insufficient to sustain the fission process.

In 1977, the Minnesota Legislature amended Minn. Stat. Sec. 116H.02, subd. 5(j) to expand the definition of "large energy facility" to include

"any nuclear fuel processing or nuclear waste storage or disposal facility". NSP argued that the principal concern of the 1977 Legislature was the possibility of Minnesota being selected by the Federal Government as a regional or national site or dumping ground for permanent waste storage or disposal of high level radioactive wastes. On the other hand, NSP argued that the Legislature was not concerned in any way with the expansion of spent nuclear fuel storage facilities, or pools as they are commonly referred to, that occur from time to time at operating nuclear generating plants. For that reason, NSP opposed the within considered rules to the extent that they bring within the purview of the certificate of need process any expansions of spent nuclear fuel pools.

In support of its position, NSP raises a number of arguments. First, the United States Nuclear Regulatory Commission (NRC) issues licenses to operate nuclear generating plants for a 40-year term. After a five year license proceeding, NSP's Prairie Island Nuclear Generating Plant received its 40-year operating license in 1977. The Company's Monticello facility is expected to receive its 40-year license from the NRC sometime in 1978, following a six-year license proceeding. Both facilities are pre-MEA facilities. NSP stated that periodic expansions of the spent fuel pools at both nuclear facilities are likely to occur in the future. Since a lack of capacity to store fuel byproduct could cause a nuclear facility to shut down, it is argued that if the certificate of need process is applicable to expansions of spent fuel pool capacity, such process would be in effect a re-litigation of the fundamental need for the particular generating plant involved, and that such procedure was foreclosed when the 40-year operating license was granted. The Company fears the proposed rules present a potential for periodic retroactive determination of the need for its existing nuclear generating facilities.

It is found that NSP's argument that a determination of the need for an expansion of an on-site spent fuel pool will end up as a re-litigation of the fundamental need for the nuclear generating plant is without merit.

In a recent hearing before the NRC regarding spent fuel pool modification for the Prairie Island facility, the Minnesota Pollution Control Agency was denied the opportunity to litigate the fundamental issue of need for power from the nuclear generating plant since the need was previously determined when the 40-year license issued. The same procedures must be followed in Minnesota when application is made for a certificate of need to expand spent fuel pool capacities. In other words, the Minnesota Energy Agency clearly does not have authority to re-examine the issue of need for the generating facility since that issue was previously determined by the Federal Government in processes that started prior to the existence of the Minnesota Energy Agency. The Minnesota Energy Agency cannot re-examine the need for any type of electric generating facility created prior to the certificate of need legislation and the Agency cannot re-examine or re-litigate the need for NSP's two nuclear generating facilities.

However, in the same manner in which NSP may have had to go through a hearing process with the Federal Government to modify their 40-year operating

license to increase their spent fuel pool capacity without going into the issue of need for the nuclear generating plant, the Company should be required to obtain approval from state authorities before increasing spent fuel pool capacity. This procedure leaves the Energy Agency with substantial issues to determine. For example, if off-site storage or disposal facilities are reasonably available, the Minnesota Energy Agency may, on proper grounds, deny a requested certificate of need for expansion of storage capacity in order to require the utility to remove its nuclear waste or byproduct to another site or to a location outside the State of Minnesota. Another practical example would be wherein the Energy Agency may deny the expansion modification as requested, but permit less additional storage capacity than originally requested if there is reason to believe that off-site storage facilities could be developed in the near future to handle the nuclear byproduct.

Just as NSP could not validly argue against having to go before the Federal Government to obtain modification of its operating license in order to expand existing fuel pool storage capacity, it cannot validly argue against having to go before the Minnesota Energy Agency to obtain permission for expansion of such storage facilities.

However, caution is advised since the issue of need must only go to whether or not there is need to <u>expand the storage capacity</u> but must not go to the issue of whether or not there is a need for the energy generated at the nuclear plant. The two nuclear plants in question are "grandfathered" in under Minnesota law and must be allowed to operate for their full term under the existing Federal licenses. If the Minnesota Energy Agency Staff is of the opinion that the Energy Agency can re-litigate the issue of <u>need</u> for the energy produced at the existing nuclear facilities, it is specifically found that the Energy Agency cannot so re-litigate that issue. If the director of the Minnesota Energy Agency finds that there is any ambiguity regarding this point, it is found that additional clarifying language should be added to the proposed rules to clearly indicate that a hearing on a requested expansion of spent fuel pool storage facility only goes to the issue of whether such additional storage capacity should be allowed and that any decision such as "no build" decision would be improper if the end result can be reasonably expected to force a plant shut down.

Finally, one should examine the need for and reasonableness of the state having authority over whether or not a utility should expand its spent fuel pool storage capacity. In making such determinations, the Hearing Examiner considered the fact that spent fuel pool assemblies can generate enormous heat and contain highly radioactive uranium, actinides, and plutonium. The latter isotope is highly toxic to man. Because it is lethal in miniscule amounts and because it has a "half-life" of 25,000 years, plutonium must be isolated from the biosphere for approximately 250,000 years. One method of expanding the storage capacities is to replace existing storage racks with new racks having a much more dense honeycomb configuration. Such modification within the water-filled basins has distinct physical limits because, if placed

too closely to one another, spent fuel pool assemblies could attain a "critical mass" of fissile uranium and plutonium, starting a sustained and uncontrolled nuclear fission reaction. For these reasons, it is found both reasonable and necessary for the Minnesota Energy Agency (as the appropriate governmental body) to have jurisdiction over fuel pool expansions in order to protect public health and welfare.

Next, NSP argues that spent fuel which is produced as a byproduct of nuclear generating plant operation cannot be considered a nuclear waste as that term is used in Minn. Stat. Sec. 116H.02, subd. 5(j) (1977). In order to determine whether or not such byproduct is a "waste" certain background information will be helpful to the reader of this Report.

The nuclear fuel cycle philosophy prevalent in the nuclear industry at the time when Prairie Island and Monticello were designed, licensed, and built was that the spent nuclear fuel would be shipped to a reprocessing facility for recovery of the uranium-235 (U-235) and plutonium-239 (Pu-239) in the fuel. The goal at that time was to minimize the time between the removal of the spent fuel and reprocessing so that the valuable fissile materials U-235 and Pu-239 could be recycled to the reactor as fuel.

Spent fuel pools typically were designed to hold one or two cycles of discharged spent fuel from each reactor serviced by the pool, plus a reserve storage capability for emergency maintenance inside the reactor which could require removal of all fuel assemblies from the reactor. Spent fuel discharged from the reactor was expected to reside in the pool for 90-100 days while cooling off. At the end of this period, spent fuel shipping casks were expected to transport the spent fuel to reprocessing plants.

Prairie Island was originally designed with 210 spent fuel storage locations which were sufficient to receive a normal refueling discharge of 40 spent fuel assemblies from one reactor. Monticello was originally designed with 740 spent fuel storage locations, which were sufficient to receive two normal refueling discharges of 121 spent fuel assemblies and a complete discharge of 484 fuel assemblies from the reactor.

Late in 1974, it became apparent that reprocessing facilities would not be available to receive spent fuel on the schedule previously anticipated. Studies of the situation were initiated and recommendations were made in the middle of 1975 to increase the storage capabilities of the Prairie Island and Monticello pools. The problem, as perceived at that time, was to provide very short-term storage until the reprocessing facilities became operable. By the fall of 1976, it became apparent that more storage capacity might be needed. In the meantime, contractual commitments had been made with a supplier for 675 spent fuel storage locations at Prairie Island. Time was too short to change the design for more storage capacity, and the higher capacity design employed new concepts which it was believed could result in protracted licensing proceedings with the Federal Government.

In April, 1977, the Carter Administration announced its new nuclear fuel cycle policy, which does not call for reprocessing of spent fuel. Recognizing the spent fuel storage problem at reactor sites, the Carter Administration

committed the Federal Government to ultimately taking responsibility for spent fuel storage. However, the earliest the Federal Government now expects to have storage space available is 1985.

Today, on-site spent fuel pool storage expansion has become the only present alternative to plant shut down at numerous reactors in the United States because spent nuclear fuel is so unwanted that there is nowhere to ship such nuclear waste. For the present, and possibly for many, many years to come, commercial reactor spent fuel has been rendered useless by President Carter's April 7, 1977, announcement terminating all plans for the reprocessing of spent fuel into reuseable uranium and plutonium. Two considerations that are undisputable are that it is not currently known whether nuclear spent fuel will or will not be reprocessed in the future, and that currently there is no operating reprocessing plant in the United States. Thus, there is no current practical use for spent nuclear fuel.

It is found that the byproduct of nuclear generating plants is currently "waste" as that term is used in Minn. Stat. Sec. 116H.02, subd. 5(j). To argue that the byproduct of the nuclear generating plant is not waste because such byproduct may be desirable as a potential energy resource in the future is akin to arguing that household garbage, used crankcase oil, and domestic animal waste excretions are not "wastes" because they are a potential and technically feasible energy resource.

Additionally, spent nuclear fuel contains amounts of high-level radioactive waste along with the recoverable uranium and plutonium fuels. Because of this, spent fuel should be subject to stringent environmental and safety restrictions. The vehicle for such state control can be the certificate of need process which by statute requires the participation of other state agencies responsible to utilize their particular expertise in the siting, construction or operation of spent fuel pools. See, Minn. Stat. Sec. 116H.13, subd. 7. To argue that the high-level waste portion of a spent fuel assembly is not nuclear waste because the assembly also contains potentially recoverable fuel is improper.

NSP further attempts to argue that spent fuel is not waste by asserting that the NRC and Congress have not yet classified them as such. The fact that NRC or Congress has not so classified them is not binding upon the State of Minnesota. There is no law prohibiting the Minnesota Energy Agency from using a common sense definition of the term "waste". The way in which Agency Staff interpreted "waste" is found to be a reasonable policy decision on behalf of the Minnesota Energy Agency. It is noted that the term "nuclear waste storage or disposal facility" is not defined in the applicable statute.

Next, NSP argues that the expansions of spent fuel pools associated with the Company's nuclear generating plants which have been completed or are just commencing, and further expansions which are contemplated in the near future do not amount to the construction of a facility. NSP is arguing that the expansion of a spent fuel pool is neither the expansion of a "facility" nor does such expansion constitute "construction" as those terms are applicable to the expansion of large energy facilities under the Minnesota

Energy Agency Act. The Company asserts that expansions of spent fuel pools are merely internal enlargements within an existing nuclear reactor building; that is, only the number of racks for storing the spent fuel will be increased mainly by increasing the density of the racks.

Notwithstanding the arguments of NSP, it is found that the expansion of a spent fuel pool constitutes both "construction" and that the spent fuel pool is a "facility" as those terms are used in the Minnesota Energy Agency Act. A "facility" is defined in Webster's Third New International Dictionary (unabridged) as: "Something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform a particular function or to serve or facilitate some particular end." Quite obviously, a spent fuel pool is something which is established to perform a particular function and also to facilitate a particular end.

Minn. Stat. Sec. 116H.02, subd. 9, defines "construction" as follows:

> Means significant physical alteration of a site to install or enlarge a large energy facility, but including activities incident to preliminary engineering or environmental studies.

It is NSP's argument that the internal enlargement or re-racking of a spent fuel pool to increase its storage capacity does not properly fit within the statutory definition of "construction". The Company bases its argument on the fact that all activities are confined within the existing nuclear reactor buildings. The issue reduces to whether replacing the storage lattice constitutes significant physical alteration of the site. Certainly, the structure of the facility is physically altered. Such alteration goes to the very essence of the function of a spent fuel pool storage facility (i.e., to store nuclear byproduct). By increasing its storage capacity, which is a spent fuel pool's principal function, a significant physical alteration is accomplished. Any argument that such physical alterations do not fall under the certificate of need process simply because the construction occurs within an existing building is herein rejected. If one were to accept that line of reasoning, in the future, NSP could simply build one huge structure, for example NSP's Sherco site, put Sherco III and IV inside of it, and claim a certificate of need is not necessary because there is no new building.

In addition to increasing the storage capacity of an existing spent fuel pool storage facility, other types of capacity increases could take place by adding another pool in the same building or on another site. It is found that all such expansions of storage capacity are activities which are subject to the certificate of need process.

Northern States Power Company asserts that 20 percent is an inappropriate cut-off point for expansion of a nuclear waste storage or disposal facility. Agency Staff agreed that the 20 percent figure is somewhat arbitrary. However, Staff argued, the Legislature placed no size limitation on what constitutes a nuclear waste storage or disposal facility. Agency Staff then asserted that a logical alternative would be to require a certificate of need no matter how small the expansion. The Hearing Examiner finds that in setting forth the findings that establish the rational basis for adoption of the within considered rules, the Energy Agency is not limited to only those

facts that are supported by substantial evidence of the type which is necessary in an adjudicatory hearing. There is a difference between the kind of facts relied upon in a rulemaking hearing and the kind of facts relied on in an adjudication. Professor Kenneth Culp Davis identifies this difference:

> Two main elements in rulemaking are (1) facts, and (2) ideas about policies. The two are generally interwoven in such a degree that in some part of the whole problem of what to do, they are inseparable. Even so, a main element in rulemaking is necessarily the policy choice that the administrator must make. Adoption of a rule may require some understanding of facts, but it always requires legislating. Courts must leave administrators free to legislate, within the limits of rationality. And legislating inevitably involves the addition of something to the facts in the rulemaking record.

K. Davis, Administrative Law of the Seventies, (Cumulative Supp. 1977) (emphasis in original).

The Minnesota Supreme Court recognized the difference between legislative facts and adjudicatory facts and has identified the support needed to uphold the two kinds of facts. See, St. Paul Area Chamber of Commerce v. Minnesota Public Service Commission, 251 N.W.2d 350 (Minn. 1977). In the within considered proceeding, some of the facts are legislative facts—policy decisions and judgments. In the matter at hand, it is found that the 20 percent cut-off figure is a reasonable policy decision on the part of the Minnesota Energy Agency and adds a degree of consistency to the applicability of the certificate of need process as it will pertain to the expansion of spent fuel pool facilities and other types of facilities similarly regulated by the certificate of need process.

In furtherance of NSP's assertion that the Legislature did not intend the certificate of need process to extend to the Company's spent fuel pool facilities, NSP asserts that the eight criteria set forth in Minn. Stat. Sec. 116H.13, subd. 3, are clearly inapplicable to spent fuel pools associated with operating nuclear generating plants. NSP asserted that:

> "Clearly none of the eight criteria make any sense whatsoever in the case of spent fuel pools or expansions thereof. Such fuel pools and expansions merely allow a nuclear generating plant to operate throughout its 40-year operating license. No increase in the energy supply to the state is involved. Because the eight criteria are utterly meaningless in this situation, one can only conclude that there is no rational relationship between the legislation/proposed rules and the subject matter ostensibly sought to be regulated, at least insofar as spent fuel pools and expansions thereof might be concerned."

Notwithstanding the above argument of NSP, the Company defeats its own assertions by stating:

> "It is not the intent of the foregoing arguments to imply that a proper subject for regulation might not include an independent, free standing nuclear waste storage or disposal facility or its expansion disassociated from an operating nuclear generating plant . . . ." (Emphasis original)

If one admits that a free standing nuclear waste storage or disposal facility is subject to the certificate of need process, it would not be logical to accept that party's argument that a nuclear waste storage or disposal facility associated with an operating nuclear generating plant should be exempt from

the certificate of need process because the facility cannot be evaluated under the eight statutory criteria set forth in Minn. Stat. Sec. 116H.13, subd. 3. Clearly, there is no way to distinguish between a free standing nuclear waste storage or disposal facility or a nuclear waste storage or disposal facility associated with an operating nuclear generating plant when examining those facilities in light of the eight factors specified in Minn. Stat. Sec. 116H.13, subd. 3.

Furthermore, not all large energy facilities can be assessed in light of the eight factors in the Minnesota Energy Agency Act. For example, section 116H.13, subdivision 3(5) specifies the following factor to be considered by the director in making his decision on the issuance of a certificate of need:

> Socially beneficial uses of the output of this facility, including its uses to protect or enhance environmental quality; (emphasis added)

Most large energy facilities could not be viewed favorably in light of the above-quoted factor. Generally, such large energy facilities as high voltage transmission lines, oil refineries, coal depots, and electric generating facilities are not facilities which have an intrinsic use to protect or enhance environmental quality. In fact, past experience has shown that substantial oppositions to such large energy facilities is based on the environmental degradation brought about by the installation of such facilities.

Additionally, the assertion by NSP that "none of the eight criteria make any sense whatsoever in the case of spent fuel pools or expansions thereof" (NSP Ex. No. 1 at 8-10) is found to be incorrect. It is true that the factors, which were enacted into law prior to the inclusion of nuclear waste storage and disposal facilities in the certificate of need process, are specifically addressed to the need for facilities which supply energy. Hence, the factors direct the Agency to examine the forecasts for energy demand and alternatives to reduce that demand. However, it is a simple matter to apply these factors sensibly to the newly regulated facilities which supply storage and disposal services, rather than energy. The Agency will doubtless examine the forecasts of demand for such services, and demand will have a direct bearing on the amount of nuclear waste to be produced in the future. If demand and thus energy output are reduced, the need for expansion of existing fuel pool storage facilities will be similarly reduced while an increase in demand and output will necessitate a greater amount of storage space for the nuclear byproduct unless off-site facilities are reasonably available. Further, proposed EA 1158 is ample proof of the fact that the factors can be intelligently modified and applied for spent fuel pool facilities.

In any event, the allegedly poor fit of the eight factors to spent fuel pool expansions does not justify the conclusion that the Agency may rewrite the statute to exempt such facilities. Moreoever, if the Agency were to exempt all facilities which arguably are not suited to the criteria, the Energy Agency must likewise exempt from the certificate of need process permanent, independent, free standing nuclear waste storage and disposal

facilities which NSP claims that the Legislature primarily intended to reach.

Interwoven in NSP's argument against on-site spent fuel pool storage facilities falling under the purview of the certificate of need process is their theory that the Legislature did not intend to so regulate on-site spent fuel pools.

However, Chapter 381, Minn. Laws 1977, amended the existing certificate of need legislation to include "any nuclear fuel processing or nuclear waste storage or disposal facility". Minn. Stat. Sec. 116H.02, subd. 5(j) (1977 Supp.). The amendment is clear and unambiguous on its face and brings within the certificate of need process any nuclear waste storage or disposal facility. The amendment was enacted on June 2, 1977. At the time of this enactment, it was a matter of public record that the Minnesota Pollution Control Agency was opposing, in a NRC licensing proceeding, NSP's request for authority to expand the spent fuel storage pool at Prairie Island.

Nuclear power plants in this country have been constructed with capacity to hold spent fuel for a period of approximately six months, prior to off-site shipment. The assumption underlying this design—that spent fuel would have a current value and would be rapidly reprocessed—has now turned out to be false. With the termination of reprocessing plans, all spent fuel has become nuclear waste, which must be stored somewhere until the Federal Government finally determines how to dispose of it safety. The absence of any alternative storage locations for these wastes has resulted in a national spent fuel storage crisis in which the only alternatives are reactor shut downs or on-site expansions. These facts had become obvious by 1977, and the legislative action in amending the statute took place in this context.

In its attempt to obtain an exemption, however, NSP now expresses its "opinion" that the Legislature was concerned only with "permanent storage or disposal of high level radioactive wastes". However, proposed EA 2.1102 A. 8. and 9., which is the principal cause of NSP'c concern, merely codifies the language of Minn. Stat. Sec. 116H.02, subd. 5(j) (1977 Supp.).

Finally, the Hearing Examiner rejects NSP's argument that because the energy capacity or supply picture in Minnesota is not in any way increased by an expansion of a spent fuel pool, and because spent fuel pools or expansions thereof are totally unrelated to rapid growth and demand for energy, the Legislature could not have intended to require a certificate of need for such activities. As stated above, that argument founders on NSP's admission that the Legislature did intend to require a certificate of need for "an independent, free standing nuclear waste storage or disposal facility . . . disassociated from an operating nuclear generating plant." The latter type of facility does not increase the energy capacity or supply picture and has no more relation to the rapid growth and the demand for energy than does an on-site spent fuel pool expansion. Additionally, NPS's arguments are further self-defeating and circuitous by their claim that nuclear waste byproduct has a value as an energy resource after reprocessing. Such argument would support a conclusion that as the nuclear waste reserves increase, their would be an incremental increase of potential energy capacity or energy supplies in Minnesota.

It is specifically found that NSP's challenge to the appropriateness or relevance of proposed rules relating to spent fuel pools is without merit.

It is found that with the exception noted in this Paragraph No. 5., proposed EA 1102 is reasonable and necessary and should be adopted with Agency Staff changes incorporated into their Exhibit A as set forth in the Staff's Second Post-Hearing Submission.

6. (EA 1103) This proposed rule sets forth application procedures and timing requirements for the filing and processing of applications for a certificate of need. Basically, the rule responds to the statutory mandate that applications for certificates of need "shall be on forms and in a manner established by the director". Minn. Stat. Sec. 116H.13, subd. 4.

Most of the requirements of this proposed rule are commonsense requirements on their face. Since the Agency has only six months to review and approve or deny an application for a certificate of need, it is important that the form and content of applications are clearly defined, and that an adequate number of copies are filed, and that the application as filed is substantially complete. Such requirements help to avoid untimely delays due to a lack of understanding of what is expected from the applicant. Standardizing applications will reduce the time required by the Agency to review and become familiar with an applicant's request.

Proposed EA 1103 B. reads, in part, as follows:

> A minimum of seven (7) bound copies and one (1) unbound copy of the application shall be filed with the director. The director may require additional copies, not to exceed one hundred (100) copies total . . . .

(Emphasis added) Requiring seven bound copies and one unbound copy of the application is found to be reasonable on its face. However, the Agency failed to make any affirmative presentation of facts upon which a finding can be had that it is reasonable to allow the director to have the discretion of requesting an additional one hundred copies. In fact, there is no testimony whatsoever concerning the one hundred copy requirement that substantiates any factual basis for its need or reasonableness, and it is found that on its face such a requirement cannot be found reasonable. Additionally, note should be taken that upon final review by the Minnesota Attorney General's Office of administrative rules, the Attorney General, of late, has been rejecting rules utilizing the term "may" rather than the term "shall" when specific guidelines or parameters are not established in the rule itself for the discretionary action allowed.

It is found that the sentence which reads: "The director may require additional copies, not to exceed one hundred copies total" should not be adopted because there was no affirmative presentation of facts establishing the need for or reasonableness of such requirement.

Proposed EA 1103 F. is proposed to be changed by Staff from the version originally published for hearing. The additional language suggested by Agency Staff provides for an additional condition precedent before the director or Agency will consider an application for a nuclear fuel processing facility or a nuclear waste storage or disposal facility substantially complete. The additional language is as follows:

An application for either a nuclear fuel processing facility or a nuclear waste storage or disposal facility will not be considered substantially complete without an indication in response to 6 MCAR Sec. 2.1132 that the required federal construction permits or amendments to operating licenses have been obtained, unless the applicant can show in a written submission made to the director pursuant to 6 MCAR Sec. 2.1103 H. that all relevant environmental, health, and safety reviews and analysis have been completed by the federal government.

The suggested change was offered because of a belief by the Minnesota Pollution Control Agency that the 80-day review period between receipt of an application and the public hearing held on the application would be insufficient to perform the necessary environmental, health, and safety reviews and analysis for nuclear facilities. Thus, the Minnesota Pollution Control Agency believes that the relevant federal reviews should be completed before an application is submitted to the Minnesota Energy Agency. Agency Staff believes the proposed change would assure that the timing of the certificate of need process does not prevent adequate environmental, health, and safety review of nuclear facilities before the public hearings.

The suggested language change would reasonably accomplish the stated goals of both the Minnesota Pollution Control Agency and the Staff of the Minnesota Energy Agency. However, the change is substantial in that it establishes an additional condition precedent to certain types of applications before they can be considered complete for acceptance. Such condition precedent did not appear in the originally proposed rules as noticed for hearing. It is found that the suggested change goes to a new subject matter of significant substantive affect and results in a rule fundamentally different from that contained in the Notice of Hearing insofar as the rule impacts nuclear fuel processing facilities and nuclear waste storage or disposal facilities. Accordingly, it is found that the suggested change should not be adopted at this time for lack of sufficient notice.

Notwithstanding the above Finding, the suggested language change may substantially enhance the proposed rule. Accordingly, the Energy Agency should examine the merits of noticing a proposed amendment to EA 1103 in order to conduct a public hearing, with proper notice, which may conclude with the adoption of the suggested language as soon as practicably reasonable.

With the exceptions noted hereinabove, it is found that proposed EA 1103 is reasonable and necessary and should be adopted for the reasons cited in the Statement of Need.

7. (EA 1104) Proposed EA 1104 is the definitional section for the proposed Chapter 11 rules. Comments made at the hearing were directed toward three of the definitions. The first suggested change relates to definition O which defines "fuel conversion facility". The suggestion was made to strike the term "on the site," because in some cases storage facilities may need to be off the site of the fuel conversion facility. As the rule was originally proposed, it could have been interpreted such that a certificate of need would have been necessary for an off-site storage facility while another certificate may have been required for the fuel conversion facility itself. In order to avoid such unnecessary duplication of the certificate of

need process, it is reasonable and necessary to delete the words "on the site" from the definition which is not a substantial change and which comports with the original intent of the rule.

Northern States Power Company suggested that definition O be further modified to exclude coal-cleaning facilities that do not substantially change the structure of input coal. The Minnesota Pollution Control Agency concurred that such a change would be desirable. However, Minnesota Energy Agency Staff argued that many variations of coal beneficiation exist. Agency Staff argued that some processes merely remove pyritic sulphur and ash while others substantially change the organic structure of the coal so that in all cases, the input fuel is altered to some extent. Therefore, Agency Staff asserted that the Minnesota Energy Agency is within its statutory authority in requiring a certificate of need for coal-cleaning facilities. However, Agency Staff concluded that it agrees that certain facilities for washing, crushing, or agglomerating coal should be exempted from the certificate of need process but that the Agency cannot logically isolate such facilities without making the rule overly detailed. Therefore, Agency Staff proffers that a potential applicant contact the director with a specific proposal to find out if the facility requires a certificate of need.

The Hearing Examiner disagrees with the position of Agency Staff. There has been no adequate showing that in fact the certificate of need process is designed to cover coal-cleaning facilities which merely wash coal. Furthermore, and more importantly, adopting the Staff position that a potential applicant contact the director with a specific proposal to find out if the facility requires a certificate of need would be a grant of unbridled discretion to an administrative agency wherein specific criteria and guidelines would not be set forth in the rules, but rather lies in the mind of the decision maker. A rule having force and effect of law cannot be designed such that its applicability can be decided on a case by case basis according to subjective determinations of an administrative agency head. Such Finding lies at the basis of the American principle that this is a nation of laws and not of men. Accordingly, definition O must be clarified to remove any such discretions allowed to individual personalities simply because Staff feels they cannot "logically isolate those facilities without being overly detailed." It is preferable to be "overly detailed" than to ignore rule-of-law in favor of expediency.

Several comments were made relative to definition W which defines "nuclear waste storage or disposal facility". It was suggested that since burial grounds for low-level wastes are, by implication, included under the definition; that the definition should be forthright and clearly state such coverage. Therefore the phrase "including any burial ground for low-level radioactive wastes" has been included in the definition and is found to be reasonable and necessary. The additional language does not constitute a substantial change since it merely clarifies the coverage of burial grounds for low-level radioactive wastes. Also, the Minnesota Pollution Control

Agency asked whether the Staff intended that a certificate of need be required for toxic nonradioactive wastes. The Staff did not intend such result, except for nonradioactive wastes which are associated with and not separable from radioactive wastes. To clarify the matter, the word "associated" is inserted before the words "nonradioactive wastes" and such additional language is found to be reasonable and necessary without constituting a substantial change.

Finally, in conjunction with the changes concerning proposed EA 1102 A. utilizing the term "base capacity" a new definition has been included for that term. The definition is needed to make clear the proposed changes in 6 MCAR Sec. 2.1102 A. and is found to be reasonable and necessary without constituting substantial change.

With exceptions noted hereinabove, it is found that proposed EA 1104 is reasonable and necessary and should be adopted for the reasons set forth in the Statement of Need.

8. (EA 1105, 1111, 1121, 1131 - 1134) No specific or substantial comments were made with respect to these proposed rules during the hearing process. However, proposed EA 1121 A. 5. again discusses the applicability of Chapter 11 to non-specified large energy facilities not elsewhere regulated under rules of the Minnesota Energy Agency. As noted elsewhere hereinabove in this Report, attempts to regulate non-specified facilities is inappropriate and contrary to the Administrative Procedure Act in that adoption of such a rule is akin to rulemaking without a public hearing since the rule could bring within its force and effect unknown facilities. It is therefore found that proposed EA 1121 A. 5. should not be adopted.

With the exception noted above, proposed EA 1105, 1111, 1121, 1131 - 1134 are found to be reasonable and necessary and should be adopted for the reasons given in the Statement of Need.

9. (EA 1135) This proposed rule requires an applicant to supply information concerning its conservation programs. Northern States Power Company argued that the proposed rule has no relevance in the case of spent fuel storage pools. However, it is found that the information required under proposed EA 1135 does have relevancy when considering an application for a certificate of need to expand a spent fuel pool storage facility. (Caution is noted that the information Northern States Power Company would have to supply in an application for a certificate of need under Chapter 11 to expand its spent fuel pools cannot be used to re-litigate the issue of need for a nuclear generating facility.)

Information concerning Northern States Power Company's conservation programs is relevant because the degree of energy conservation accomplished will have a direct bearing on the amount of nuclear waste or byproduct produced at the facility. If, for example, as in years past, a utility were to promote the use of electrical energy, such activity could result in a greater amount of nuclear waste or byproduct. Under such hypothetical circumstances, the Energy Agency should have the option to deny an application for expansion of a spent fuel pool as requested, or to grant a certificate of need for a lesser amount of storage capacity to promote a degree of forced

energy conservation to counter any energy use increases unnecessarily fostered by the utility itself.

Proposed EA 1135 is found to be reasonable and necessary and should be adopted for the reasons set forth in the Statement of Need.

10. (EA 1141, 1146, 1151 and 1156) These rules require an applicant to describe its proposed facility.

During the hearing, it was suggested that the word "estimated" be added before the words "energy content" in subsections C. 2. and 3. of proposed EA 1141. The reason for the suggestion is that the exact energy content of input coal may not be known at the certificate of need stage. Agency Staff agreed with the suggestion and it is found that the suggestion is reasonable and necessary without causing substantial change to the rule as originally proposed.

The Minnesota Department of Natural Resources suggested an additional requirement for proposed EA 1146 which would state: "For a coal slurry pipeline, a description of the procedure in case of electrical outage at one or more pump stations or cessation of slurry movement for any reason."

The Department of Natural Resources stated in a memorandum that according to a study by the Center for Advanced Computation at the University of Illinois, Urbana, ("The Coal Future—Appendix F", by Michael Reiber and Shao Lee Soo, May, 1975), the design of the only currently operating coal slurry pipeline specifies dumping the slurry in case of power failure. The Department of Natural Resources asserts that such procedure has a serious environmental implication and that if a pipeline proposed in Minnesota would have the same emergency procedures, such procedures should be made explicit in the certificate of need application.

The suggestions of the Department of Natural Resources should be incorporated into the proposed rule. Such additional language goes to a new subject matter but is found not to be of significant substantive effect (Minn. Reg. HE 108(2)).

The Minnesota Pollution Control Agency suggested that the design-capacity requirement of proposed EA 1152 should be more specific with regard to the types of input materials. Agency Staff agreed with the suggestion of the Minnesota Pollution Control Agency. The rule as originally proposed required information relating to design capacity in tons per year of input materials. While the design capacity in tons per year is useful information, the information is inadequate to the extent that the most important parameter, the amount of radioactivity, is omitted. Nuclear fuel as received at a processing facility is approximately one-half to two-thirds uranium plus transuranic elements, the remainder being structural materials. Since the input would be the base source term from which all other impacts, principally the environmental impacts, and the products would be reckoned, the design input capacity should be more specific than as originally proposed. Accordingly, Agency Staff recommended amending proposed EA 1151 C. 2. The proposed changes to the rule as originally noticed for hearing are not substantial, but found to merely clarify the basic type of information originally required under the

rule as noticed for hearing. Accordingly, proposed EA 1151 C. 2. should be adopted with the language finally suggested by Agency Staff as follows:

> The sources and amounts of input materials that would be processed by the facility during operation at the design capacity, including uranium, plutonium and structural materials in tons per year and fission product nuclides in curies per year.

Subsection C. 2. of EA 1151 as finally proposed is found to be reasonable and necessary and does not constitute a substantial change.

Proposed EA 1151 C. 2. and 3., as originally proposed, dealt with the topic of transporting radioactive materials to and from the facility. Agency Staff suggests deleting those topics from EA 1151 C. 2. and 3.; and suggests inclusion of a new subpart which reads as follows: "The methods that would be used to transport materials to and from the facility." The change is non-substantial and is reasonable for the sake of clarity and preciseness. Therefore, the suggestion should be adopted.

Finally, the Minnesota Pollution Control Agency suggested amending proposed EA 1151 as originally proposed by requiring an applicant to supply information regarding projected costs for decommissioning of the proposed facility. The topic of financial and institutional arrangements to decommissioning such facility was not specifically addressed in the rules as originally proposed. Therefore, the additional language suggested by Agency Staff goes to a new subject matter that was not in the rule as noticed for hearing. Furthermore, it is arguable that such new subject matter may be of significant substantive effect. See, Minn. Reg. HE 108(2). Furthermore, Minn. Stat. Sec. 15.0412, subd. 4 (1976) requires an agency to make an affirmative presentation of facts establishing the need for and reasonableness of the rule at the public hearing. In this situation, it was not the Minnesota Energy Agency which made an affirmative presentation substantiating the need for or reasonableness of the proposed additional language. Rather, it was the Minnesota Pollution Control Agency that raised and supported the issue at the hearing. Finally, there is substantial issue which was not addressed at the hearing as to whether financing and institutional arrangements regarding the decommissioning of a large energy facility is appropriately within the jurisdiction of the Energy Agency's responsibility to determine need. Accordingly, it is found that this change recommended by the Pollution Control Agency and finally proposed by Agency Staff before the close of the record to proposed EA 1151 C. and 1151 C. 9. should not be adopted. Similarly, the Minnesota Pollution Control Agency made a like recommendation with regard to proposed EA 1156 which concerns the decommissioning of a nuclear waste or disposal facility. The Hearing Examiner finds that for identical reasons, the changes to EA 1156 C. 4. and 5. should not be adopted. If the Energy Agency determines that it has jurisdiction to require financial information regarding decommissioning of large energy facilities and if the Agency determines that such information would be useful, it would be an easy matter to renotice a hearing for the purpose of discussing this particular topic.

With exceptions noted hereinabove, it is found that proposed rules EA 1141, 1146, 1151 and 1156 are reasonable and necessary and should be adopted for the reasons given in the Statement of Need.

11. (EA 1142, 1147, 1152 and 1157) These rules require an applicant for a certificate of need to supply information concerning "alternatives" to the facility for which a certificate is being requested.

The statutory authority for these rules emanates from Minn. Stat. Sec. 116H.13, subd. 3(7).

Justification given by Agency Staff in its Statement of Need is as follows:

> "Minn. Stat. Sec. 116H.13, subd. 3 (1976) requires the director to consider possible alternatives to the proposed facility in assessing need.
>
> The director needs to know the capability of each possible alternative to meet the projected demand, as well as the associated costs and benefits. This information will be considered by the director in determining whether the proposed facility is the most reasonable and prudent alternative available.
>
> The second criterion puts the burden of proof for showing an alternative superior to the proposed facility on parties other than the applicant. However, it is reasonable and necessary that the applicant present information it has available with respect to each alternative. To that extent possible, such information should parallel that given for the proposed facility."

The proposed rules require an applicant to supply information in the application which specifies alternatives available which differ significantly from the proposed facility with respect to location, size, timing, or design. The rule goes on to request very specific information for 14 different categories, when applicable. For example, the applicant is to supply: "A schematic drawing showing major components of the (alternative) facility."

Aside from the very general type statement given by Agency Staff in its Statement of Need and quoted above, there is no evidence in the record to support the reasonableness of the 14 categories of informational requirements in the herein considered rules. The very general statements made at the hearing do not suffice as an affirmative presentation of facts showing the reasonableness of the requirements contained in the proposed rules.

In sustaining its burden, at the hearing, of establishing the need for and reasonableness of the proposed rule by an affirmative presentation of facts, agencies must do more than present the rule and explain what the rule means or accomplishes. The presentation must be done at the hearing rather than in post-hearing submissions in order that the public can have an opportunity to react. The Legislature has very carefully chosen its words in amending the Administrative Procedures Act. The presentation by the agency must consist of "facts".

The facts may be either adjudicative or legislative. When an agency relies on adjudicative facts to supports its position, the substantial evidence test can be applied. On the other hand, legislative facts are an utterance of agency policy decisions. Such policy decisions must be supported by facts establishing the need for and reasonableness of the choices selected.

The Agency Staff's testimony in support of proposed EA 1142, 1147, 1152 and 1157 merely concludes that the director needs to know the capability of each possible alternative along with associated costs and benefits and that such information will be used by the director in making his decision. The Staff's supporting testimony is inconsistent with the rules. Although the Staff talks in terms of the director having to know about each possible alternative, the rules only require information concerning alternatives which differ significantly from the proposed facility. It is found that there was a failure to make an affirmative presentation of facts establishing the reasonableness of the herein considered rules.

As stated above, an affirmative presentation of facts showing the reasonableness of a proposed rule means something more than merely reciting the statutory authority for promulgating a rule and explaining what the rule means or accomplishes.

In setting forth the evidence that establishes the reasonableness for adoption of the within considered rules, the Agency was not limited to only those facts that are supported by substantial evidence in the record. There is a difference between the kind of facts relied on in a rulemaking hearing, and the kind of facts relied on in an adjudication. Professor Kenneth Culp Davis identifies this difference:

> Two main elements in rulemaking are (1) facts, and (2) ideas about policies. The two are generally interwoven in such a degree that in some parts of the whole problem of what to do, they are inseparable. Even so, a main element in rule-making is necessarily the policy choices that an administrator must make. Adoption of a rule may require some understanding of facts, but it always requires legislating. Courts must leave administrators free to legislate, within the limits of rationality. And legislating inevitably involves the addition of something to the facts in the rulemaking record.

K. Davis, Administrative Law of the Seventies, (Cumulative Supp. 1977) (emphasis in original).

It is found that as Professor Kenneth Culp Davis states: A main element in rulemaking is necessarily the policy choices that an administrator must make. In the within considered rulemaking proceeding, many of the facts are legislative facts—policy decisions and judgments. There is no one right answer—there are only reasonable answers. However, unlike most other states and the Federal system, in Minnesota an agency must make an affirmative presentation of facts establishing the need for and reasonableness of its policy choices.

Professor Davis seems to prefer the Federal system whereby rules having force and effect of law are adopted in much the same manner as legislation enacted by duly elected legislators. In its wisdom, the Minnesota Legislature placed additional restrictions upon administrative rulemaking proceedings. In effect, administrative agencies must account to the public before putting into effect their rules. The Minnesota procedure, although not accepted by the majority of states, coincides closer to the democratic process. At one time, majority rule was a radical message of democracy. At first, it was a limited message, the franchise restricted to propertied males. As the dynamic forces within our system operated, the voting franchise was expanded

to all citizens regardless of their wealth, gender or racial and ethnic background. As the nation grew and dynamic forces continued at work, the workload upon government was delegated, in part, to administrative bodies. Although the body politic does not have the voting franchise to determine which individuals are to set policy for administrative agencies, such agencies have legislative power in the form of rulemaking. Such a grant of power and authority delegated to administrative agencies can easily tend to remove the democratic process one step farther from government. Through its farsightedness, the Minnesota Legislature delegated rulemaking authority to state agencies with very structured safeguards that have the affect of placing upon administrative bodies the duty and responsibility to expose to the public the reasons behind their policy decisions. Those decisions are then examined in light of whether or not the choices are in fact needed and reasonable. This precaution in favor of the democratic process should be applauded. Unquestionably, the rulemaking process in Minnesota is more cumbersome and taxes agencies' skills, expertise and workload. But, expediency should never replace the safeguards instituted by Minnesota's Legislature which allow the public to scrutinize actions of agencies which have force and affect of law.

An example of a federal agency acting on legislative facts is Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973), where the U.S. Supreme Court upheld regulations of the Federal Reserve Board governing credit transactions of more than four installments. Professor Davis' discussion of the Mourning is helpful:

> [t]he Supreme Court had no power to change "four" to three or five, because Congress had delegated that power to the Board and the Board had made its determination. On the question on what the number should be, the Court could do no more than determine whether "four" was arbitrary, capricious, and abusive discretion, or otherwise not in accordance with law.

K. Davis, Administrative Law of the Seventies, 206 (Cumulative Supp. 1977). In the State of Minnesota, the policy choices that an administrative agency must make in a rulemaking process are held to a designated standard of reasonableness. Once the need and reasonableness is affirmatively made in the record, courts should not superimpose their will over the wisdom of the choice selected by the administrator. However, the threshold issue is whether or not the administrator made the requisite affirmative presentation required in Minnesota.

It must be remembered that there is a substantial distinction between the administrative rulemaking procedures in Minnesota as compared to the federal government and most other states. The federal government and most states do not operate under the structured type of rulemaking process that exists in Minnesota. Only a few states, including Iowa, Massachusetts, Minnesota, Nebraska, Ohio, Virginia and Wisconsin have structured rulemaking hearings wherein legislation mandates rigid procedural requirements. Minnesota's rigid procedural requirements include publication of notice of intent to solicit outside information, prior published notice of the public hearings, full and complete public participation in the form of verbal and written comments, questioning of agency witneses, a formal review by the Minnesota

Chief Hearing Examiner on the issue of "substantial change", and, most importantly, the proposing agency has a statutory burden to affirmatively show the need for and reasonableness of the proposed rules. Finally, in Minnesota, there is formal review by the Office of the Minnesota Attorney General. Because of such factors, it is quite obvious that in Minnesota there is a greater burden upon an administrator or agency in substantiating their policy choices than is the case under the federal system and the system of most other states.

It is found that the very general statements given by Agency Staff in support of the herein considered proposed rules do not suffice to carry the agency's burden of making an affirmative presentation of facts establishing the need for and reasonableness of the policy/legislative choices inherent in the proposed rules. In fact, the testimony given in support of proposed EA 1142, 1147, 1152 and 1157 pertains to statements regarding the benefit that may be derived if the rule is adopted rather than giving factual information for the reasonableness of the choices used in drafting the proposed rules and their numerous subparts.

Additionally, the Statement of Need concludes with its discussion of the proposed rules by indicating that "the second criterion puts the burden of proof for showing an alternative superior to the proposed facility on parties other than the applicant." A review of proposed EA 1142, 1147, 1152, and 1157 does not, in fact, reveal any proposed language that supports this assertion given by Agency Staff in its Statement of Need.

Because of the above, the Hearing Examiner finds that the Agency failed to carry forth its requisite burden in order to allow adoption of the within discussed proposed rules in accordance with Minnesota Law.

Finally, if one bisects the proposed rules and focuses on the subpart which requires an applicant to supply a schematic drawing showing major components of alternative facilities, one would expect to find at least some testimony and evidence regarding the economic impact of such a burden upon industry. There was no such testimony or evidence. This leads into the question of how many alternatives an applicant is to consider. The rule is silent on that issue, but Page 23 of the Statement of Need says: "The director needs to know the capability of each possible alternative. . . ." (Emphasis added) Such requirement is unreasonable. Is the applicant only to discuss those alternatives considered by the applicant itself? Is the applicant to consider all possible and/or reasonable alternatives? Is the applicant to supply the required information for alternatives that may be suggested by Agency Staff, or that may be suggested by intervening third parties?

It is found that there is statutory authority for the Energy Agency to require from an applicant information regarding alternatives. However, in the within considered proceeding, the Agency failed to make an affirmative presentation of facts showing the reasonableness of the manner in which the Agency would be attempting to elicit such information from an applicant. Unquestionably, there is reason to believe that such a rule would be helpful to the

Agency, its director, the general public and special interest groups. Accordingly, an appropriate rule should be noticed for hearing within the near future.

Based upon the Findings in this Paragraph No. 11, adoption of proposed EA 1142, 1147, 1152 and 1157 cannot be recommended.

12. (EA 1143, 1148, 1153, and 1158) These rules pertain to historical and forecast data which must be supplied by an applicant. The proposed rules direct an applicant to provide historical data on its existing facilities for meeting energy demand; known future facilities which could be used by the applicant; a forecast of its future consumption, sales or transportation of energy products; a description of the techniques and data used in preparing the forecast; and a discussion of key assumptions which entered into the forecast.

No substantial comments were made with respect to these proposed rules. Proposed EA 1143, 1148, 1153 and 1158 are found to be reasonable and necessary and should be adopted for the reasons given in the Statement of Need.

13. (EA 1144, 1149, 1154 and 1159) These proposed rules require an applicant to supply data pertaining to environmental information concerning the facility for which a certificate of need is requested.

The proposed rules also require an applicant to provide the requisite environmental data regarding "alternative facilities". In accordance with Findings hereinabove at Paragraph No. 11, it is found that to the extent the within considered proposed rules require an applicant to supply environmental data regarding "alternative facilities" such requirement is unreasonable and should not be contained in the proposed rules by reason of fact that it is found that the rules pertaining to "alternatives" should not be adopted.

It was suggested that a five-mile limit be inserted in proposed EA 1144 A. 11. to provide an applicant with more guidance to the the specific area for which information is required. The five-mile limitation is a reasonable designation and is consistent with the rule as originally noticed for hearing inasmuch as a reasonable interpretation of the rule could have logically limited the designated area to five miles. Therefore, the suggested change is reasonable but non-substantial. The same reasoning applies to proposed EA 1154 A. 12. wherein the term "within five miles of the site" should be added after the word "areas".

The Minnesota Pollution Control Agency recommended an additional factor to be added to proposed EA 1154 A. as follows:

> The estimated total population within 50 miles of the site, and a map showing the distribution of the population within 50 miles of the site.

The 50 mile requirement regarding population distribution is justifiable because of the concerns raised at the hearing. Furthermore, since an applicant need only supply estimated totals, it should be easy for the applicant to obtain the requisite information from various maps prepared by both governmental bodies and private industry. Thus, the suggested language is found to be reasonable and necessary.

Before the close of the record, Agency Staff recommended adding additional language to proposed EA 1154 B. 2. The specific language recommended

is "if such an analysis is required by federal authorities" and would limit the applicability of the proposed subpart to only those instances where such analysis is required by federal authorities. The only reason given for adding the additional language by Agency Staff is found in their Second Post-Hearing Submission at Page 9 as follows:

> "The staff believes this change is necessary because of the addition to proposed rule 6 MCAR Sec. 2.1103 F. If the state is to require completion of federal analysis before accepting an application for a nuclear facility, it is unreasonable for the state to require an analysis of human exposure if the federal authorities do not."

Inasmuch as the Hearing Examiner could not recommend adoption of proposed EA 1103 F. (see, Paragraph No. 6 above); it follows he cannot recommend the adoption of the within considered proposed additional language since the basis supporting the considered language rests on a provision previously rejected in this Report. Furthermore, the proposed language limits those instances in which an applicant would have to conduct an analysis of human exposure to ionizing radiation attributable to operation of the proposed facility. Such issues have raised substantial concern with a vocal percentage of Minnesota's population. Had the suggested limiting language been utilized in the proposed rule as originally noticed for hearing, such limiting language may have invited additional comment, concern or opposition by environmentalists and therefore, the suggested language change is found to be "substantial". Accordingly, the suggested additional language should not be adopted.

Proposed EA 1159 was submitted by Energy Agency Staff with identical changes as those made by Staff for proposed EA 1154 in its Second Post-Hearing Submission. The Hearing Examiner finds, as was the case with proposed EA 1154, that the changes suggested for EA 1159 A. 12. and 13. should be adopted while the Staff's recommended change for EA 1159 B. 2. should be rejected.

With the exceptions noted herein in this Paragraph No. 13, and in accordance with the Findings contained in this Paragraph, it is found that proposed EA 1144, 1149, 1154 and 1159 are reasonable ane necessary and should be adopted for the reasons set forth in the Statement of Need.

14. (EA 1181) This proposed rule pertains to certificate of need application procedures for what Agency Staff refers to as "other facilities". For reasons stated elsewhere hereinabove in this Report, it is found that proposed EA 1181 cannot be adopted since it overreaches statutory authority of the Energy Agency to the extent that the rule purports to regulate facilities which are yet unclassified or undefined by the Legislature as "large energy facilities". In its Second Post-Hearing Submission, the Minnesota Energy Agency Staff at Page 10 asserted that the proposed rule applies to: ". . . facilities which may be added later by the Legislature to the list of large energy facilities." Adoption of EA 1181 would be akin to the Agency adopting rules without a public hearing process because the proposed rule would regulate facilities that may come into being in the future and which may be subject to a rule without having had the right or privilege to participate in the rulemaking hearing. Because of the very nature of the rule, Agency Staff is unable to make an affirmative showing of either the need for or the reasonableness of the proposed rule.

15. (EA 1186) This proposed rule allows an applicant to file additional data if it believes that such data is relevant to the director's decision. There was no substantive comment or objection to the proposed rule. Proposed EA 1186 is found to be reasonable and necessary and should be adopted for the reasons set forth in the Statement of Need.

16. (EA 1191) This proposed rule pertains to: "certificate of need modifications".

Subpart A. specifies that: "Issuance of a certificate of need may be made contingent upon modifications specified by the director." The testimony offered by Agency Staff in support of Subpart A. is as follows:

> "This rule is needed to specify those situations when recertification is required by a change in a facility previously certified by the director".

(Emphasis added) The testimony offered by Agency Staff in support of EA 1191 had nothing whatsoever to do with the force and effect of proposed EA 1191 A. Subpart A. pertains to the initial issuance of a certificate of need, while the testimony in support of the proposed rule pertains to recertification of certificates of need previously granted. Accordingly, the Agency Staff failed to make an affirmative presentation of facts establishing the need for or reasonableness of proposed EA 1191 A. Thus, Subpart A. cannot be adopted.

Subpart B. of proposed EA 1191 sets forth two circumstances under which changes (modifications) of a large energy facility would not require recertification. However, the two circumstances permitting exemptions are not even discussed by Agency Staff in its supporting testimony. Thus, the rationale, reasonableness or need behind the exemptions specified in Subpart B. were not supported at the hearing by an affirmative presentation of facts requisite before a rule can be lawfully adopted. For that reason, proposed EA 1191 B. cannot be adopted.

The reasonableness and need for Subpart C. of proposed EA 1191, as was the case with Subpart B., was not the subject of an affirmative presentation of facts requisite for its lawful adoption. Furthermore, Subpart C. permits the director to make an independent determination as to whether or not recertification is necessary when a large energy facility is modified. However, no guidelines or criteria are established for guiding the director in making his decision. Such a rule has the potential to subject the regulated to the subjective determination of an agency acting under color of law and guided by its own visceral reaction to the facts at hand without benefit of established written criteria or guidelines for the decision-maker to follow or the courts to review in determining whether the action taken was arbitrary or capricious.

Based upon the above Findings, proposed EA 1191 should not be adopted.

CONCLUSIONS

A. That the Minnesota Energy Agency and the Hearing Examiner duly acquired and now have jurisdiction over the within proceedings.

B. That all relevant, legal and procedural requirements of statute and rule have been properly complied with.

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED: That the Director of the Minnesota Energy Agency adopt the within subject rules, in accordance with the Findings hereinabove. Any language changes, deletions or additions necessitated by the Findings hereinabove will be reviewed by the Chief Hearing Examiner when determining the issue of "substantial change".

Dated: September 12, 1978.

William Seltzer

WILLIAM SELTZER
Hearing Examiner

Attachment A

SUGGESTED CHANGES TO
THE PROPOSED RULES
6 MCAR §§ 2.1101-2.1191

§ 2.1102 A Applicability of rules.

2. ~~any-project-which,-within-a-period-of-two-years,-would expand-the-design-capacity~~ expansion of an existing fuel conversion facility by at least 25 tons per hour of input material over the base capacity of the facility;

4. ~~any-project-which,-within-a-period-of-two-years,-would expand-the-design-throughput~~ expansion of an existing coal slurry pipeline by at least 1000 tons of coal or coal derivatives per day over the base capacity of the facility;

5. ~~any-project-which,-within-a-period-of-two-years,-would expand-the-design-throughput~~ expansion of an existing coal liquids pipeline by at least 15,000 barrels per day over the base capacity of the facility;

7. ~~any-project-which,-within-a-period-of-two-years,-would expand-the-design-output~~ expansion of an existing nuclear fuel processing facility by at least 20 percent of the base capacity of the facility;

9. ~~any project which, within a period of two years, would expand the design capacity~~ expansion of an existing nuclear waste storage or disposal facility by at least 20 percent of the base capacity of the facility;

§ 2.1104 Definitions.

EE. "Base capacity" means either (1) the capacity or throughput of a large energy facility as of the effective date of these rules, (2) the capacity or throughput of a certified new large energy facility, or (3) if a large energy facility has been expanded since the effective date of these rules, the capacity or throughput of the facility following the most recent certified expansion.

Look at stat. pg. 7th. /
NSP defini dispute
(B) type of facility
which can be regulated.
per Joe Bizzano.
Call My.
Bizzano
330-6605

ES POWER COMPANY
EPARTMENT
OLLET MALL
MINNESOTA 55401
330-6600

HAROLD J. BAGLEY
JOHN P. MOORE, JR.
DAVID A. LAWRENCE
GALE K. NORDLING
JACK F. SJOHOLM, JR.
STEPHEN C. LAPADAT
JO ANN M. McGUIRE
ROBERT W. GROTH
ATTORNEYS

er 9, 1978

neral

s Governing
for inter alia
e or Disposal Facilities
-WS

rder of the MEA Director of
he aforesaid rules, I would like
supplemental statement of
, dated May 25, 1978, and
thereof which deal with juris-
riefly alluded in our telephone

I would particularly call your attention to my argument of last resort dealing with the assertion of jurisdiction by the MEA over spent fuel pool expansion at existing nuclear generating stations as being within the Agency's interpretation of the statutory words "nuclear waste storage or disposal facility". See pages 12-15.

I assume you have a copy of NSP's supplemental statement as part of your reviewing documents. If not, please call me.

Yours very truly,

JOSEPH D. BIZZANO, JR.

JDB:kp

RECEIVED
OCT 11 1978
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

STATE OF MINNESOTA

MINNESOTA ENERGY AGENCY

In the Matter of the Proposed Adoption of Rules of the Minnesota Energy Agency Governing Contents of Applications for Certificates of Need and Criteria for Assessment of Need for Fuel Conversion Facilities, Coal Slurry or Coal Liquids Pipelines, Nuclear Fuel Processing Facilities and Nuclear Waste Storage or Disposal Facilities, 6 MCAR §§ 2.1101-2.1191.	)	Docket No. EA-78-003-WS **DIRECTOR'S FINDINGS OF FACT, CONCLUSIONS AND DECISION**

The hearing in the above-captioned matter was ordered on March 17, 1978, and was convened for the Minnesota Energy Agency (hereinafter "Agency") by Hearing Examiner William Seltzer of the Minnesota Office of Hearing Examiners at 9:30 a.m. on May 4, 1978, in Conference Room "D" of the Veterans Service Building, Saint Paul, Minnesota.

The hearing examiner made and issued his Report of Hearing Examiner on September 12, 1978. The hearing examiner recommended to the Agency that it adopt the Agency's proposed rules incorporating the language changes suggested by him.

The cross-outs and underlinings in the rules that are included below indicate changes from the rules as originally proposed.

The director of the Agency, upon the record certified to him by the hearing examiner and the Report of Hearing Examiner, hereby makes and issues the following Findings of Fact, Conclusions and Decision.

FINDINGS OF FACT

1. The hearing examiner generally did a thorough job of presenting his Findings of Fact in the above-captioned proceeding. The hearing examiner's Findings 1-4, 8, 9, 12, 14 and 15 are hereby adopted as Findings of the director.

2. In general, the director agrees with hearing examiner's Finding 5 and hereby adopts it as a Finding of the director, but adds the following comments.

The director does not like the inconsistent manner in which incremental expansions of large energy facilities are addressed in the various sets of certificate of need rules. However, the director believes that an improvement should not be rejected simply because it may be inconsistent with rules previously adopted. The director prefers to adopt the improvement and to amend the other rules to conform to it as soon as possible.

The director agrees with the hearing examiner that the rules should be clarified regarding expansions of spent-fuel pools at nuclear reactor sites. (See page 8 of the hearing examiner's Report). Accordingly, the director adopts the following language at the end of 6 MCAR § 2.1111 A:

In the case of an application for a certificate of need for an expansion of a nuclear waste storage or disposal facility serving an existing large electric generating facility, the director shall not make a decision which could reasonably be expected to result in a forced shutdown of the generating facility.

3. The director agrees with most of hearing examiner's Finding 6. However, the director believes the third and fourth paragraphs of the finding, dealing with "additional copies," are contrary to precedent, unfair, and in violation of the legislative intent that the program be self-supporting. With the exception of those paragraphs, the Finding is adopted as the director's.

The Statement of Need states that "an adequate number of copies" is needed "to avoid untimely delays." It also states in regard to 6 MCAR § 2.1105 that "the certificate of need program must be self-supporting." It is clear to the director that the Legislature's creation of a fee system was for the purpose of making the certificate of need program self-supporting. If the director cannot obtain an adequate number of copies from the applicant, one of several unfortunate circumstances is likely to result: (1) other state agencies and potential intervenors will be unable to evaluate an applicant's proposal; (2) an extremely limited number of applications will have to be shared, leading either to inadequate examination of the proposal or a protracted process; or (3) the Agency will have to make numerous copies of the application at considerable nonreimbursed expense.

The Agency has included the same provision in earlier adopted sets of certificate of need rules. Further, it used a virtually identical justification in the earlier rulemaking proceedings. No comments were made regarding the number of copies at the public hearing in this matter. The wisdom of holding an additional hearing on this nitpicking matter is extremely questionable. The hearing examiner's tardiness in completing his Report would cause additional hardships if another hearing were convened on this matter. Two potential applicants have expressed an interest in submitting applications as soon as the rules are effective.

The director believes that a minor modification of the proposed rules would more clearly express the procedure following by the Agency in utilizing additional copies. Accordingly, the director adopts the following revision of the first two sentences of proposed 6 MCAR § 2.1103 B:

B. A minimum of seven (7) bound copies and one (1) unbound copy of the application shall be filed with the director for use by the director and the Agency staff. The director ~~may~~ shall require additional copies, not to exceed one hundred (100) copies total, to supply other governmental authorities, potential intervenors, and libraries designated as distribution points for public use. The director shall provide for the record at the hearing a list indicating the distribution of the additional copies.

4. The director agrees with hearing examiner's Finding 7 and hereby adopts it as a Finding of the director. The director adopts the following modification of 6 MCAR § 2.1104

0 in accordance with this finding and as suggested by the hearing examiner at page 17 of his Report:

> O. "Fuel conversion facility" means any facility intended to convert coal, peat, wood, or other material, excepting fissile, fertile, or fissionable nuclear material, into another combustible fuel and having the capacity to process 25 tons (22.7 metric tons) of the material per hour at its peak capacity. A fuel conversion facility shall include any storage facility ~~on the site~~ needed for operation of the facility at the design capacity. A coal-cleaning or coal-agglomerating facility shall not be considered a fuel conversion facility unless its operation causes a change in the molecular structure of the input coal;

5. The director agrees with hearing examiner's Finding 10 and hereby adopts it as a Finding of the director. However, the language suggested by the Department of Natural Resources ("DNR") has not been adopted as part of rule 1146 as recommended by DNR and the hearing examiner, but rather as part of the environmental data rule on coal slurry pipelines (6 MCAR § 2.1149 C 4), where the director believes it more appropriately belongs.

6. The director strongly disagrees with hearing examiner's Finding 11. It is not adopted by the director.

The director believes that the facts presented and the arguments made by the Agency staff do establish the need for and reasonableness of the introductions and various subdivisions of the rules on alternatives. The Statement of Need states that "[t]o the extent known, such information should parallel that given for the proposed facility." In each case, the information required for alternatives is also required for the proposed facility. If the director is to make an accurate and fair comparison of alternatives, comparable information must be available for the various alternatives. In most cases, more information will be available for the proposed facility simply because it is the facility preferred and most-studied by the applicant. However, this fact should not discourage the director from seeking as full a record as possible, nor does it excuse an applicant from telling what it knows about the various alternatives. In short, any data element listed for the alternatives is needed for the same reasons given for that data element with respect to the proposed facility. The director believes that is clear from the Statement of Need and the Transcript (pages 129-147, 163-165).

The hearing examiner's argument that the "[s]taff's supporting testimony is inconsistent with the rules" is nonsense. The only reasonable interpretation of the phrase "each possible alternative" includes only those alternatives "which differ significantly from the proposed facility." Clearly, for any facility there is an infinite number of possibilities when one considers size, design, timing and location. What the staff did was find a common-sense solution to a difficult problem.

The staff did not list data requirements for more alternatives than exist. If anything, it did the opposite -- it listed data requirements on fewer alternatives than needed by the director. The staff appropriately balanced the director's need for information against the applicant's

ability to supply it and the reasonableness of requiring the applicant to do so.

The record does not reveal that any hearing participant regarded the alternatives section as unnecessary or unreasonable. Questions and comments from individuals at the hearing, other than the hearing examiner, either were of a clarifying nature or were more significant in their application to other proposed rules.

Another factor weighing against the hearing examiner's recommendation is that the same arguments for alternatives have been advanced in previous rulemaking proceedings by the Agency before the same hearing examiner. It is difficult to know what constitutes sufficient justification when conflicting signals are given to the Agency by the Office of Hearing Examiners.

In summary, the director believes the rules regarding alternatives are necessary and reasonable. He also believes the justification given for the rules in the Statement of Need and at the public hearing to be sufficient to establish the need for and reasonableness of the rules. Absence of these rules would make it extremely difficult for the director to discharge his statutory responsibilities in the certificate of need area.

The recommendation of the hearing examiner is respectfully declined and the rules on alternatives (6 MCAR §§ 2.1142, 2.1147, 2.1152 and 2.1157) are adopted as indicated in the attached copy of the rules. The requirements regarding costs of decommissioning the nuclear facilities are not adopted for the reasons given in hearing examiner's Finding 10, adopted above at Finding 5 as a finding of the director.

7. The director agrees with hearing examiner's Finding 13, except with respect to the second paragraph thereof. As noted in director's Finding 6, the director has adopted the rules pertaining to alternatives. For reasons stated in director's Finding 6 and in the Statement of Need and the Transcript, environmental data on alternatives considered by the applicant are both reasonable and necessary. The director therefore adopts each of the environmental data rules with no change in the introductory paragraph thereof.

With the change noted above, hearing examiner's Finding 13 is adopted as a Finding of the director.

8. A certificate of need modifications section, such as proposed 6 MCAR § 2.1191, is considered by the director to be an important rule. Comparable rules have been incorporated into the other sets of certificate of need rules adopted by the director.

The director reluctantly agrees with hearing examiner's Finding 16 that proposed 6 MCAR § 2.1191 was not adequately justified in either the Statement of Need or at the public hearing. Therefore, the director cannot and does not adopt this proposed rule. The director does not find, as the hearing examiner did, that the proposed rule itself is defective.

9. The director adopts one other change that has not previously been mentioned.

The Attorney General's Office of Administrative Rules, as noted by the hearing examiner in his Finding 6, "has been rejecting rules utilizing the term 'may' rather than the term 'shall' when specific guidelines or parameters are not established in the rule itself for the discretionary action allowed."

In accordance with this policy, the director has replaced the word "may" with the word "shall" in the first sentence of 6 MCAR § 2.1103 H. With that change, the first sentence reads as follows:

> H. Prior to the submission of an application, a person ~~may~~ shall be exempted from any data requirement of these rules upon a written request to the director for exemption from specified rules and a showing by that person in the request that the data requirement (1) is unnecessary to determine the need for the proposed facility or (2) may be satisfied by submission of another document.

10. The director finds it regrettable that certain language changes and additions to the rules as proposed cannot be adopted. Several of the changes included in the copy of the revised proposed rules (Exhibit A of the Second Post-Hearing Submission of Minnesota Energy Agency Staff) resulted from suggestions made by staff of the Minnesota Pollution Control Agency at the public hearing. Some, if not all, of the changes would have resulted in better rules and better evaluation of applications submitted according to these rules. In each case the hearing examiner found that including the change would constitute a substantial change in the rules as proposed. The director chooses not to contest those findings, primarily because of the need to adopt the rules as quickly as possible.

The director believes it necessary to seek an answer to the following question: What, in the opinion of the Office of Hearing Examiners, constitutes a substantial change in proposed rules? It is becoming abundantly clear that the Office is stiffening its resistance to changes suggested at the hearing by any party, whether it be the proposing agency or members of the public.

The justification usually given by the Office is that certain suggested changes go beyond the rules as noticed and therefore inhibit the public from making comments on the changes. It seems to the director that people receiving the notice are thereby on notice that certain general topics will be discussed at the public hearing. If such people have a substantial interest in these topics, it is not unreasonable to expect them to attend the hearing to protect their interests.

I see this trend by the Office of Hearing Examiners as having two possible effects. First, the rulemaking process, which is already too long, will be further dragged out. Second, agencies will increase their opposition to any changes suggested at the hearing in order to avoid findings of substantial changes. In view of this likelihood, one is compelled to question the relevance and importance of the public hearing. I fail to see how either of the aforementioned effects is in the public interest.

Therefore, I ask the Office of Hearing Examiners to reassess and clarify its policy regarding substantial change (and to discuss it with the Attorney General's Office of Administrative Rules). I also ask the Office of Hearing Examiners to share its views on this matter with the agencies that propose administrative rules.

CONCLUSIONS

A. The Minnesota Energy Agency has duly acquired and now has jurisdiction over the subject proceeding.

B. All relevant substantive and procedural legal requirements have been complied with.

C. The Minnesota Energy Agency demonstrated the need for and reasonableness of the adopted rules by an affirmative presentation of facts.

D. It is the director's opinion that the slight amendments, additions and language changes appearing in the adopted rules do not result in a substantial change from the rules as proposed for adoption.

DECISION

The director accepts the recommendation of the hearing examiner to adopt the proposed rules and in a separate order adopts rules 6 MCAR §§ 2.1101-2.1186, incorporating the changes indicated in the director's Findings. A copy of rules 6 MCAR §§ 2.1101-2.1186, as adopted and indicating changes from the rules as proposed, is attached.

DATED: September 22, 1978

JOHN P. MILLHONE
Director