

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

Our File #546.

RULES REVIEW CHECKLIST

DATE RULES RECEIVED 10-2-79 Temporary Rule _____

Resubmitted and Received _____

DUE DATE 10-22-79

a. Returned to Agency w/o filing w/Secy of State _____
b. Approved 10/22 Date Sent Back to Agency _____

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1. Rules as Adopted X
2. Rules as Proposed X
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 X
11. Agency's Findings of Fact X
12. Certificate of Board's Resolution Adopting Rules, where applicable _____
13. Order Adopting X
14. Report of Chief Hearing Examiner X
    (i) Finding of No Substantial Change X
    (ii) Permission to Incorporate by Reference, where applicable X
15. Certificate of Compliance with Rulemaking Procedures X
16. Copy of Notice of Intent to Solicit Outside Opinion, where applicable X
17. Petition by Public, where applicable N.A.

Adopted September 5, 1979

MINNESOTA ENERGY AGENCY

RULES GOVERNING THE PERMISSIBLE HOURS OF OPERATION, THE QUANTITY AND THE EFFICIENCY OF OUTDOOR DISPLAY LIGHTING

Chapter 21
6 MCAR §§ 2.2101-2.2120

§ 2.2101 Purpose of rules. The purpose of these rules is to define outdoor display lighting, to specify permissible hours of operation of outdoor display lighting, and to establish quantity and efficiency standards for outdoor display lighting pursuant to Minnesota Statutes Section 116H.12, subdivision 1b.

§ 2.2102 Applicability of rules.

A. Beginning July 1, 1980, no person shall operate outdoor display lighting during hours other than those specified by these rules.

B. Beginning July 1, 1981, no person shall install outdoor display lighting in a quantity that exceeds, or at an efficiency less than, that provided by these rules.

C. Beginning July 1, 1985, no person shall operate outdoor display lighting which does not comply with rules 6 MCAR § 2.2115 (efficiency) and 6 MCAR § 2.2120 B (quantity).

D. Exceptions.

1. These rules shall not apply to temporary or seasonal outdoor display lighting;

2. These rules shall not apply to outdoor display lighting which provides information as to the time of day, temperature, weather conditions, or other matters concerning the public health, safety and welfare;

3. These rules shall not apply to penal institutions;

4. These rules shall not apply to airplane obstruction lighting as defined by the Federal Aviation Administration nor to any other lighting that is required by federal, state, or local governmental law or regulation.

§ 2.2104 Definitions. For purposes of these rules, the following definitions shall apply:

A. "Business day" means that portion of a 24-hour period when an establishment is open for business;

B. "Ballast" means a device used with an electric discharge lamp to obtain the necessary circuit conditions for starting and operating;

C. "Daytime hours" means the time between one-half hour after sunrise and one-half hour before sunset, or when the ambient light level is greater than two footcandles;

D. "Establishment" means a place of business or a public or private institution;

E. "Footcandle" means a standard measure of light intensity;

F. "Luminous sign tubing" means lights commonly known as neon lights;

G. "Lumens per watt" means a standard unit of measure of light efficiency;

H. "Outdoor display lighting" means any outdoor building facade lighting, any outdoor decorative lighting, any illuminated off-premise advertising, and any on-premise outdoor lighting including security lighting;

I. "Security lighting" means a type of outdoor display lighting located on, or around the exterior or perimeter of, a building, structure, fence, lot, or other outdoor area, the purpose of which is to protect persons or property against the threat or occurrence of harm;

J. "Standardized Outdoor Display Signs" means off-premise outdoor display advertising commonly known as billboards;

K. "Temporary or seasonal display lighting" means display lighting that, on at least 300 consecutive days in any 12-month period, is not illuminated.

§ 2.2110 Permissible hours of outdoor display lighting operation.

A. Standardized outdoor display signs may not be artifically illuminated during daytime hours.

B. Standardized outdoor display signs may not be artificially illuminated during the period between midnight and 6:00 a.m. or one half hour after sunrise, whichever is earlier, except for the hours during that period when the establishment(s) being advertised is (are) normally open for business.

C. Outdoor display lighting that is used to illuminate an historic landmark as defined in Minnesota Statutes Ch. 138 or Section 4.077 may be operated between one-half hour before sunset and 10 p.m.

D. All other outdoor display lighting except security lighting may be operated from one-half hour before sunset until one hour after the close of a business day, when the ambient light level is less than two footcandles and from the beginning of a business day until one-half hour after sunrise. In addition, on-premises outdoor display lighting which has a demand of 1500 watts or less may be operated after the close of a business day until midnight even though the establishment closes prior to midnight.

E. Security lighting may not be operated during daytime hours.

§ 2.2115 Permissible efficiency.

A. no person shall install or use outdoor display lighting in which the light source produces light at an initial efficiency, including ballast, of less than 40 lumens per watt.

B. Exceptions.

1. Rule 6 MCAR § 2.2115 A shall not apply to luminous sign tubing.

2. Rules 6 MCAR § 2.2115 A shall not apply to any establishment whose total outdoor display lighting system has a demand of 1500 watts or less.

§ 2.2120 Permissible quantity.

A. Beginning July 1, 1980, the provisions of Rule 6 MCAR § 2.2102 B and C notwithstanding, no person shall operate security lighting that exceeds .05 watts per square foot ~~or .2 footcandles~~ for the area lighted for security purposes.

B. No person shall operate any other outdoor display lighting that exceeds the recommended minimum standards set forth in the "IES Lighting Handbook" (5th edition), published by the Illuminating Engineering Society, by more than 20 percent.

C. Rule 6 MCAR § 2.2120 A shall not apply to an establishment whose total security lighting system has a demand of 1500 watts or less.

APPROVED AS TO FORM AND LEGALITY

Oct. 22 19 79

WARREN SPANNAUS, ATTORNEY GENERAL

BY _____

SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
OCT 22 1979
Joan Anderson Growe
Secretary of State
3:45 PM

STATE OF MINNESOTA

MINNESOTA ENERGY AGENCY

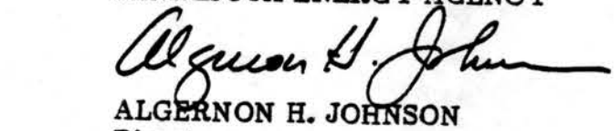
In the Matter of the Proposed Adoption of Rules of the Minnesota Energy Agency Governing the Permissible Hours of Operation, the Quantity and the Efficiency of Outdoor Display Lighting, 6 MCAR §§ 2.2101 - .2120.	))))))	Docket No. EA 79-005-MG ORDER ADOPTING RULES

The above-entitled matter came on for hearing before Myron S. Greenberg of the Minnesota Office of Hearing Examiners for the Director of the Minnesota Energy Agency at 9:00 a.m. on May 24, 1979, in Conference Room "D", of the Veterans Service Building, St. Paul, Minnesota. Proper notice required by Minn. Stat. § 15.0412 (1978) 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 these rules identified as 6 MCAR §§ 2.2101 - 2.2120 are adopted this 5th day of September, 1979, pursuant to authority vested in me by Minn. Stat. §§ 116H.08(a), 116H.12, Subd. 1(b) (1978).

STATE OF MINNESOTA
MINNESOTA ENERGY AGENCY



ALGERNON H. JOHNSON
Director

546

RECEIVED
APR 27 1979
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 the Permissible Hours of Operation, the Quantity and the Efficiency of Outdoor Display Lighting.	)))))	Docket No. EA-79-005-MG **STATEMENT OF NEED AND REASONABLENESS**

I. INTRODUCTION

The Minnesota Energy Agency has been charged by the Legislature with developing rules for limiting outdoor display lighting. The Agency has proposed rules on which it is holding public hearings. This statement sets forth the reasons why these rules are needed and how they are reasonable, in order to promote constructive and meaningful comments at public hearings.

When it created the Energy Agency in 1974, the Legislature found 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 (1978).

This general mandate is carried out under the various provisions of Chapter 116H. In section 116H.12, subdivision 1a, the Legislature specified that the use of outdoor display lighting shall be limited. It provided that outdoor display lighting "shall include building facade lighting, other decorative lighting, and all billboards and advertising signs except those which identify a commercial establishment which is open for business at that hour." To implement the limitation on outdoor display lighting, "[t]he director shall develop proposed rules . . . setting standards covering permissible hours of operation, quantity and efficiency of outdoor display lighting and defining outdoor display lighting." Minn. Stat. § 116H.12, subdivision 1b (1978).

The Agency has solicited outside information and opinions in developing the

proposed rules. On June 13, 1977, it published at 1 S.R. 1801 a Notice of Intent to Solicit Outside Information which allowed comments to be received by August 26, 1977. On August 29, 1977, the Agency published at 2 S.R. 340 a revised notice allowing comments to be received through October 7, 1977. A further Notice of Intent to Solicit Outside Information along with a draft of the proposed rules appeared in the State Register at 3 S.R. 1337-38 on December 25, 1978. On February 15, 1979, the Agency published a Notice of Proposed Rules with the Proposed Rules at 3 S.R. 1629-30.

The Agency has received numerous written and oral comments on the issue of outdoor display lighting from when the first Notice was published up until the present. The following organizations have submitted comments:

Minnesota Auto Dealers Association

Minnesota Environmental Control Citizens Association

Minnesota Motor TransportationAssociation

Minnesota Restaurant Association

Minnesota Retail Federation

North Central Electrical League

St. Paul Association of Building Owners and Managers, Inc.

Upper Midwest Sign Advertising Council

In addition, many comments were received from concerned individuals and businesses, including sign manufacturers and billboard operators.

The Agency's Policy Analysis staff has also consulted professional illimination engineers and other government agencies in developing the rules. Finally, the Staff has walked down the streets of Minneapolis and driven along freeways in the Twin Cities to better understand how display signs and other outdoor display lighting are used at various times of night.

II. GENERAL PURPOSE

The proposed rules are necessary to reduce unnecessary energy consumption by outdoor display lighting. The reduction in outdoor lighting primarily reduces the base load demand for electricity. In Minnesota, baseload electric demand is met by coal and nuclear power plants. While coal is relatively abundant, there are adverse environmental consequences associated with coal mining, transportation, and combustion. Uranium fuel is a more limited resource and there are also health and safety risks associated with the operation of nuclear power plants. Because of the high economic and environmental costs associated with building new base load generating plants and transmission lines, it is necessary to minimize the growth in base load requirements.

Some utilities in Minnesota are experiencing rapid growth in their winter peak demand. It is especially important to minimize electrical demand during the early evening hours when the winter peak occurs. In the winter, outdoor lights come on earlier in the evening and stay on later in the morning than during the summer.

The direct energy savings resulting from compliance with the rules are expected to stimulate energy conservation by the general public. Limiting outdoor lighting for indirect energy savings has been suggested by the federal government in its Standby Conservation Plan No. 3, Emergency Advertising Lighting Restrictions. This plan would prohibit the illumination of advertising signs and window displays after business hours during an energy emergency. According to DOE Deputy Secretary John O'Leary,

> we feel that advertising signs left glowing into the night after business hours would constitute an especially conspicuous and visible form of energy waste during an emergency and that, if implemented, the restrictions would serve as a constant reminder to the general public of the shortage and the need to conserve at all times.

Energy Users Report, March 1, 1979, p. 5.

Past experience suggests that requests by governmental leaders to conserve energy have a greater effect when the public perceives that all sectors are participating in conservation efforts. The following comments received by the Agency in response to its Notices of Seeking Outside Information indicate this to be the case:

> The most upsetting sight is to see hundreds of light bulbs strung around the perimeter of second-hand car lots and the like -- when we householders are being urged to turn off unnecessary lights.
>
> When people see such waste, they feel little urge to conserve.
>
> If such waste continues, who will be convinced that an energy crisis exists?
>
> Paraphrasing a fourth writer, it is wise to save even a small amount of energy because, "once the state starts doing it, the people will follow."

Another benefit of the proposed rules is a decrease in light pollution. Unnecessary lighting can be distracting to the motorist, cause ecological disruption, render astronomical observatories useless, and may cause adverse psychological effects. While the effects of light pollution have not been adequately studied, it is apparent that many, if not most, outdoor lights are designed in a manner which allows much of the light to escape into the sky. This escaped light, which causes skyglow around major cities, is not useful for its intended purpose. Several of the letters received cited examples of where outdoor display lighting is hazardous to the motorist.

III. 6 MCAR § 2.2102 APPLICABILITY OF RULES

Rule 2102 sets a timetable for complying with the rules and specifies exceptions to

them. Paragraph A. provides that building and sign owners have until July 1, 1980, to make necessary changes in the hours during which display lighting is operated. An additional year is allowed in paragraph B. before installed new lighting must comply with the rules. The additional time will allow building and sign owners to install lighting systems which were ordered before the rules took effect. Paragraph C. requires that all outdoor display lighting must comply with efficiency and quantity standards by July 1, 1985. This additional four year period allows for natural turnover and replacement of lights and additional experience in working with these rules. The additional time period allows the Energy Agency and industry to evaluate the feasibility of the rules and the cost of conversion. It also provides time to amend the rules, if they prove unworkable or too lenient.

The rules do not apply to temporary or seasonal lighting which, if covered by the rules, might become uneconomic. Examples include Christmas lights, state and local fairs, and certain other recreational events. It would be unfair to require these lighting applications to comply with the rules for permanent lighting applications.

Also, the rules do not apply to lighting which provides time of day, temperature, or weather conditions because these signs are useful only if operated on a 24 hour basis. There are circumstances in which it is important for motorists and pedestrians to know the information provided by these signs. Finally, the rules do not apply to penal institutions or in other situations where certain lighting levels are required by law.

IV. 6 MCAR § 2.2104 DEFINITIONS

Rule 2104 defines outdoor display lighting and one of its subsets, security lighting. Security lighting is defined in order to exclude it from other rules governing display lighting. Because of the many and varied applications of outdoor display lighting, it is easier to specifically define security lighting for purposes of exclusion than attempt to define all application of outdoor display lighting. The situation can be diagrammed as follows:



With respect to the definition of daytime hours, two foot candles was selected on the basis of conversations with individuals in the lighting business as the light level at which photocells are activated.

Temporary or seasonal display lighting is defined to exclude commercial Christmas

lighting unless it is illuminated for more than 65 days.

V. 6 MCAR § 2.2110 PERMISSIBLE HOURS OF OPERATION

Rule 2110 specifies the hours in which outdoor display lighting may be operated. Paragraph B recognizes that most people view billboards during the day and early evening. Two examples illustrate this point. On Interstate 35W where it crosses Lake Street in Minneapolis, the traffic count during the evening of March 15, 1979, was as follows (expressed as a percent of the daily peak between 4:00 to 5:00 p.m.):

4:00 p.m. to 5:00 pp.m.	100%
Midnight to 1:00 a.m.	16%
1:00 a.m. to 2:00 a.m.	10%
2:00 a.m. to 3:00 a.m.	5%
3:00 a.m. to 4:00 a.m.	3%
4:00 a.m. to 5:00 a.m.	4%
5:00 a.m. to 6:00 a.m.	12%

A similar decrease in traffic volumes can be observed for University Avenue in St. Paul near Hamline Avenue. From 11:00 p.m. to midnight,the traffic volume had dropped to 349 vehicles compared with the daily peak of 1,635 vehicles. The volume continues to drop until it reaches a low of 54 vehicles between 3:00 a.m. and 4:00 a.m. These examples are indicative of traffic volume patterns on other streets and highways. Paragraph B does not jeopardize existing contracts between billboard companies and the businesses which use billboards since 18 hours of viewing are permitted.

Illumination of historic landmarks between one-half hour before sunset and 10 p.m. is allowed in Paragraph C for aesthetic reasons. Most people have the opportunity to observe historic landmarks during these hours.

Paragraph D allows lighting to advertise for establishments that are open in the evening.

VI. 6 MCAR § 2.2115 PERMISSIBLE EFFICIENCY

Rule 2115 specifies the permissible efficiency of outdoor display lights. It effectively eliminates installation of incandescent lights. Rule Paragraph B.1. recognizes that luminous sign tubing cannot be modified without economic cost. Paragraph B.2. recognizes that small and medium sized business establishments would suffer undue economic hardship by having to comply with 2115 A.

Rule 2115 is designed to encourage the replacement of incandescent bulbs with more efficient lights. Incandescent bulbs produce about 17-22 lumens per watt. In contrast, mercury bulbs produce 56-63 lumens per watt, fluorescent bulbs 67-83 lumens per watt, and multivapor lamps operate at 85-115 lumens per watt.

The efficiency improvements required by rule 2115 will save money as well as energy. The following example compares the costs of servicing a lighting need with three different types of lights.

Assumptions:

Required level of lighting is 40,000 lumens.

Lights are to be operated six hours per day, 365 days per year.

Incandescent lights operate at 20 lumens per watt.

Mercury lights operate at 50 lumens per watt.

Fluorescent lights operate at 75 lumens per watt.

Electricity costs $.04/Kwh.

Calculation of Annual Lighting Costs:

Incandescent

$$\frac{40{,}000 \text{ lumens}}{20 \text{ lumens per watt}} \times 6 \times 365 \times \$.04 = \$175.20$$

Mercury

$$\frac{40{,}000 \text{ lumens}}{50 \text{ lumens per watt}} \times 6 \times 365 \times \$.04 = \$70.08$$

Fluorescent

$$\frac{40{,}000 \text{ lumens}}{75 \text{ lumens per watt}} \times 6 \times 365 \times \$.04 = \$46.69$$

The potential cost savings of mercury and fluorescent lights over incandescent lights in this example are quite substantial. The annual savings would be even more dramatic if the lights were operated longer on a daily basis, as is the case with security lighting. In addition, the savings will increase in proportion to the increase in the price of electricity.

VII. 6 MCAR § 2.2120 PERMISSIBLE QUANTITY

Rule 2120 establishes the permissible quantity of lighting.

Paragraph A specifies the maximum level of security lighting averaged over the area to be illuminated. The Agency has determined that this level is adequate for security purposes. Paragraph C exempts most small and many medium sized businesses from complying with Paragraph A. Paragraph C causes significant economic hardships to be avoided by the application of Paragraph A.

Paragraph B allows flexibility in meeting recommended minimum lighting standards established by the Illuminating Engineering Society. It should be noted that I.E.S. lighting standards were not developed with energy conservation as an important consideration.

It should also be noted that outdoor display lighting may serve a dual purpose. For

many small buildings, some of the security lighting also has advertising benefits. By allowing for exemptions and flexibility in the rules, the Agency intends to avoid adverse economic effects on small businesses. One type of business which would be affected by Rule 2120 is the car sales lot. In one such establishment, one hundred 160 watt bulbs were observed.

VIII. CONCLUSION

The rules proposed to define outdoor display lighting and to govern its quantity, efficiency and hours of operation are needed and are reasonable. They should be recommended for adoption by the Agency.

Respectfully submitted,

Richard A Wallen

RICHARD A. WALLEN

Acting Assistant Director

Data and Analysis Division
Minnesota Energy Agency

Dated: April 27, 1979

Exhibit C

MINNESOTA AUTOMOBILE DEALERS ASSOCIATION

277 UNIVERSITY AVE. • ST. PAUL, MN 55103 • LOCAL (612)291-2400 • TOLL FREE 1-800-652-9029 • GARY D. RIPPENTROP, EXECUTIVE VICE PRESID

June 6, 1979

Mr. Myron Greenberg
Hearing Examiner
Room 300
1745 University Avenue
St. Paul, Minnesota 55104

Re: Proposed rules of the Energy Agency governing outdoor display lighting

Dear Mr. Greenberg:

As a representative of 800 franchised new automobile and truck dealers in the State of Minnesota, MADA is pleased to have this opportunity to comment on the proposed rules of the Minnesota Energy Agency governing outdoor display lighting. This memorandum is intended to support and supplement our oral comments made at the public hearing held on May 24, 1979. These comments will carefully examine the statutes upon which the Agency relies for authority to promulgate these rules and will address the issue of the Agency's authority to conduct this rule making proceeding to regulate display lighting in general and security lighting in particular. These comments will also address the issue of whether the Agency has met its burden of demonstrating the need for and the reasonableness of the proposed rules. With respect to this issue, a specific concern is that the reasonableness of the quantity figure for security lighting has not been sufficiently demonstrated. These comments will also pursue a technical drafting issue which we raised at the public hearing concerning the need for the proposed rules to specifically authorize the use of security lighting during nighttime hours. In conclusion, we will recommend several amendments to the proposed rules. (See Appendix G.)

The Minnesota Energy Agency relies on two sections of the Minnesota Statues for authority to initiate this proceeding - §116H.08(a) and §116H.12(1b). Section 116H.08(a) provides that the director may "Adopt rules pursuant to Chapter 15 necessary to carry out the purpose of sections 116H.01 to 116H.15." Section 116H.12(1b) provides that "The director shall develop proposed rules, pursuant to Chapter 15, by October 1, 1977, setting standards covering permissible hours of operation, quantity and efficiency of outdoor display lighting and defining 'outdoor display lighting (Emphasis supplied)'" Section 116H.08(a) contains the general grant of authority for the Agency to promulgate rules. Section 116H.12(1b) is a specific provision authorizing the Agency to "develop proposed rules" governing outdoor display lighting. This latter provision also sets out in part the subject matter which may be regulated.

An authoritative analysis of the statues in question must be prefaced with a discussion of the Minnesota law of statuatory construction. Minnesota Statutes Chapter 645 provides guidance in this area. A fundemental principal of construction is contained in Minn. Stat. §645.16 which states:

> "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all of its provisions."

In the event of irreconcilable provisions, a particular provision will govern over a general provision according to Minn. Stat. §645.26(1) which reads as follows:

> "When a general provision in a law is in conflict with a special provision in the same of another law, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions be irreconcilable, the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted at a later session and it shall be the manifest intention of the legislature that such general provision shall prevail."

A number of Minnesota Supreme Court Decisions have construed this provision. In Butler v. Engel, 68 N.W. 2d 226 (1955), the Court was called on to reconcile two confliciting provisions of the Minnesota Traffic Code, Minn. Stat. Chapter 169. The Court cited Minn. Stat. §645.26 and held that a specific provision applicable to one part of the Traffic Code governed over a general provision which if read literally would apply to all parts of the Traffic Code. If the meaning of particular words and phrases is at issue, they should be construed according to the rules of grammar and according to their common and approved usage unless they are technical or unless such a construction would be contrary to the manifest intent of the legislature. (Minn. State §645.08(1))

It is MADA's position that the specific limitation set out in §116H.12(1b) governs over the general grant of authority contained in §116H.08(a), and that the Agency has exceeed its authority by proceeding with the hearing process to have these proposed rules adopted as final rules having the force and effect of law. When this issue was raised at the public hearing, it was the opinion of the Hearing Examiner that the purpose of this proceeding is to ultimately adopt final fules. This is supported by the notice of hearing document and a reference in the Statement of Need requesting a recommendation of adoption to the Agency. If the intent of this present proceeding is not to develop proposed rules to serve as guidelines only, then no effect has been given to the limiting language of §116H.12(1b). Such a reading of the statute is contrary to the cannons of statutory construction and in our opinion seriously flaws this proceeding. A review of the history of the adoption of M.S. 116H.12, subdivisions 1a and 1b may be instructive. As originally introduced in 1977, neither H.F. No. 522 nor its companion measure, S.F. No. 669 contained any provision relating to outdoor

display lighting. In fact, the Senate version never included a display lighting provision. The House Committee on Environment and Natural Resources adopted a version of the outdoor display lighting provision in a strike-everything amendment. (See 1977 House Journal page 771.) Note that this original version contained a flat prohibition on outdoor display lighting from 11 pm to 4 am and authorized the Energy Agency to "promulgate rules" relating to hours, quantity and efficiency (Emphasis Supplied). An attempt by Senator Luther to amend an even more restrictive outdoor display lighting provision onto the Senate bill was rejected. See 1977 Senate Journal p. 2433.

With this clear rejection of a tough outdoor display lighting provision by the Senate, it became clear to members of the House that their version of the display lighting provision would be rejected by the Senate with the result that the Final Conference Committee Report which became Laws 1977 Ch. 381 and the outdoor display lighting provision (Section 12) deleted the prohibition during 11 pm to 4 am and directed the Agency to adopt "Proposed" rather than final rules and if one were to listen to tapes of Conference Committee debate and Floor debate, one will find that the intent of the authors and the Legislature was that the proposed rules would be reviewed by the House Environment and Natural Resources Committee and the Senate Energy and Housing Committee in the 1978 session to determine their reasonableness. That the Agency failed to adopt the proposed rules by October 1, 1977 in view of their legislative history is, MADA believes, grounds for invalidating the present rules. In support of our position the Energy Agency apparently recognized this defect in its authority and attempted to cure it through legislation amending Minn. Stat. §116H.12. The Agency's bill H.F. 990, (See Appendix A), extended the time from July 1, 1979 to July 1, 1980 as the date for limiting outdoor display

lighting and more importantly amended §116.12(1b) to give the Agency authority to promulgate final rules by July 1, 1979. This bill which failed to pass during the regular session was introduced and passed as S.F. No. a during the Special Session and has been signed into law by Governor Quie. With this amendment to §116.12(1b), the authority to initiate a proceeding to promulgate final rules now exists. However, the Agency should not be allowed to go forward with the present proceeding to adopt final rules since its authority has just now been vested.

MADA believes that the Energy Agency also exceeded its authority by proposing rules regulating the permissible quantity of security lighting. Minn. Stat. §116H.12(1a) sets out several types of lighting which the legislature deemed to be outdoor display lighting. They are "building facade lighting, other decorative lighting, and all billboards and advertising signs except those which advertise a commercial establishment which is open for business at that hour."

In order to determine what may be regulated under this statute, it must be examined to ascertain the intent of the Legislature. Since general words are to be construed to be restricted in their meaning by preceeding particular words, (See generally M.S. 645.08) the meaning of the word "display" becomes very important. The Websters New World Dictionary defines the word when used as an adjective as "designating printing type in larger sizes, used for headings, advertisements, etc." Use of the word connotes setting something off - exhibiting something. The examples of outdoor display lighting which the Legislature offers in the statute are all consistent with this definition. The purpose of each is to call attention to a business establishment or product - to advertise it or exhibit it. The Statute makes absolutely no mention of lighting used for purposes other than display, such as security lighting. Security

lighting has a specific purpose of protecting persons or property from the threat or occurrence of harm. It is totally different from display lighting and should not be regulated pursuant to Minn. Stat. 116H.12. Apparently the position of the Agency is that since the Statute gives it authority to define the term "outdoor display lightin it can tailor its definition to include any outdoor lighting it please We disagree. The Agency must be confined solely to the task it was authorized by statute to perform. As the Minnesota Supreme Court recently emplasized in State v. Fry Roofing Co., 246 N.W. 2d 696, 698 (1976), an adminstrative agency is a "creature of statute whose authority and jurisdiction are strictly prescribed by the legislature...." According to the Court in the Fry decision:

> "Courts cannot properly aid the agency by construing the statute to confer upon it implicit authority, when to do so would contravene the legislature's apparently deliberate failure to explicitly grant it such authority."

This judicial principle was again restated in Minnesota-Dakotas Retail Hardware Association v State of Minnesota, Minnesota Supreme Court, May 11, 1979. Security lighting is not display lighting and for the Agency to regulate it is clearly contrary to the legislative mandate.

Leaving the authority issues and moving to the proposed rules themselves, it is MADA's position that the Energy Agency has not made a sufficient affirmative presentation of facts to demonstrate the need and reasonableness of the proposed rules. Some facts are contain in the Statement of Need and Reasonableness; almost none were offered by the Agency at the public hearing. According to the State-ment of Need and Reasonableness, the major reason for the rules is to conserve our energy resources. According to the Agency, there woul be direct savings as a result of a reduced demand for electricity. In addition, it is anticipated that there will be a secondary, symboli

effect of stimulating energy conservation by the general public. The argument goes: If the public perceives that all sectors are participating in conservation efforts, this will stimulate individual energy savings. In support of the symbolic effects of the proposed rules, the Agency cites a standby conservation plan proposed at the federal level by the Department of Energy. This plan would prohibit the illumination of advertising signs and window displays after business hours during an energy emergency.

Upon a close examination, the need for the regulations can be questioned. The Agency offers no figures on the amount of energy which would be directly conserved if these regulations were to be adopted. Apparently electricity used in Minnesota is generated from relatively abundant fuels. Also, in response to the energy crisis, the Minnesota Building Code has already adopted some standards regulating the efficiency of lighting including outdoor lighting (See Appendix B). Any direct energy savings resulting from the rules would probably be minimal and in any event there would be no conservation of our least abundant fuel - oil. The indirect effects of the proposed rules as stimulating energy conservation in other sectors is not well documented. In its Statement of Need and Reasonableness, the Agency uses as an example the long strings of incandescent light bulbs on car lots to display automobiles. This conspicuous waste of energy supposedly deters individual energy conservation. The Agency does not seem to take into account that over the last two or three years, these strings have largely disappeared. The reason is economic; the cost of electricity has risen to the point that the used of incandescent bulbs for display lighting is just too expensive. Also with respect to the validity of the symbolic effects, the Standby Conservation Plan cited by the Agency was rejected by the U.S. House of Representatives. At the

hearings, the General Accounting Office (GAO) commented on the plan as follows:

> "Extinguishing illuminated advertising signs appears to be primarily a symbolic gesture to raise the Nation's energy emergency consciousness. DOE estimated oil savings from this plan to be 4,000 B/D. Signs which direct customers to, or inform them of an open business, are exempt from this restriction, minimizing much of the adverse impact this plan could have on motels, restaurants, etc.
>
> DOE expects this plan to cost $3 million to administer. Given the small savings, DOE might be better off dropping this plan as a mandatory measure, saving $3 million, and then putting it in force on a voluntary basis." (See Appendix C)

Symbols must be handled very carefully. The architect who spoke at the public hearing seemed to grasp the importance of symbols and symbolic effect. Perhaps the lighted domes on the Capitol or the Cathedral convey a message which far outweighs the absence of that light as a symbol of energy conservation.

With respect to the reasonableness of the proposed rules, the Statement of Need and Reasonableness seeems to emphasize the amount of public comment as bearing on the reasonableness of the proposed rules. It also emphasizes the long lead time during which the rules can be adjusted. There is a broad statement that the Agency consulted professional illumination engineers and government agencies in developing the rules, but there is very little indication of what input these sources had. The reasonableness of the quantity figure established in 6 MCA §2.2120(B) may be supported because it references a respected engineering handbook.

MADA's position is that this is not a sufficient demonstration of the reasonableness of the proposed rules. Because of the language of Minn. Stat. §116H.12(1b), it was our understanding that this hearing process was for the purpose of developing proposed rules only. There would be an opportunity for the legislature to evaluate the proposed rules before they went into effect. (See our letter

and the earlier discussion of legislative intent - Appendix D. The reasonableness of the rules is not supported by a strong cost-benefit analysis. The Statement of Need and Reasonableness calculates anticipated savings when more efficient lighting is substituted for incandescent bulbs, but no analysis is done on the impact of other provisions of the proposed rules. There should be a complete analysis calculating such costs as lost revenues resulting from turning out advertising light and signs. The most important cost which need evaluation is that which results from increased vandalism and theft if security lighting must be reduced.

Regarding specific provisions, 6 MCAR §2.2120(B) is unreasonable as it applies to the automobile retail dealer. The provision reads:

> "No person shall operate any other outdoor display lighting that exceeds the recommended minimum standards set forth in the "IES Lighting Handbook" (5th edition) published by the Illuminating Engineering Society by more than 20 percent."

The argument could be made that since the standard is tacked to the minimum requirements of the "IES Lighting Handbook" that therefore it is reasonable. However, when applied to outdoor lights used to display automobiles, the standard does not make sense. As written, the standard covers all outdoor display lighting except security lighting. Looking to the definition of outdoor display lighting contained in 6 MCAR §2.2104(H), the standard would cover outdoor building facade lighting, any outdoor decorative lighting, any illuminated off premise advertising, and any on-premise outdoor lighting. Presumably, "any on-premise outdoor lighting" would include lighted signs and any lighting used to display merchandise outdoors. Therefore, as written, 6 MCAR §2.2120(B) would restrict the quantity of light used to display merchandise outdoors to not more than 20 percent in excess of the recommended minimum standards contained in the "IES Lighting Handbook." Since automobile retailers are perhaps the only businessmen who use display lighting to illuminate merchandise

outdoors(as well as to provide a safe place for business invitees to which the dealer owes a clear duty of care), this aspect of the standard applies strictly to them. But yet when a search is made of the "IES Lighting Handbook" to determine what standard applies, it is discovered that there is no standard which would apply to the outdoor display of merchandise or the protection of business invitees. We feel that it is unreasonable for the Agency to set a standard which has no application. 6 MCAR §2.2120(B) should be amended to exclude lighting for which no minimum standard is offered. (See Appendix G)

Another particular provision which troubles us is 6 MCAR §2.2120(A relating to the permissible quantity of security lighting. Aside from the argument that the Agency is not authorized to regulate security lighting, it is our opinion that the reasonableness of the figure has not been adequately demonstrated. 6 MCAR §2.2120(A) provide

> "Beginning July 1, 1980, the provisions of 6 MCAR §2.2102 B and C notwithstanding, no person shall operate security lighting that exceeed .05 watts per square foot for the area lighted for security purposes."

In the Statement of Need and Reasonableness, the Agency states that it "has determined that this level is adequate for security purposes." There is no supporting material to document the adequacy of the figure in any way. The standard is not tied to the "IES Lighting Handbook", so its reasonableness cannot be supported by a reference to respected authority. The regulations as originally proposed gave an additional standard - .2 footcandles. From conversations with the Energy Agency prior to the hearing, it was our understanding that the amount of light allowed under each standard (.05 watts/square foot and .2 footcandles) would be roughly equivalent if mercury vapor lights were used. Since the "IES Lighting Handbook" does provide some standards for security lighting in terms of footcandles, we can

make some effort to judge the reasonableness of the .05 watts/square foot. According to the standard embodied in the IES Lighting Handbook, .2 footcandles is the recommended figure for protective lighting in coal yards and protective lighting for general inactive area on dairy and poultry farms. (See Appendix E)

It is conceivable that the standard may be reasonable depending on particular security needs. However, the standard seems clearly arbitrary when applied to the automobile retailer. The standard does not vary when applied to high crime areas as distinct from low crime areas. The standard takes no account of whether an area is fenced or wide open. It does not seem to take into account the huge amount of extremely vulnerable and mobile inventory which a new car dealer keeps on his lot. At a minimum, the dollar figure is $100,000 and for large dealers the figure runs into the millions. Theft and vandalism rates are already very high and the product is very desirable and mobile. (See Appendix F)

We see two more issues with respect to 6 MCAR §2.2120(A) governing the permissible quantity of security lighting. First, in making the calculation we were confronted with the problem of determining exactly what is "the area lighted for security purposes." It is not clear from the regulations if this area is to include sides of buildings or square footage of doors. We have recommended amendment to clear up this ambiguity (See Appendix G). Second, the statute authorizes the Agency to regulate the "quantity" of outdoor display lighting. Even if it is determined that security lighting is display lighting, it is our opinion that it is not appropriate to regulate the "quantity" of security lighting in terms of watts per square foot. This is a measure of energy use only and has no bearing on the quantity of light actually used. Depending on the efficiency of the light source, the amount of light produced from

a constant wattage could vary by a factor of 5. It is indeed arguable that such an arbitrary quantity standard is not in compliance with the Agency's Statement of Need and Reasonableness in that various forms of lighting operate at widely different effiency levels. Flourescent lighting conceivably might meet the .05 watt maximum and yet consume more energy than sodium or mercury vapor lighting which exceeds the .05 maximum. How does that result square with the overall purpose of conserving energy resources. It may well be that the Agency is trapped in a hopeless dilemma on this issue, but that is precisely why these proposed rules should be rejected and the Agency instructed to conduct further studies.

Our final comment concerns the drafting of 6 MCAR §2.2110 Permissible Hours of Outdoor Display Lighting Operation. In 6 MCAR §2.2110 (A) it states that "no person shall operate outdoor display lighting during hours other than those specified by these rules." 6 MCAR §2.2100(E) states when security lighting may not be operated, yet there are no designated hours when security lighting may be operated. 6 MCAR §2.2100(D) states in part that "all other outdoor display lighting except security lighting may be operated from one half hour before sunset until one hour after the close of a business day." By implication, this section requires that security lighting may not be operated during the same period. This means that security lighting may not be switched on until an hour after close of business. Apart from the fact that we see it as important that these regulations be amended to specifially authroize the use of security lighting during all nighttime hours (See Appendix G) we suggest that in Minnesota, the result is extremely dangerous to our members. Consider the fact that sunrise is as late as 7:50 am in winter months and that sunset is as late as 9:04 pm in summer months. and one can readily see that there will be times when a dealer's lot

and building must under these regulations remain in total darkness awaiting the appropriate time to turn on or off security lighting. The alternative is to open at 7 am in the winter and stay open until 10 pm in the summer. This, of course, ignores the fact that by law (recently upheld by court decision in Minnesota) auto dealers must be closed all day on Sundays.

Based on the forgoing, analysis it is our opinion that the proposed rules governing outdoor display lighting should not be recommended for adoption by the Energy Agency.

Respectfully Submitted,

Louis W. Claeson

Louis Claeson
MADA Counsel

APPENDIX G

RECOMMENDED AMENDMENTS

1. Relating to 6 MCAR §2.2104 Definitions. Add a subdivision:

   L. "Area lighted for security purposes" means the gross surface area lighted for security purposes including the surface area of the tops, sides and doors to a building if they are lighted for security purposes.

2. Relating to 6 MCAR §2.2110(E) Permissible hour of operation. Amend to read as follows:

   E. Security lighting may not be operated during daytime hours but may be operated during non-daytime hours.

3. Relating to 6 MCAR §2.2120(A) Permissible quantity of security lighting.

   Alternative A - Strike 6 MCAR §2.2120(A) in its entirety. We strongly urge Alternative A because the Agency has clearly failed to demonstrate the need and reasonableness of this standard, particularly as it is applied to automobile and truck dealerships. The Agency should be instructed to conduct additional study in an effort to develop a reasonable standard.

   Alternative B - Amend 6MCAR §2.2120 by adding a paragraph to read:
   D. Rule 6 MCAR §2.2120(A) shall not apply to any establishment which maintains the majority of its inventory outdoors.
   (In the alternative simply provide that 6 MCAR §2.2120(A) shall not apply to any business licensed as a motor vehicle dealer under Minnesota Statutes Section 168.27)

   Alternative C - Amend 6 MCAR §2.2120 (A) to read:
   A. Beginning July 1, 1980, the provisions of Rule 6 MCAR §2.2102 B and C notwithstanding, no person shall operate security lighting that exceeds ~~.05~~ .1 watts per square foot for the area lighted for security purposes.

4. Relating to 6 MCAR §2.2120(B) Permissible quantity of other display lighting. Amend to read as follows:
   B. No person shall operate any other outdoor display lighting except for lighting to display merchandise outdoors and to provide a safe area for business invitees, that exceeds the recommended minimum standards set forth in the "IES Lighting Handbook" (5th edition) published by the Illuminating Engineering Society by more than 20 percent.

Midway Ford Company
of
Roseville

June 1, 1979

Mr. Gary Rippentrop
MADA
277 University Avenue
St. Paul, Minnesota 55103

Dear Mr. Rippentrop:

With the recent discussions relative to the State Of Minnesota considering legislation which would limit our use of outdoor display and protective lighting, I thought that the following information might benefit you.

During the year of 1978, Midway Ford had losses totaling nearly $50,000 for theft and vandalism. This total does not include the new vehicles which were stolen which would increase that total by about $20,000.00. These figures are appaling and our insurance carrier is constantly checking up on us to see that we follow all their recommended loss prevention procedures which includes lights being turned on all night.

For the first five months of this year we have had ca. $16,000.00 worth of theft and vandalism to new and used vehicles including the loss of tires, seats, radios, wheel covers, batteries, spare tires & wheels, bumpers, door trim panels, engine and transmission parts etc. from vehicles. These thefts are taking place during the evening hours and weekends (Sunday) when we are closed in spite of the fact that we are patrolled by both the Roseville Police and a private patrol service four times each night.

It is my considered opinion that if the State Of Minnesota passes legislation which requires us to turn off our lights at night that they should pass companion legislation to provide on site guard service to protect businesses such as ours. With no lights I am sure our losses will increase and if that is the case, I am certain we will be unable to secure insurance.

I hope you will present facts such as these to the legislators so that they give some rational thought to this matter before making a decision which is adverse to business. A business that ceases to function also ceases to have employees. Best that they not forget the relationship.

Sincerely,

Edward J. Tichenor

Edward J. Tichenor
President and General Manager

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 the Permissible Hours of Operation, the Quantity and the Efficiency of Outdoor Display Lighting, 6 MCAR Sections 2.2101-2.2120.

REPORT OF THE HEARING EXAMINER

The above-entitled matter came on for hearing before Myron S. Greenberg, duly appointed Hearing Examiner on May 24, 1979, in Room D of the Veterans Service Building, 20 West 12th Street and Columbus Avenue, Saint Paul, Minnesota.

This is a rules hearing pursuant to Minn. Stat. Ch. 15, held to determine whether to adopt rules defining outdoor building facade lighting, outdoor decorative lighting, illuminated off-premise advertising and on-premise outdoor lighting as well as specifying permissible hours of operation of such lighting and establishing minimum efficiency standards for such lighting.

Representing the Minnesota Energy Agency (hereinafter "Agency") were Richard A. Wallen, Assistant Director, Policy Analysis Division; and Dwight S. Wagenius, Special Assistant Attorney General.

Nineteen members of the public and industry representatives appeared and signed the register at the hearing. The hearing continued until all persons had an opportunity to be heard. The record remained open until June 8, 1979, for the submission of comments. Five such comments were received, including a letter from the Agency (hereinafter "Agency letter") containing some changes to the rules and response to various suggestions made during the hearing.

Pursuant to Minn. Stat. Sec. 15.0412, subd. 4, this Report shall be available to all affected persons for review for at least five working days before the Agency takes any final action on the proposed rules.

Thereafter, the Agency shall, if it proposes to adopt the rules as originally proposed or otherwise amended, submit a copy of the Order Adopting Rules, a copy of any additional Agency findings, a copy of the rules as originally proposed, and a copy of the rules adopted to the Chief Hearing Examiner for review pursuant to Minn. Stat. Sec. 15.0412, subd. 4. Submission to the Chief Hearing Examiner shall precede review by the Attorney General. The Chief Hearing Examiner shall complete his review and submit his report to the Agency on the issues of substantial changes in the rule and compliance with Minn. Stat. Sec. 15.0412 within ten calendar days. The Agency will 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

1. On April 4, 1979, the Agency filed the following documents with the Chief Hearing Examiner:

(a) A copy of the proposed rules.
(b) The Order for Hearing proposed to be issued.
(c) The Notice of Hearing proposed to be issued.
(d) A Statement by the Agency of the number of persons expected to attend the hearing and the estimated length of time necessary for the Agency to present its evidence at the hearing.

2. On April 9, 1979, the Agency requested of the Chief Hearing Examiner approval to incorporate by reference certain materials into the proposed rules. By order dated April 10, 1979, the Chief Hearing Examiner gave approval for such incorporation by reference.

3. On April 16, 1979, a Notice of Hearing was published in the EQB Monitor at Volume III, Issue 41, page 134. On April 23, 1979, a Notice of Hearing and copy of the proposed rules were published at 3 State Register 1927.

4. On April 24, 1979, the Agency 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 as well as other individuals and representatives of government or industry known by the Agency to be interested in the subject matter of the proposed rules.

5. On April 27, 1979, the Agency filed the Statement of Need with the Hearing Examiner. That document was available for inspection at the Office of Hearing Examiners from the date of filing to the date of hearing.

6. On May 29, 1979, the Agency filed the following documents with the Hearing Examiner:

(a) The Notice of Hearing as mailed.
(b) The Affidavit of Receipt of the Secretary of State's list.
(c) The Affidavit of Mailing of the Notice to all persons on the Secretary of State's list.
(d) The Secretary of State's Certificate.

No Order for Hearing was filed.

7. In response to various solicitations for comments on the proposed rules, the Agency received over 60 comments from individuals and organizations, all of which are part of the record and have been reviewed by the Examiner. (Agency Exs. 7, 8 and 9) (The responses to solicitations for information which was admitted during the hearing should have been filed with the Hearing Examiner 25 days prior to the hearing pursuant to 9 MCAR Sec. 2.105 G.)

8. The Agency's authority to promulgate the proposed rules is contained in Minn. Stat. Sec. 116H.08(a), and Sec. 116H.12, subd. 1(b) (1978).

The Examiner rejects the contention of the Minnesota Automobile Dealers Association (MADA) that the Agency lacks authority to adopt rules governing

the subject matter. In its letter of June 6, 1979, to the Hearing Examiner, (hereinafter "MADA letter") MADA contends that Minn. Stat. Sec. 116H.12(1)(b) limits the Agency's authority to "develop proposed rules" (MADA letter, p. 2), and cites various provisions of law dealing with statutory construction which purport to support its position. Contrary to the position taken by MADA, the Examiner has determined that the sections of law cited by the Agency as establishing its authority to promulgate rules do, in fact, invest it with such authority.

Indeed, the phrase "develop proposed rules" may be somewhat misleading and indicate that something less than rules having the force and effect of law should be developed by the Agency. The language immediately following that phrase, however, i.e., "pursuant to chapter 15," clearly indicates that a formal rules proceeding is contemplated by the Legislature. Such proceedings are intended to and have the effect of establishing rules with the force and effect of law.

The Examiner also rejects the contention by MADA that the Agency exceeded its authority by proposing rules regulating the permissible quantity of security lighting. As noted by the Agency in its post-hearing submission to the Examiner (hereinafter "Agency letter"):

> Security lighting is used as display lighting in certain businesses using the out-of-doors for display area. To avoid spliting hairs over what is what when, the Agency chose to include all security lighting within outdoor display lighting, then define out security lighting for specific reasons within certain rules. The Legislature listed certain types of lighting which had to be included within outdoor display lighting but gave the Agency authority and discretion to further and more completely define "outdoor display lighting." See Minn. Stat. Sec. 116H.12, subd. 1(b) (1978). Agency Staff believes it has conformed to legislative intent in the proposed rules. (Agency letter, p. 2)

The Examiner further disagrees with MADA's interpretation of recent cases which it claims restricts the Agency from considering security lighting in its definition of "outdoor display lighting." (MADA letter, p. 6) MADA claims "security lighting is not display lighting and for the Agency to regulate it is clearly contrary to the legislative mandate." (Ibid.) Such statement is refuted by testimony during the hearing that some businesses—automobile dealerships, in particular--consider display lighting and security lighting to be one and the same.

9. The Examiner finds the Agency's Statement of Need to provide adequate support for establishing the need for and reasonableness of the proposed rules and, unless otherwise indicated, the Examiner adopts the justification provided in that Statement of Need as his own.

10. The proposed rules serve three purposes. As expressed by 6 MCAR Sec. 2.2101 (hereinafter abbreviated to 2101 or the appropriate designation of a proposed rule section), the rules define outdoor display lighting, specify permissible hours of such lighting and establish quantity and efficiency standards for that lighting.

A second general purpose noted in the Statement of Need is "to reduce unnecessary energy consumption." (Statement of Need, p. 2) Although factually supportable, the amount of energy actually saved by implementing the proposed rules would be extremely small relative to total usage (50-150 car loads of coal per year). Even Dr. Wallen, in testimony supporting the Agency's proposals, recognized that energy saving was a secondary goal of the rules.

The major purpose and goal is to impress on people the necessity for energy conservation, especially those who perceive a waste of energy through inefficient or unnecessary outdoor lighting. The rules are designed to accomplish this, essentially, by establishing a policy of "lights out" for most outdoor lighting.

11. General support for the rules was expressed by the Minnesota Public Interest Research Group (MPIRG), various individuals and the Twin Cities Astronomy Club. Representatives of the latter testified extensively regarding the negative effects of intensive night lights on the ability of astronomers to observe the stars. Suggestions for changes made by those astronomers were, however, substantial in nature and would require additional hearings. Examples of such suggestions include requiring increased use of low pressure sodium bulbs and shading of fixtures which send light over the horizon. (See, testimony of Lauren Nelson; see also, testimony and letter of MPIRG attorney James Miller)

General opposition to the rules was expressed in written and oral evidence by MADA, various sign companies and associations and other individuals. (See, e.g., testimony of Richard A. Nordquist and letter from Reverend David Hayes) Diane Lynch, representing the Saint Paul Area Chamber of Commerce, criticized the rules as penalizing small businesses and service businesses. The deficiencies in the rules which were subject to such criticism have, in the Examiner's opinion, been corrected by changes accepted during the hearing and noted in the Agency letter submitted after the hearing (discussed in subsequent Findings). The expressed desire of the outdoor display industry to remain self-regulated has been countered by the legislative mandate to the Agency to promulgate these rules. (See, testimony of Nancy Jorgenson on behalf of Naegle Outdoor Advertising Company)

12. The essence of the rules is contained in 2110, 2115 and 2120 which address, respectively, permissible hours of outdoor display lighting operation, permissible efficiency and permissible quantity.

Certain changes in these rules eliminated criticisms and improved them substantively. Specifically, 2110 B. was changed by adding the word "normally" before "open for business". As noted by the Agency, "this slight addition provides for time clock-triggered display signs on holidays and other days when businesses normally open are closed." (Agency letter; testimony of Al Brodie, Minnesota Hotel/Motel Association)

In 2110 D., the Agency proposed to add the following language after the originally proposed language:

> In addition, on-premise outdoor display lighting which has a demand of 1550 watts or less may be operated after the close of a business day until midnight even though the establishment closes prior to midnight.

(Agency letter) This change eliminates the problem noted by Richard Nordquist, Upper Midwest Sign Advertising Council, that small businesses rely heavily on their illuminated signs for inexpensive but effective advertising and, as originally proposed, the rule severely curtailed this method of promotion.

In response to an inquiry from Al Brodie, the Agency Staff stated its belief that it is:

> . . . unnecessary to make special provisions in the rules for motels, as urged at the hearing. As Staff stated at the hearing, a motel's business day may include at least all those hours when it has a vacancy. A "no vacancy" sign is not viewed as outdoor display lighting.

(Ibid.) The Examiner agrees with that position and so finds.

MADA perceived a problem with and expressed concern about 2110 E. not specifically stating when security lighting may be operated. (The rule states when it may not be operated, to wit, "during daytime hours".) (MADA letter, pp. 12-13) The Examiner does not believe the rules to be particularly unclear about when security lighting is permitted and is reasonable as proposed. There would be no harm, however, in tacking onto the rule, as desired by MADA, the phrase "but may be operated during non-daytime hours." (MADA letter, Appendix G)

During the hearing, the Agency agreed to change 2110 (and other appropriate rules) to clarify that outdoor display lighting and security lighting could be operated during daytime hours if and when triggered by photocell mechanisms. (See, testimony of Don Erickson and response of Richard Wallen) The omission of such clarification from changes recited in the Agency letter appears to be an oversight. Such provision is consistent with the thrust of the proposed rules and is reasonable to allow consistent and effective operation of photocell-equipped lights.

13. Rule 2115 effectively eliminates installation of incandescent lights for outdoor display advertising by establishing an efficiency standard. (Statement of Need, p. 5) This standard is already met by approximately 95 percent of all outdoor billboards according to an energy survey done for the Agency by Naegle Outdoor Advertising Company. The reason for such compliance is apparently economic, not altruistic; it costs less to use fluorescent or mercury lights than incandescent.

The rules allow sufficient time for changeover from incandescent to other types of lights. (Section 2102 makes the efficiency provisions effective in 1981, for new signs and in 1985, for all signs.)

Alfred French, an architect and urban designer, urged greater flexibility in the rules to distinguish between energy efficiency and luminaire

efficiency. He noted that high efficiency luminaires are not necessarily the most economical or energy efficient form of lighting. His suggestions are: (1) the rules should differentiate between classes of use, and (2) the rules should allow people who can meet general energy efficiency standards, by whatever effective means, to do so.

The Examiner finds that Mr. French's approach, although reasonable, would probably not have the desired (by the Agency) effect of exemplifying, indeed, dramatizing, the necessity to conserve. The "lights out" concept promoted by the Agency is important and likely to be effective because of its visibility, i.e., it is readily noticed and understood.

14. Rule 2120 A. limits the quantity of security lighting to that which produces .05 watts per square foot. (The proposed alternative standard of .2 foot candles was deleted by the Agency at the hearing.) Part B. of that rule establishes a standard for lighting quantity of 20 percent more than the recommended minimum standards set forth in the IES Lighting Handbook (5th Edition). (Incorporated by reference pursuant to an Order of the Chief Hearing Examiner as noted in Finding 2, supra.)

Although evidence regarding the .05 watts per square foot standard is slight, Dr. Wallen's consultations with government and insurance representatives does support that measure as adequate for security purposes. (As an example of its adequacy, security lighting for the power plant at Monticello lighting for the power plant at Monticello is .03 watts per square foot.) Similarly, the 20 percent leeway allowed by the rules over minimum recommended standards of the Illuminating Engineering Society is reasonable and lenient. As pointed out by Dr. Wallen, these standards are intended as a guide; reasonable compliance is the goal of the Agency. The Agency does not intend to institute a major inspection program to ensure strict compliance with the rules.

The main objection to the rule limiting quantity of lighting came from the Automobile Dealers Association. (See, testimony of Gary Rippentrop and MADA letter, pp. 8-12) The Examiner rejects MADA's contention that the proposed rules are not supported by the record. There is merit, however, in MADA's complaint that the IES Lighting Handbook gives little guidance to auto dealers for their specific industry concerns, i.e., protection of a large, generally sprawling, open stock which is an attractive target for thieves and vandals. Although experience in working with the rules, once adopted, may eliminate some problems, the Examiner suggests further discussions between Agency and MADA representatives to develop specific standards for the retail automobile dealers' lighting needs. Such specific standards could then be considered for promulgation as a rule.

15. Minor changes in the rules to correct citations where such citations are incomplete are necessary for clarity.

Based upon the foregoing, the Examiner makes the following:

CONCLUSIONS

1. The Energy Agency and the Office of Hearing Examiners duly acquired and have jurisdiction in the instant matter.

2. Due, timely and adequate legal notice of the hearing was properly served and published by the Agency. All other procedural requirements of statute and rule have been fulfilled.

3. The Agency has demonstrated its statutory authority to adopt the proposed rules.

4. The Agency has demonstrated that the proposed rules are reasonable and necessary.

Based upon the foregoing, the Examiner makes the following:

RECOMMENDATION

That the rules be adopted as proposed with the minor modifications noted in this Report.

Dated: July 9, 1979.

Myron S. Greenberg

MYRON S. GREENBERG
State Hearing Examiner

Exhibit A

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

September 12, 1979

Mr. Louis W. Claeson
Minnesota Automobile Dealers Association
277 University Avenue
St. Paul, Minnesota 55103

Re: Energy Agency Rules Regulating Outdoor Display Lighting
EA-79-005-MG

Dear Mr. Claeson:

Enclosed herewith is a copy of the Chief Hearing Examiner's Report and Memorandum relating to the above-referenced rules.

You are reminded that you have a right to be notified, by the agency, on the date they submit these rules to the Attorney General for his review on form and legality. You should also be advised and reminded that the Attorney General allows interested persons to file argument on legal issues with him.

Yours very truly,

DUANE R. HARVES
Chief Hearing Examiner

DRH:sh
Enc.

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 the Permissible Hours of Operation, the Quantity and the Efficiency of Outdoor Display Lighting, 6 MCAR Sections 2.2101-2120.

REPORT OF THE CHIEF HEARING EXAMINER AND MEMORANDUM

WHEREAS, a hearing was held on May 24, 1979, before Myron S. Greenberg, a Hearing Examiner of the State Office of Hearing Examiners, on the above-entitled matter in compliance with Minn. Stat. Sec. 15.0412, subd. 4; and

WHEREAS, the Report of the Hearing Examiner made pursuant to Minn. Stat. Sec. 15.052, subd. 3, was issued to the Minnesota Energy Agency on July 9, 1979; and

WHEREAS, the Minnesota Energy Agency has now determined to adopt rules pursuant to Minn. Stat. Sec. 15.0412, subd. 4; and

WHEREAS, the Minnesota Energy Agency has submitted said rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. Sec. 15.052, subd. 4 and 9 MCAR Sec. 2.110; 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 Minnesota Energy Agency has met all requirements of Minn. Stat. Sec. 15.0412, subd. 4.

NOW, THEREFORE, upon receipt of this Report, the Minnesota Energy Agency has the responsibility of submitting the complete hearing record and the rules as adopted by the Agency to the Attorney General, notifying all persons who requested to be informed that the hearing record has been submitted to the Attorney General, and publishing in the State Register, all pursuant to Minn. Stat. Sec. 15.0412, subd. 4.

Dated: September 12th, 1979.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

M E M O R A N D U M

A serious question relating to the Agency's statutory authority to adopt these rules was raised at the hearing by Minnesota Automobile Dealers Association (hereinafter MADA). Subsequent to the issuance of the hearing examiner's report, MADA again raised that issue and several other issues by letter to the Chief Hearing Examiner dated July 13, 1979, which is attached hereto as Exhibit "A".

The Agency submission to the Chief Hearing Examiner was received on September 7, 1979, via first class mail. On that same date, the Minnesota Supreme Court issued its opinion in the case of Can Manufacturers Institute, Inc., et al. vs. State of Minnesota, Minnesota Pollution Control Agency, et al.

Based upon the above referenced decision, the Chief Hearing Examiner must reject the hearing examiner's findings and conclusions relating to statutory authority to adopt rules having the force and effect of law, as the law existed at the time of the hearing. Very clearly, MADA's argument on legislative intent has been accepted by our Supreme Court in the above referenced case.

However, as was pointed out by the examiner and by MADA, Special Session Laws 1979, Ch. 2, Sec. 21, clearly gives the Director authority to adopt rules having the force and effect of law as opposed to the previous language which authorized the Director to "develop proposed rules". Special Session Laws 1979, Ch. 2, was approved June 7, 1979, and, as it is an appropriation bill carrying no specific effective date, became effective on July 1, 1979. Therefore, on the date the rules were actually adopted, September 5, 1979, there can be no question that the Agency had the authority to do so.

MADA cited no authority for the proposition that an agency must have actual authority to adopt rules at the time it proposes them. The writer was unable to find any such authorities following a limited independent research.

Thus, it has been concluded that while the Agency did not have authority to adopt rules at the time of the hearing, it had authority to do so on September 5, 1979.

With respect to the other areas of concern raised by the MADA letter, the Chief Hearing Examiner has accepted the findings and conclusions of the hearing examiner for two reasons. First, the Agency has been given very broad authority to define "outdoor display lighting" and thus has attempted to define all such lighting, including "security lighting". The mere fact that the Legislature failed to specifically include the term "security lighting" in Minn. Stat. Sec. 116H.12, subd. 1a., does not specifically prohibit its inclusion.

The second reason relates to the argument of the reasonableness of including automobile dealers within the purview of these rules. As there has been no showing that the inclusion of automobile dealers is either

arbitrary, capricious or illegal, it cannot be said to be unreasonable. The Agency, by authority granted to it by the Legislature, is responsible for making policy decisions such as including "security lighting" in the definition of "outdoor display lighting", based on facts presented at the hearing. As the hearing examiner pointed out, the policy decision was based on facts obtained prior to and during the hearing process, including testimony " . . . that some businesses--automobile dealers, in particular--consider display lighting and security lighting to be one and the same." (Examiner's Report, Finding 8, page 3).

D.R.H.

EXHIBIT "A"

MINNESOTA AUTOMOBILE DEALERS ASSOCIATION

277 UNIVERSITY AVE. ● ST. PAUL, MN 55103 ● LOCAL (612)291-2400 ● TOLL FREE 1-800-652-9029 ● GARY D. RIPPENTROP, EXECUTIVE VICE PRESIDENT

July 13, 1979

RECEIVED

JUL 16 1979

OFFICE OF HEARING EXAMINERS

Mr. Duane R. Harves
Chief Hearing Examiner
Hearing Examiners Office
1745 University Avenue
St. Paul, MN 55104

Re: In the Matter of Adoption of Rules Regulating Outdoor Display Lighting. Report EA-79-005-MG.

Dear Mr. Harves:

I am writing in regard to the Report of the Hearing Examiner in the above matter. In the course of your review of the proposed rules and the report thereon, I urge you to review the record carefully. The Minnesota Automobile Dealers Association is vitally interested in these proposed rules as the record will indicate. There are several areas of concern to us in the report which I will briefly outline to you.

On page 3 of the Report, Mr. Greenberg rejects our contention that the Energy Agency lacks statutory authority to adopt final rules. I would refer you to pages 3 and 4 of my letter of June 6, and specifically to the legislative history discussion of the then existing M.S. 116H.12, subd. 1a and 1b. I do not believe Mr. Greenberg fully understood the thrust of our argument that during the course of passage of that subdivision the legislature deleted authority to "promulgate rules" and replaced it with authority to adopt "proposed rules." Consider also that Extra Session Laws 1979 Chapter 2, amended that same subdivision to delete the term "proposed." It is therefore obvious that the legislature did not itself believe the Agency had authority to adopt final rules until Extra Session Laws 1979, Ch. 2, was signed into law.

Additionally on page 2 of the Report, Mr. Greenberg refers to testimony that automobile dealerships consider display lighting and security lighting to be one and the same. I am puzzled by that reference and can only conclude that Mr. Greenberg refers to the lighting fixtures as physical entities being one and the same. While physically they are one and the same, they serve separate and distinct purposes. One purpose is to display the inventory for public inspection and the other is to protect that inventory from theft and vandalism. I would refer you to pages 5 and 6 of my letter of June 6 for a further elaboration of this point.

As to justifying adoption of those rules on the psychological concept of a "lights out" policy which appears to be the only justification given any credence in the Report, I would refer you to pages 8 and 9 of my letter of June 6, particularly the quote from a report by the General Accounting Office.

Perhaps one of the most serious flaws in the Report of the Hearing Examiner in defense of the rules appears on page 6 wherein Mr. Greenberg refers to testimony of Dr. Wallen of the Energy Agency that "these standards are intended as a guide" and that the Agency "does not intend to institute a major inspection program to ensure strict compliance with the rules." Does Mr. Greenberg mean to suggest that one should not worry about a rule having the force and effect of law because one individual on the staff of the Agency considers it only a guide and perhaps will not pursue enforcement? There is certainly nothing in the regulation to suggest that it is intended as a guide. Consider that M.S. 116H.15 provides specific penalties for violation as well as injunctive relief. If a rule is invalid, unwise, arbitrary, unreasonable, or beyond the authority of an Agency to adopt, it cannot and should not be considered valid simply because the Agency or its staff do not intend to enforce it.

Finally I would refer you to the last full paragraph number 15 on page 6 wherein Mr. Greenberg apparently acknowledges that our industry has specific concerns not adequately addressed by the proposed rule. If further discussions between the Agency and MADA are considered wise by Mr. Greenberg, it seems to be an admission that as applied to motor vehicle dealers, the rules may well be unreasonable. We suggest that the rules should therefore be amended to specifically exclude automotive retailers until reasonable standards can be worked out. Rules of questionable reasonableness should not be recommended for adoption especially when they are justified not on the basis of energy efficiency or conservation but on an illusory psychological "lights out" concept.

If you have any questions regarding our concerns, please do not hesitate to contact me. For your easy reference, I am enclosing a copy of my June 6 letter to Mr. Greenberg.

Yours sincerely,

Louis W. Claeson
MADA Counsel

LWC:jf
Enclosures

Exhibit A

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

September 12, 1979

Mr. Louis W. Claeson
Minnesota Automobile Dealers Association
277 University Avenue
St. Paul, Minnesota 55103

Re: Energy Agency Rules Regulating Outdoor Display Lighting
EA-79-005-MG

Dear Mr. Claeson:

Enclosed herewith is a copy of the Chief Hearing Examiner's Report and Memorandum relating to the above-referenced rules.

You are reminded that you have a right to be notified, by the agency, on the date they submit these rules to the Attorney General for his review on form and legality. You should also be advised and reminded that the Attorney General allows interested persons to file argument on legal issues with him.

Yours very truly,

DUANE R. HARVES
Chief Hearing Examiner

DRH:sh
Enc.

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 the Permissible Hours of Operation, the Quantity and the Efficiency of Outdoor Display Lighting, 6 MCAR Sections 2.2101-2120.

REPORT OF THE CHIEF HEARING EXAMINER AND MEMORANDUM

WHEREAS, a hearing was held on May 24, 1979, before Myron S. Greenberg, a Hearing Examiner of the State Office of Hearing Examiners, on the above-entitled matter in compliance with Minn. Stat. Sec. 15.0412, subd. 4; and

WHEREAS, the Report of the Hearing Examiner made pursuant to Minn. Stat. Sec. 15.052, subd. 3, was issued to the Minnesota Energy Agency on July 9, 1979; and

WHEREAS, the Minnesota Energy Agency has now determined to adopt rules pursuant to Minn. Stat. Sec. 15.0412, subd. 4; and

WHEREAS, the Minnesota Energy Agency has submitted said rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. Sec. 15.052, subd. 4 and 9 MCAR Sec. 2.110; 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 Minnesota Energy Agency has met all requirements of Minn. Stat. Sec. 15.0412, subd. 4.

NOW, THEREFORE, upon receipt of this Report, the Minnesota Energy Agency has the responsibility of submitting the complete hearing record and the rules as adopted by the Agency to the Attorney General, notifying all persons who requested to be informed that the hearing record has been submitted to the Attorney General, and publishing in the State Register, all pursuant to Minn. Stat. Sec. 15.0412, subd. 4.

Dated: September 12th, 1979.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

MEMORANDUM

A serious question relating to the Agency's statutory authority to adopt these rules was raised at the hearing by Minnesota Automobile Dealers Association (hereinafter MADA). Subsequent to the issuance of the hearing examiner's report, MADA again raised that issue and several other issues by letter to the Chief Hearing Examiner dated July 13, 1979, which is attached hereto as Exhibit "A".

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D.R.H.

EXHIBIT "A"

MINNESOTA AUTOMOBILE DEALERS ASSOCIATION

277 UNIVERSITY AVE. • ST. PAUL, MN 55103 • LOCAL (612)291-2400 • TOLL FREE 1-800-652-9029 • GARY D. RIPPENTROP, EXECUTIVE VICE PRESIDENT

July 13, 1979

RECEIVED
JUL 16 1979
OFFICE OF HEARING EXAMINERS

Mr. Duane R. Harves
Chief Hearing Examiner
Hearing Examiners Office
1745 University Avenue
St. Paul, MN 55104

Re: In the Matter of Adoption of Rules Regulating Outdoor Display Lighting. Report EA-79-005-MG.

Dear Mr. Harves:

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If you have any questions regarding our concerns, please do not hesitate to contact me. For your easy reference, I am enclosing a copy of my June 6 letter to Mr. Greenberg.

Yours sincerely,

Louis W. Claeson
MADA Counsel

LWC:jf
Enclosures

STATE OF MINNESOTA

MINNESOTA ENERGY AGENCY

In the Matter of the Proposed Adoption of Rules of the Minnesota Energy Agency Governing the Permissible Hours of Operation, the Quantity and the Efficiency of Outdoor Display Lighting, 6 MCAR SS 2.2101-.2120.	))))))	Docket No. EA 79-005-MG DIRECTOR'S FINDINGS OF FACT, CONCLUSIONS AND DECISION

The hearing in the above-captioned matter was ordered on April 9, 1979, and was convened for the Minnesota Energy Agency (hereinafter "Agency") by Hearing Examiner Myron S. Greenberg of the Minnesota Office of Hearing Examiners at 9:00 a.m. on May 24, 1979, in Conference Room D of the Veterans Service Building, St. Paul, Minnesota.

The hearing examiner made and issued his Report of the Hearing Examiner on July 9, 1979. The hearing examiner recommended to the Agency that it adopt the rules as proposed with the minor modifications noted in his Report.

The director of the Agency, upon the record certified to him by the hearing examiner and the Report of the Hearing Examiner, hereby makes and issues the following Findings of Fact, Conclusions and Decision.

FINDINGS OF FACT

1. The hearing examiner did an excellent thorough job of presenting his Findings of Fact in the above-captioned matter. His Findings are hereby adopted as the Findings of the Director with the additions set out below.

2. To Finding 6, the Director adds that the original Order for Hearing executed by the Director, dated April 6, 1979, was found in the Agency's files and has been inserted into the record. The Director notes that the signed Order for Hearing does not vary in any particular from the "Order for Hearing proposed to be issued" whose filing is noted in Hearing Examiner's Finding 1.

3. Regarding Finding 12, the Agency notes that, in the paragraph on the top of page 5 of the Report, there is a typographical error. The figure on the second line of the proposed additional language in rule 2110D should be 1500. The adopted rule uses 1500 watts.

Further, the Examiner points out in the last paragraph of Finding 12 that the Agency omitted a change it agreed to at the hearing. That omission has been corrected in the adopted rules by adding to proposed rule 2110 D "when the ambient light level is less than two footcandles." That provision is consistent with the operation of photocell-equipped lights.

4. In the third paragraph of Finding 14, the Examiner suggests further work on meeting the specific concerns of automobile dealers. As soon as the rules are effective the Agency will publish a notice seeking comment from automobile dealers and will consider adding specifics to the rules to meet industry concerns if evidence of the need for such specifics is shown.

Based upon the foregoing Findings the Director makes the following

CONCLUSIONS

A. The Minnesota Energy Agency duly acquired and now has jurisdiction over the subject proceedings.

B. The Agency has statutory authority to adopt the proposed rules.

C. All relevant substantive and procedural legal requirements have been fulfilled.

D. The need for and reasonableness of the proposed rules has been demonstrated by an affirmative presentation of facts.

DECISION

The Director accepts the recommendation of the Hearing Examiner to adopt the proposed rules and in a separate order adopts rules 6 MCAR §§ 2.2101 - .2120 , incorporating the changes indicated in the Report of the Hearing Examiner and in the Director's Findings. A copy of the rules, as adopted and indicating changes from the rules as proposed, is attached.

Dated: September 5, 1979

STATE OF MINNESOTA
MINNESOTA ENERGY AGENCY

ALGERNON H. JOHNSON
Director

Exhibit B

MINNESOTA AUTOMOBILE DEALERS ASSOCIATION

277 UNIVERSITY AVE. • ST. PAUL, MN 55103 • LOCAL (612)291-2400 • TOLL FREE 1-800-652-9029 • GARY D. RIPPENTROP, EXECUTIVE VICE PRES

January 12, 1979

Mr. Richard A. Wallen
980 American Center Building
160 East Kellogg Boulevard
St. Paul, MN 55101

Dear Mr. Wallen:

As a representative of almost 800 franchised new automobile and truck dealers in the State of Minnesota, MADA would like to take this opportunity to comment on the draft rules of the Minnesota Energy Agency governing outdoor display lighting. Minnesota automobile dealers have a great deal at stake when it comes to the regulation of outdoor lighting. They are no doubt large consumers of both outdoor display and outdoor security lighting. In order to effectively market cars during the evening hours, a great deal of display lighting is necessary not only to enable customers to better judge the vehicles, but to provide a safe place in which to shop. As business invitees, a dealer owes his customers a significant duty to provide them a safe location. And maybe more importantly, because of their large investment in inventory which must be left outdoors, dealers have the highest concern for security lighting. In talking to area dealers, the comments have been to the effect that "If I can't have lights, I'm out of business," or "My insurance company wants more lighting." Use of armed guards, guard dogs or other security measures has been largely ruled out by insurance considerations.

Automobile dealers are very experienced users of outdoor display and security lighting. As generally highly competent businessmen, they have responded to the huge increases in energy costs over the last few years. In preparation for commenting on these draft rules, a number of dealers in the metropolitan area were contacted. In each case, the change-over to more efficient lighting had already been made. Each one contacted used lighting at least as efficient as mercury vapor for both display and security purposes. This leads to a fundamental issue: Have rising energy costs and consumers' response to that rise made these rules unnecessary? I would assume also that there will be some cost-benefit analysis offered when hearings are held pursuant to Chapter 15.

Another fundamental issue concerns the authority of the Energy Agency to promulgate these proposed rules. If that authority does exist, does it extend to the adoption of final rules? It had been our understanding that the 1977 Legislature granted the Agency authority to draft proposed rules by October 1, 1977. The idea was that the 1978

Legislature would then have the opportunity to review them and decide on a course of action. Since the deadline is past and the 1978 Legislature has adjourned, has the grant of authority also lapsed? Even assuming continuing authority to adopt proposed rules, the language of Minn. Stat. §116H.12 (1b) appears to limit that authority to proposed rules thereby prohibiting the adoption of final rules. With this in mind, it would appear to us that the July 1, 1979, date cited in EA 2102(A) is premature.

With regard to specific provisions of the draft rules, we feel that a general exception should be included within EA 2102(D) for lighting which is required by other laws or regulations. For example, provision should be made for local and state fire codes which incorporate OSHA Regulation §1910.110(d)(2)(12)(ii) to require that a bulk L-P Gas tank with a capacity of 2000 gallons or more which is normally loaded or unloaded at night must be illuminated.

In our opinion the definition of "security lightin" under EA 2104 (I) may be too narrow. We feel it should definitely include not only lighting at the exterior or perimeter of a building or lot, but also security lighting for the interior portions of a lot. The provision as now constituted is capable of being interpreted to limit the definition to the exterior or perimeter. Our dealers must be able to provide security lighting within their lots, especially those lots of considerable square footage.

With regard to EA 2110, the implication of subdivisions (D) and (E) is that security lighting may be operated during non-daytime hours. However, we feel that this should be more specifically spelled out by clearly authorizing security lighting during non-daytime hours.

We appreciate the opportunity to make these initial comments on the draft rules.

Sincerely,

Louis W. Claeson
MADA Counsel

LWC:jf

our file 546

MINNESOTA AUTOMOBILE DEALERS ASSOCIATION

277 UNIVERSITY AVE. ● ST. PAUL, MN 55103 ● LOCAL (612)291-2400 ● TOLL FREE 1-800-652-9029 ● GARY D. RIPPENTROP, EXECUTIVE VICE PRESIDENT

October 3, 1979

RECEIVED
OCT 4 1979
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

Office of the Attorney General
G-25 State Administration Building
50 Sherburne Avenue
St. Paul, MN 55155

Re: In the Matter of the Proposed Adoption of Rules Governing the Permissible Hours of Operation, the Quantity and Efficiency of Outdoor Display Lighting, 6 MCAR Sec. 2.2101-2120.

Dear Sir:

I have been notified by Dwight S. Wagenius, Attorney for the Minnesota Energy Agency, that the above proposed rules have been forwarded to your office for review as to form and legality. I wish to take this opportunity to challenge the legality of these rules on several grounds. Directing your attention to the enclosed Report and Memorandum of Duane Harves, dated September 12, 1979 (Exhibit A), it has been my contention from passage of Minnesota Statutes, Section 116H.12, Subd. 1a and 1b in 1977, that the agency lacked authority to promulgate final rules when the hearing was held May 24, 1979. As you will note, Chief Hearing Examiner Harves now apparently agrees with the MADA position. Unfortunately, Mr. Harves concludes that passage of clarifying legislation in Extra Session Laws 1979 Ch. 2, effective July 1, 1979, can be relied upon to cure the pre-existing lack of authority. I have serious reservations as to whether subsequent legislation can retroactively grant authority to an agency to promulgate final rules and therefore validate a hearing process which the agency clearly lacked authority to conduct. I believe an entire new hearing procedure is necessary to adopt these rules as final rules pursuant to the authority granted in Ex. Sess. Laws 1979, Ch. 2.

To accept the argument of Mr. Harves seems to me to completely frustrate the purpose and intent of Minnesota Statutes, Section 15.0412. While neither I nor Mr. Harves have found any authority on either side of the issue, I believe the concept that an agency may not hold hearings on final rules in advance of the actual grant of authority to do so is so elemental as to be obvious to all. The statutory language clearly contemplates that a grant of authority is a prerequisite to adoption of the rules and that adoption must follow the procedures specified in

Section 15.0412 (which includes the hearing process). The careful, well-considered time frame woven into Section 15.0412, subd. 4, would be rendered nugatory by permitting agencies to anticipate legislative grants of authority. In fact, to permit such a practice would have the effect of encouraging agencies to coerce the legislature into granting authority so as to avoid the wasteful expenditure of time and money in conducting hearings for which no authority is ultimately granted. I intend to continue my research in this area in hopes of locating a decision directly in point. Before leaving this issue I wish to point out that MADA raised the lack of authority issue well in advance of the hearing. See letter to Richard Wallen dated January 12, 1979 (Exhibit B).

Apart from our contention that the agency lacked authority to adopt final rules, we believe the rules are flawed on several other grounds set forth in my letter of June 6, 1979, to Myron Greenberg (Exhibit C). MADA reiterates the arguments contained therein in objection to the validity of the rules. I am also enclosing a copy of my letter of July 13, 1979, to Duane Harves in which I raised several objections to the findings of the Hearing Examiner (Exhibit D) and I reiterate the arguments set forth therein in objection to the legality of the rules. I am also enclosing a copy of my letter of September 27, 1979, to Algernon Johnson (Exhibit E), in reply to a letter directed to me dated September 12, 1979 (Exhibit F). Again the arguments contained therein are readopted in objection to the rules. Finally I am enclosing a copy of a letter from me to Mr. Richard Wallen dated June 27, 1977, in which we raised the security lighting issue for the first time in hopes that the Agency would realistically address the problem owing to our members' unique problems. Unfortunately, the rules as adopted do not adequately address the issue, a fact which the Hearing Examiner seems to recognize (Hearing Examiner's Report, Finding 14, page 6).

We respectfully urge your careful consideration of our position on these issues, and if you wish to discuss them personally or need additional information, please give me a call.

Sincerely,

Louis W. Claeson
MADA Counsel

LWC:jf
Enclosures

a part of the hearing record in the event the rules governing this subject are repealed or amended.

Robert A. Mampel
Commissioner of Banks

Department of Education

Notice of Intent to Solicit Outside Opinion Regarding Rules for Pre-School Health and Developmental Screening Programs

The Department of Education is drafting rules and emergency rules to implement S.F. 743 enacted by the 1977 Minnesota Legislature, requiring that every school board provide a voluntary health and developmental screening program for children once before entering kindergarten.

The Department invites interested persons or groups to provide information, comment, and advice on the subject, in writing or orally, to E. Raymond Peterson, Assistant Commissioner of Education, or Reynold Erickson, Director of Pupil Personnel Services, Minnesota State Department of Education, 657 Capitol Square Building, 550 Cedar Street, St. Paul, MN 55101.

All materials to be considered in the original draft should be submitted by June 27, 1977. Written statements will be made part of the public hearing record.

Energy Agency

Notice of Intent to Solicit Outside Opinion on Rules Establishing Permissible Hours of Operation and Setting Standards Governing the Quantity and the Efficiency of Outdoor Display Lighting

Notice is hereby given that the Minnesota Energy Agency (hereinafter the "agency") is seeking information or opinions from sources outside the agency in preparing to propose the adoption of rules establishing permissible hours of operation and setting standards governing the quantity and the efficiency of outdoor display lighting. The rules are required by Laws of 1977, ch. 381, § 11 which amends Minn. Stat. § 116H.12 (1976) by adding subdivisions 1a and 1b.

The agency requests information and comments concerning the subject matter of the proposed rules. Interested or affected persons or groups may submit statements of information and comment orally or in writing. Written statements may be addressed to:

Richard A. Wallen
Minnesota Energy Agency
740 American Center Building
150 East Kellogg Boulevard
St. Paul, MN 55101

Oral statements will be received during regular business hours over the telephone at (612) 296-7457, and in person at the above address.

All statements of information and comment must be received by August 26, 1977. Any written material received by the agency shall become part of the hearing record when rules governing this subject are promulgated.

Richard A. Wallen
Director, Certificate
of Need Program
Minnesota Energy Agency

Metropolitan Sports Facilities Commission

Request for Preliminary Location and Schematic Site Plan Proposals

Notice is hereby given that the Metropolitan Sports Facilities Commission, established by Laws of 1977, ch. 89, will now seek preliminary location and schematic site plan proposals from all interested parties for new or remodeled sports facilities in the Metropolitan Area.

Laws of 1977, ch. 89, § 9, subd. 2, requires the Commission, by August 1, 1977, to select from the preliminary location and schematic site plan proposals received not more than three locations in the Metropolitan Area for further study and consideration. Preliminary location and schematic site plan proposals shall be in conformance with the criteria set forth in this notice.

All proposals submitted in response to this request shall address and comply with all provisions contained in Laws of 1977, ch. 89, irrespective of the provisions contained herein. In addition the Commission reserves the right to waive any formality with respect to proposals received, to request further elaboration regarding any such proposal, and do other things as may be necessary with respect to proposals received irrespective of the provisions contained herein.

(hereinafter the "Agency") is seeking information or opinions from sources outside the Agency in preparing to amend Rules of Procedure governing the Agency's Certificate of Need Program, Minnesota Rules EA 500-520. The amendments would reflect two years' experience operating under the current rules, which were made effective on September 30, 1975.

The Agency requests information and comments concerning the subject matter of these rules. 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
Chief Energy Facility Analyst
Minnesota Energy Agency
740 American Center Building
150 East Kellogg Boulevard
St. Paul, MN 55101

Oral statements will be received during regular business hours over the telephone at (612) 296-7502, and in person at the above address.

All statements of information and comments must be received by December 16, 1977. Any written material received by the Agency shall become part of the hearing record in the event that amendments to the rules are promulgated.

Richard A. Wallen
Director, Certificate
of Need Program

Revised Notice of Intent to Solicit Outside Opinion on Rules Governing Outdoor Display Lighting

The Minnesota Energy Agency (hereinafter the "Agency") gave notice on June 13, 1977 (1 S.R. 1801) that it is seeking information or opinions from sources outside the Agency in preparing to propose the adoption of rules establishing permissible hours of operation and setting standards governing the quantity and the efficiency of outdoor display lighting. The rules are required by Laws of 1977, ch. 381, § 11 which amends Minn. Stat. § 116H.12 (1976) by adding subdivisions 1a and 1b.

That notice required that all statements of information and comment be received by August 26, 1977.

The Agency requests information and comments concerning the subject matter of the proposed rules. Interested or affected persons or groups may submit statements of information and comment orally or in writing. Written statements may be addressed to:

Richard A. Wallen
Minnesota Energy Agency
740 American Center Building
150 East Kellogg Boulevard
St. Paul, Minnesota 55101

Oral statements will be received during regular business hours over the telephone at (612) 296-7457, and in person at the above address.

Notice is hereby given that the last date for receiving statements of information and comments amending the subject matter of the proposed rules is extended to October 7, 1977. Any written material received by the Agency shall become part of the hearing record when rules governing this subject are promulgated.

Richard A. Wallen
Director, Certificate
of Need Program

Department of Labor and Industry

Notice of Workers' Compensation Advisory Council Meeting

Public notice is hereby given that the Workers' Compensation Advisory Council, created under Minn. Stat. § 175.007, meets the first Thursday of each month at 1:00 p.m. in Room 551, 444 Lafayette Road, St. Paul, Minnesota, 55101, unless notice is given otherwise.

E. I. Malone
Commissioner

Metropolitan Sports Facilities Commission

Notice of Public Hearings on Three Proposed Stadium Sites

The Metropolitan Sports Facilities Commission will hold three public hearings to receive public testimony on the three proposed stadium locations and related design spec-

Energy Agency

Minnesota Power & Light Company and United Power Association Application for a Certificate of Need for a Large Electric Generating Facility

Order and Notice of Reconvened Hearing

It is hereby ordered and notice is hereby given that the contested case hearing concerning the above-entitled matter, originally scheduled for December 11, 1978, but postponed, will reconvene at 9:30 a.m. on January 29, 1979, in Courtroom No. 2, Fourth Floor, Federal Building, 515 West First Street, Duluth, Minnesota

December 15, 1978

John P. Millhone

Energy Agency

Notice of Intent to Solicit Outside Information Regarding Proposed Rules Governing Outdoor Display Lighting

Notice is hereby given that the Minnesota Energy Agency is seeking information, or opinions and comments, from sources outside the Agency in preparing rules governing the permissible hours of operation, the quantity and the efficiency of outdoor lighting. The Agency is developing the rules pursuant to Minn. Stat. § 116H.12, subd. 1a. The Agency has solicited outside information on two prior occasions. Using its own research and the information received, the Agency has drafted a set of rules on which it seeks comment. They appear below. If the draft rules are too strong or too weak, or if they indicate too many exemptions or too few, or if they have other weaknesses, please write the Agency, with the reasons for your belief. Your written comments should be addressed to:

Richard A. Wallen
980 American Center Building
160 East Kellogg Boulevard
St. Paul, Minnesota 55101

The comments should be received by January 15, 1979. The Agency will use the comments on the draft rules to prepare the rules which it will propose for adoption. Comments received will become part of the hearing record of the rulemaking proceeding.

December 11, 1978

Richard A. Wallen, Manager
Policy Analysis Activity

Energy Agency Draft Rules Governing the Permissible Hours of Operation, the Quantity and the Efficiency of Outdoor Display Lighting

Chapter 21: EA 2101-2120

EA 2101 Purpose of Rules.

The purpose of these rules is to define outdoor display lighting, to specify permissible hours of operation of outdoor display lighting, and to establish quantity and efficiency standards for outdoor display lighting pursuant to Minn. Stat. § 116H.12, subd. 1b.

EA 2102 Applicability of Rules.

A. Beginning July 1, 1979, no person shall use outdoor display lighting during hours other than those specified by these rules.

B. Beginning July 1, 1980, no person shall install outdoor display lighting in a quantity that exceeds, or at an efficiency less than, that provided by these rules.

C. Beginning July 1, 1984, no person shall operate outdoor display lighting which does not comply with rules EA 2115 (efficiency) and EA 2120 B. (quantity).

D. Exceptions.

1. These rules shall not apply to temporary or seasonal outdoor display lighting;

2. These rules shall not apply to outdoor display lighting which provides information as to the time of day, temperature, weather conditions, or other matters concerning the public health, safety and welfare;

3. These rules shall not apply to penal institutions;

4. These rules shall not apply to airplane obstruction lighting as defined by the Federal Aviation Administration.

EA 2104 Definitions. For purposes of these rules, the following definitions shall apply:

A. "Business day" means that portion of a 24 hour period when an establishment is open for business;

B. "Ballast" means a device used with an electric discharge lamp to obtain the necessary circuit conditions for starting and operating;

C. "Daytime hours" means the time between one half hour after sunrise and one half hour before sunset when the ambient light level is greater than one foot candle;

D. "Establishment" means a place of business or a public or private institution;

E. "Foot candle" means a standard measure of light intensity;

F. "Luminous sign tubing" means lights commonly known as neon lighting;

G. "Lumens per watt" means a standard unit of measure of lighting efficiency;

H. "Outdoor display lighting" means any outdoor building facade lighting, any outdoor decorative lighting, any illuminated off-premise advertising, and any on-premise outdoor lighting including security lighting;

I. "Security lighting" means a type of outdoor display lighting located on, or around the exterior or perimeter of a building, structure, fence, lot, or other outdoor area, the purpose of which is to protect persons or property against the threat or occurrence of harm;

J. "Standardized Outdoor Display Sign" means off-premise outdoor display advertising commonly known as billboards;

K. "Temporary or seasonal display lighting" means display lighting that, on at least 300 consecutive days in any 12-month period, is not illuminated.

EA 2110 Permissible hours of outdoor display lighting.

A. Standardized outdoor display signs may not be artificially illuminated during daytime hours.

B. Standardized outdoor display signs may not be artificially illuminated during the period between midnight and one half hour after sunrise except hours during the period in which the establishment(s) being advertised is open for business.

C. Outdoor display lighting that is used to illuminate a historical landmark as defined in Minn. Stat. ch. 138 or § 4.077 may be operated between one half hour before sunset and 10 p.m.

D. All other outdoor display lighting except security lighting may be operated from one half hour before sunset until one hour after the close of a business day and from the beginning of a business day until one half hour after sunrise.

E. Security lighting may not be operated during daytime hours.

EA 2115 Permissible efficiency.

A. No person shall install or use outdoor display lighting in which the light source produces light at an initial efficiency, including ballast if required, of less than 40 lumens per watt.

B. Exceptions.

1. Rule 2115 A. shall not apply to Luminous sign tubing.

EA 2120 Permissible quantity.

A. Beginning July 1, 1979, no person shall operate security lighting that exceeds .05 watts per square foot for the area lighted for security purposes.

B. No person shall operate any outdoor display lighting that exceeds the recommended minimum standards set forth in the "IES Lighting Handbook" published by the Illuminating Engineering Society by more than 20 percent.

Metropolitan Council

Public Hearing on the Proposed 208 Areawide Plan/Development Guide for Water Quality Management

The Metropolitan Council will hold a public hearing on Thursday, January 25, 1979 at 2 p.m., reconvening at 7 p.m. in the Metropolitan Council Chambers, 300 Metro Square Building, 7th and Robert Sts., St. Paul, Minnesota 55101, for the purpose of receiving public comments on the Council's 208 Areawide Plan/Development Guide for Water Quality Management. This plan/development guide when adopted will supersede the current Waste Management Development Guide/Policy Plan and will fulfill federal requirements as the Region's water quality plan under Section 208 of Public Law 92-500. All interested persons are encouraged to attend the hearing and offer comments on the proposed plan/development guide. Persons wishing to speak at the hearing may register in advance by contacting the Council's public hearing coordinator at 291-6482. Those who register first will be scheduled to speak first. Written

Our File 546

MINNESOTA AUTOMOBILE DEALERS ASSOCIATION

277 UNIVERSITY AVE. • ST. PAUL, MN 55103 • LOCAL (612)291-2400 • TOLL FREE 1-800-652-9029 • GARY D. RIPPENTROP, EXECUTIVE VICE PRESIDENT

October 3, 1979

RECEIVED

OCT 4 1979

ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

Office of the Attorney General
G-25 State Administration Building
50 Sherburne Avenue
St. Paul, MN 55155

Re: In the Matter of the Proposed Adoption of Rules Governing the Permissible Hours of Operation, the Quantity and Efficiency of Outdoor Display Lighting, 6 MCAR Sec. 2.2101-2120.

Dear Sir:

I have been notified by Dwight S. Wagenius, Attorney for the Minnesota Energy Agency, that the above proposed rules have been forwarded to your office for review as to form and legality. I wish to take this opportunity to challenge the legality of these rules on several grounds. Directing your attention to the enclosed Report and Memorandum of Duane Harves, dated September 12, 1979 (Exhibit A), it has been my contention from passage of Minnesota Statutes, Section 116H.12, Subd. 1a and 1b in 1977, that the agency lacked authority to promulgate final rules when the hearing was held May 24, 1979. As you will note, Chief Hearing Examiner Harves now apparently agrees with the MADA position. Unfortunately, Mr. Harves concludes that passage of clarifying legislation in Extra Session Laws 1979 Ch. 2, effective July 1, 1979, can be relied upon to cure the pre-existing lack of authority. I have serious reservations as to whether subsequent legislation can retroactively grant authority to an agency to promulgate final rules and therefore validate a hearing process which the agency clearly lacked authority to conduct. I believe an entire new hearing procedure is necessary to adopt these rules as final rules pursuant to the authority granted in Ex. Sess. Laws 1979, Ch. 2.

To accept the argument of Mr. Harves seems to me to completely frustrate the purpose and intent of Minnesota Statutes, Section 15.0412. While neither I nor Mr. Harves have found any authority on either side of the issue, I believe the concept that an agency may not hold hearings on final rules in advance of the actual grant of authority to do so is so elemental as to be obvious to all. The statutory language clearly contemplates that a grant of authority is a prerequisite to adoption of the rules and that adoption must follow the procedures specified in

Section 15.0412 (which includes the hearing process). The careful, well-considered time frame woven into Section 15.0412, subd. 4, would be rendered nugatory by permitting agencies to anticipate legislative grants of authority. In fact, to permit such a practice would have the effect of encouraging agencies to coerce the legislature into granting authority so as to avoid the wasteful expenditure of time and money in conducting hearings for which no authority is ultimately granted. I intend to continue my research in this area in hopes of locating a decision directly in point. Before leaving this issue I wish to point out that MADA raised the lack of authority issue well in advance of the hearing. See letter to Richard Wallen dated January 12, 1979 (Exhibit B).

Apart from our contention that the agency lacked authority to adopt final rules, we believe the rules are flawed on several other grounds set forth in my letter of June 6, 1979, to Myron Greenberg (Exhibit C). MADA reiterates the arguments contained therein in objection to the validity of the rules. I am also enclosing a copy of my letter of July 13, 1979, to Duane Harves in which I raised several objections to the findings of the Hearing Examiner (Exhibit D) and I reiterate the arguments set forth therein in objection to the legality of the rules. I am also enclosing a copy of my letter of September 27, 1979, to Algernon Johnson (Exhibit E), in reply to a letter directed to me dated September 12, 1979 (Exhibit F). Again the arguments contained therein are readopted in objection to the rules. Finally I am enclosing a copy of a letter from me to Mr. Richard Wallen dated June 27, 1977, in which we raised the security lighting issue for the first time in hopes that the Agency would realistically address the problem owing to our members' unique problems. Unfortunately, the rules as adopted do not adequately address the issue, a fact which the Hearing Examiner seems to recognize (Hearing Examiner's Report, Finding 14, page 6).

We respectfully urge your careful consideration of our position on these issues, and if you wish to discuss them personally or need additional information, please give me a call.

Sincerely,

Louis W. Claeson
MADA Counsel

LWC:jf
Enclosures

Exhibit D

July 13, 1979

Mr. Duane R. Harves
Chief Hearing Examiner
Hearing Examiners Office
1745 University Avenue
St. Paul, MN 55104

Re In the Matter of Adoption of Rules Regulating Outdoor Display Lighting. Report HA-79-005-MG.

Dear Mr. Harves:

I am writing in regard to the Report of the Hearing Examiner in the above matter. In the course of your review of the proposed rules and the report thereon, I urge you to review the record carefully. The Minnesota Automobile Dealers Association is vitally interested in these proposed rules as the record will indicate. There are several areas of concern to us in the report which I will briefly outline to you.

On page 3 of the Report, Mr. Greenberg rejects our contention that the Energy Agency lacks statutory authority to adopt final rules. I would refer you to pages 3 and 4 of my letter of June 6, and specifically to the legislative history discussion of the then existing M.S. 116H.12, subd. 1a and 1b. I do not believe Mr. Greenberg fully understood the thrust of our argument that during the course of passage of that subdivision the legislature deleted authority to "promulgate rules' and replaced it with authority to adopt "proposed rules." Consider also that Extra Session Laws 1979 Chapter 2, amended that same subdivision to delete the term "proposed." It is therefore obvious that the legislature did not itself believe the Agency had authority to adopt final rules until Extra Session Laws 1979, Ch. 2, was signed into law.

Additionally on page 2 of the Report, Mr. Greenberg refers to testimony that automobile dealerships consider display lighting and security lighting to be one and the same. I am puzzled by that reference and can only conclude that Mr. Greenberg refers to the lighting fixtures as physical entities being one and the same. While physically they are one and the same, they serve separate and distinct purposes. One purpose is to display the inventory for public inspection and the other is to protect that inventory from theft and vandalism. I would refer you to pages 5 and 6 of my letter of June 6 for a further elaboration of this point.

As to justifying adoption of those rules on the phychological concept of a "lights out" policy which appears to be the only justification given any credence in the Report, I would refer you to pages 8 and 9 of my letter of June 6, particularly the quote from a report by the General Accounting Office.

Perhaps one of the most serious flaws in the Report of the Hearing Examiner in defense of the rules appears on page 6 wherein Mr. Greenberg refers to testimony of Dr. Wallen of the Energy Agency that "these standards are intended as a guide" and that the Agency "does not intent to institute a major inspection program to ensure strict compliance with the rules." Does Mr. Greenberg mean to suggest that one should not worry about a rule having the force and effect of law because one individual on the staff of the Agency considers it only a guide and perhaps will not pursue enforcement? There is certainly nothing in the regulation to suggest that it is intended as a guide. Consider that 15 U.S.C. 1191.15 provides specific penalties for violation as well as injunctive relief. If a rule is invalid, unwise, arbitrary, unreasonable, or beyond the authority of an Agency to adopt, it cannot and should not be considered valid simply because the Agency or its staff do not intend to enforce it.

Finally I would refer you to the last full paragraph number 15 on page 6 wherein Mr. Greenberg apparently acknowledges that our industry has specific concerns not adequately addressed by the proposed rule. If further discussions between the Agency and MADA are considered wise by Mr. Greenberg, it seems to be an admission that as applied to motor vehicle dealers, the rules may well be unreasonable. We suggest that the rules should therefore be amended to specifically exclude automotive retailers until reasonable standards can be worked out. Rules of questionable reasonableness should not be recommended for adoption especially when they are justified not on the basis of energy efficiency or conservation but on an illusory psychological "lights out" concept.

If you have any questions regarding our concerns, please do not hesitate to contact me. For your easy reference, I am enclosing a copy of my June 6 letter to Mr. Greenberg.

Yours sincerely,

Louis W. Claeson
MADA Counsel

LWC:jf
Enclosures

Exhibit E

MINNESOTA AUTOMOBILE DEALERS ASSOCIATION

277 UNIVERSITY AVE. ● ST. PAUL, MN 55103 ● LOCAL (612)291-2400 ● TOLL FREE 1-800-652-9029 ● GARY D. RIPPENTROP, EXECUTIVE VICE PRESIDEN

September 27, 1979

Mr. Algernon H. Johnson, Director
Minnesota Energy Agency
980 American Center Building
150 East Kellogg Boulevard
St. Paul, MN 55101

Dear Mr. Johnson:

First, let me apologize for not acknowledging your September 12 letter before this time, but I was in Washington D.C. all last week. I am sure by this time that you have been advised by Duane Harves or Dwight Wagenius that whereas the Hearing Examiner and your agency had previously rejected almost out of hand our argument as to lack of authority to promulgate rules, the Minnesota Supreme Court with respect to similar legislation has agreed with MADA's position. While in my previous correspondence to the Hearing Examiner I did not cite authority for our opinion that a new hearing process must be commenced, I intend to research that issue in detail. At this point I would offer the observation that to allow an agency to hold hearings on proposed final rules in advance of the actual authority to adopt rules is totally at variance with the entire purpose of the rule-making hearing requirements and violates the due process protections embodied in the Minnesota Administrative Procedures Act. There is a careful, well-considered time frame woven into our APA which would go by the boards if agencies were permitted to anticipate legislative grants of authority. Finally, as to this issue lest there be any doubt as to our timely raising this issue, I would refer to my letter of January 12, 1979, directed to Richard Wallen in which I raised the lack of authority issue, well in advance of the hearing.

In the third paragraph on page 1 of your letter, you discuss enforcement of the rules. I am in total agreement that these rules will have the force and effect of law, and individuals and organizations must comply with them. The reason I raised this issue is that the Hearing Examiner in his report (Examiner's Report, Finding 14, page 6) seems to rely on testimony of Mr. Wallen that the standards "are intended as a guide; reasonable compliance is the goal of the agency." My point is that the validity of a rule cannot rise or fall on the basis of intended enforcement policy or compliance levels anticipated by the agency or its staff.

In the fourth paragraph on page 1 of your letter, you state that "MADA has not submitted any empirical evidence that the rules are unreasonable or unworkable," and that "the record establishes that the rules are necessary and reasonable." In reviewing the entire file on record in the Hearing Examiner's office, I believe your statement overstates the case in behalf of the agency. While the Statement of Need and Reasonableness on page 2 indicates the agency staff consulted professional illumination engineers and other government agencies, there is nothing in the record to indicate the full nature and extent of these discussions. Walking the streets of Minneapolis and driving the freeways was a noble effort, but again the statements based thereon are conclusory only. Additionally in the Statement of Need and Reasonabless on pages 2-3, there is reference to the DOE Standby Conservation Plan and display lighting. I believe the written comments of MADA (June 6, 1979) with respect to that plan fairly well destroy the value of that proposal as offering any basis for validity of the proposed rules. The Standby Plan was rejected by the U.S. House of Representatives, and the General Accounting Office commented that given the small savings of energy compared with high administrative costs, the DOE would be "better off dropping this plan as a mandatory measure..." The Hearing Examiner noted that Mr. Wallen conceded that energy savings were only a secondary goal (Examiner's Report, Finding 10, page 4) and further noted that the amount of energy saved by implementing the rules would be "extremely small." One last point with regard to the Statement of Need and Reasonableness is that the security lighting issue is virtually ignored. In fact, my recollection is that security lighting is mentioned only once and then only to refer to its advertising benefits - see pages 6-7 of the statement.

In his report, the Hearing Examiner states that "evidence regarding the .05 watts per square foot standard is slight" (Examiner's Report, Finding 14, page 6). The only real empirical evidence as to the reasonableness of this standard offered by the Agency was the lighting at the Monticello power plant, a facility bearing absolutely no real relationship to auto dealerships. Again the Hearing Examiner acknowledges the lack of evidence in Finding 14 on page 6 regarding the IES Lighting Handbook and the fact that it gives little guidance to our members. While we do intend to work with the agency in developing additional information regarding the impact of the standard, we are concerned that any change from the rules as adopted will require a new and lengthy hearing procedure before any amendment can be adopted. Just what will happen in the meantime is a source of concern, particularly given your statement that "known violators will be subject to the appropriate statutory enforcement processes and penalties." Our further surveys may well indicate violations of the .05 watt standard. Are we therefore submitting our members who cooperate in these surveys to possible prosecution?

Our continued feeling is that the agency did not sustain its burden to demonstrate the reasonableness of the rules. The letter of Edward J. Tichenor, President of Midway Ford, dated June 1, 1979, demonstrates that dealers have genuine security problems, and as the Hearing Examiner found, the IES handbook heavily relied upon by the agency, offers little help to dealers (Examiner's Report, Finding 14, page 6). While we intend to cooperate with the agency as suggested by the Hearing Examiner, and as I have indicated to Mr. Wallen in telephone conversations, I must reiterate that our ultimate goal must be to protect the interests of our dealer members. Therefore, we cannot rule out other options available to us to challenge the rules if a challenge becomes necessary.

Sincerely,

Louis W. Claeson
MADA Counsel

LWC:jf

Exhibit G

Minnesota AUTOMOBILE DEALERS ASSOCIATION

GARY D. RIPPENTROP, Exec. Vice Pres. • 277 UNIVERSITY AVE. • ST. PAUL, MINN. 55103 • (612) 291-2400

296-5120

June 27, 1977

Richard A. Wallen
Minnesota Energy Agency
740 American Center Building
150 East Kellogg Boulevard
St. Paul, Minnesota 55101

Reference: Outdoor Display Lighting

Dear Mr. Wallen:

Pursuant to notice filed in the State Register on Monday, June 13, 1977, I am writing to make certain comments regarding the development of proposed rules regulating outdoor display lighting. Our organization is very much concerned as to how outdoor display lighting is to be defined. Outdoor advertising signs are obvious items of display and their use may well be subject to restriction although on premises advertising signs and lighting ought to be permitted during the normal business hours of the particular Firm. Of paramount concern to our organization however is the use of lighting for security purposes. Because both new and used vehicles must be stored outside, a considerable amount of lighting is necessary during the hours of darkness to prevent theft and vandalism. In no way should this lighting be considered as display lighting although it may have that incidental effect. The important point is that the primary purpose of such lighting during non business hours is for security. Moreover in virtually all cases, economical Mercury or Sodium Vapor or similar lighting is utilized which consumes very little energy.

The security element of outdoor lighting in the automotive industry is not just the idea of the individual auto dealer, but is the recommendation of insurance carriers. If dealers are going to continue to be covered by adequate insurance protection, they must provide adequate security. It is our understanding that dealers have been advised that if they eliminate or materially curtail outdoor security lighting, they will lose their coverage.

For your further information, we are enclosing a copy of recommendations for open lot security distributed by Federated

(continued)

Insurance Company of Owatonna. Note that security lighting is high on the list. If you have any questions regarding these comments, please feel free to call or write. We would be happy to discuss proposed language or exclusions with you. In any event, we propose to follow the development of these rules very closely.

Yours very truly,

Louis W. Claeson
MADA Counsel

LWC/pam

Enclosure

Exhibit F

MINNESOTA ENERGY AGENCY
980 AMERICAN CENTER BUILDING
150 EAST KELLOGG BOULEVARD
ST. PAUL, MINNESOTA 55101

612-296-5120

September 12, 1979

Louis W. Claeson, Counsel
Minnesota Automobile Dealers Association
277 University Avenue
St. Paul, Minnesota 55103

Re: Proposed Adoption of Rules of the Minnesota Energy Agency Governing Permissible Hours of Operation, the Quantity and the Efficiency of Outdoor Display Lighting

Dear Mr. Claeson:

On September 5, 1979, I adopted the rules in question. A copy of my Decision and a copy of the rules as adopted are attached.

I cannot agree with you that the Agency lacks authority to adopt the subject rules. However, this is a matter that will be reviewed by the Attorney General's Office of Administrative Rules. I also cannot agree with your contention that the rules are not supported by the record.

Regarding enforcement, these rules, when effective, will have the force of law. Therefore, individuals and groups will be expected to comply with them. The Agency has no intention of adopting meaningless rules. While the Agency does not have the budget and staff necessary to ensure compliance by everyone, known violators will be subject to the appropriate statutory enforcement processes and penalties.

Finally, it is my opinion that MADA has not demonstrated any particular problems it would have in complying with the rules. That is, MADA has not submitted any empirical evidence that the rules are unreasonable or unworkable. On the contrary, the record establishes that the rules are necessary and reasonable. Nevertheless, when the rules are published in the State Register, the

Agency will also publish a notice seeking comments from automobile dealers and others. The Agency will consider adding specifics to the rules to meet industry concerns if evidence of the need for such specifics is shown.

I hope this procedure is satisfactory to the Association.

Sincerely,

ALGERNON H. JOHNSON
Director

AHJ:DJ:mb
Enclosures

STATE OF MINNESOTA

MINNESOTA ENERGY AGENCY

In the Matter of the Proposed Adoption of Rules of the Minnesota Energy Agency Governing the Permissible Hours of Operation, the Quantity and the Efficiency of Outdoor Display Lighting, 6 MCAR §§ 2.2101 - .2120.	)))))	Docket No. EA-79-005-MG 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 been followed.

Dated: September 27, 1979

Dwight S. Wagenius

Special Assistant Attorney General

A-79-005-MG

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 THE PERMISSIBLE HOURS OF OPERATION, THE QUANTITY AND THE EFFICIENCY OF OUTDOOR DISPLAY LIGHTING, 6 MCAR §§ 2.2101-2.2120.

ORDER OF THE CHIEF HEARING EXAMINER

Pursuant to Minnesota Statutes, 1978, Section 15.0412, the Minnesota Energy Agency, on April 9, 1979, requested prior approval of the Chief Hearing Examiner to be allowed to incorporate by reference excerpts from IES Lighting Handbook, 5th Edition, published by the Illuminating Engineering Society.

The Chief Hearing Examiner, having reviewed the above-referenced publication and the tables referenced therein, has found that the materials to be referenced would exceed 3,000 words in length and would exceed five printed pages in the Minnsota State Register. Additionally, the Chief Hearing Examiner finds that the publication is readily available at the Minnesota Energy Agency for review, and is otherwise readily available and accessible to the public.

NOW, THEREFORE, the Chief Hearing Examiner herewith gives approval to the Minnesota Energy Agency for the incorporation by reference of excerpts from the IES Lighting Handbook, 5th Edition, published by the Illuminating Engineering Society, in the proposed rules of the Minnesota Energy Agency governing the permissible hours of operation, the quantity and the efficiency of outdoor display lighting.

Dated this 10th day
of April, 1979.

DUANE R. HARVES
Chief Hearing Examiner

RECEIVED
MAY 29 1979
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 the Permissible Hours of Operation, the Quantity and the Efficiency of Outdoor Display Lighting, 6 MCAR §§ 2.2101-2.2120.	))))))	**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/she is an employee of the Minnesota Energy Agency of the State of Minnesota.

2) That on the 18th day of April, 1979, he/she 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 (1978).

3) That on the 20th day of April, 1979, in response to the above request, the Secretary of State provided him/her 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 20 day of April, 1979.

Elisabeth C. McLeod
Notary Public

ELISABETH C. McLEOD
NOTARY PUBLIC—MINNESOTA
RAMSEY COUNTY
My Commission Expires Nov. 24, 1983

RECEIVED
MAY 29 1979
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 the Permissible Hours of Operation, the Quantity and the Efficiency of Outdoor Display Lighting, 6 MCAR §§ 2.2101-2.2120.	))))))	**CERTIFICATE OF DELIVERY SECRETARY OF STATE LIST**

I hereby certify that the attached 589 labels 1 sheet constitute the complete list of persons, associations, and interested groups who as of 8:40 o'clock A.M., this 20th day of April, 1979, have requested pursuant to Minn. Stat. § 15.0412 (1978) 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

Joan Anderson Growe

By: Donna M. Scott

RECEIVED
MAY 29 1979
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 the Permissible Hours of Operation, the Quantity and the Efficiency of Outdoor Display Lighting, 6 MCAR §§ 2.2101-2.2120.	))))))	**AFFIDAVIT OF MAILING**

Kathleen Strauch, being first duly sworn upon oath, deposes and says:

That on the 24th day of April, 1979, at the City of St. Paul, County of Ramsey, State of Minnesota, she~~/he~~ 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.

Kathleen Strauch

Subscribed and Sworn to Before Me

this 24th day of April, 1979

Cecilia Loughrey

Notary Public

CECILIA LOUGHREY
NOTARY PUBLIC - MINNESOTA
RAMSEY COUNTY
My Comm. Expires July 16, 1980

STATE OF MINNESOTA

MINNESOTA ENERGY AGENCY

In the Matter of the Proposed Adoption of Rules of the Minnesota Energy Agency Governing the Permissible Hours of Operation, the Quantity and the Efficiency of Outdoor Display Lighting, 6 MCAR §§ 2.2101-2.2120.	))))))	Docket No. EA-79-005-MG **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, 20 West 12th Street and Columbus Avenue between Wabasha and Iglehart, St. Paul, Minnesota on May 24, 1979, commencing at 9:00 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 material may be submitted by mail to Hearing Examiner Myron Greenberg, Room 300, 1745 University Avenue, St. Paul, Minnesota 55104, telephone (612) 296-8109 either before the hearing, or within five working days after the close of the hearing unless the hearing examiner orders a longer period not to exceed 20 calendar days.

Notice: any person may request notification 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. Any person may request notification of the date on which the hearing record has been submitted (or resubmitted) to the Attorney General by the Agency. If you desire to be so notified, you may so indicate at the hearing. After the hearing, you may request notification by sending a written request to the hearing examiner (in the case of the hearing examiner's report), or to the Agency (in the case of the Agency's submission or resubmission to the Attorney General).

The proposed rules, if adopted, would define outdoor display lighting to include any outdoor building facade lighting, any outdoor decorative lighting, any illuminated off-premise advertising, and any on-premise outdoor lighting including security lighting. Having defined outdoor display lighting, the proposed rules would specify permissible hours of operation of outdoor lighting. Further, the proposed rules would establish a minimum efficiency standard for outdoor display lighting, allowing a few specific exceptions. Last, the proposed rules would establish maximum quantities of outdoor display lighting, providing a specific exception for certain security lighting. The rules have a variety of effective dates.

Copies of the proposed rules are now available and one free copy may be obtained by writing to the Minnesota Energy Agency, attention Richard A. Wallen, 980 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.

Certain of the minimum standards that would be imposed by the rules on permissible quantity of outdoor display lighting are incorporated by specific reference to the "IES Lighting Handbook" published by the Illuminating Engineering Society. The materials to be incorporated by reference are available for viewing at the Minnesota Energy Agency Library. The Agency Library can respond to inquiries about other places for convenient viewing and copying the referenced material, or for acquiring them.

Notice: The proposed rules are subject to change as a result of the rules hearing process and public input before or at the hearing. The Agency therefore strongly urges those who may be affected in any manner by the substance of the proposed rules to participate in the rules hearing process directly or by representative.

The Agency's authority to promulgate the proposed rules is contained in Minn. Stat. §§ 116H.08(a), 116H.12, subd. 1b (1978).

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/she becomes a lobbyist. Lobbying includes attempting to influence rulemaking by communicating or using 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, St. Paul, Minnesota 55155, telephone (612) 296-5615.

DATED: April 6, 1979

Algernon H. Johnson

ALGERNON H. JOHNSON
Director

STATE OF MINNESOTA

MINNESOTA ENERGY AGENCY

In the Matter of the Proposed Adoption of Rules of the Minnesota Energy Agency Governing the Permissible Hours of Operation, the Quantity and the Efficiency of Outdoor Display Lighting, 6 MCAR §§ 2.2101-2.2120.	))))))	Docket No. EA-79-005-MG **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 24, 1979, commencing at 9:00 a.m. and continuing until all persons have had an opportunity to be heard, and

IT IS FURTHER ORDERED that a Notice of Hearing be given to all persons who have registered their names with the Secretary of State for that purpose, and

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

DATED: April 6, 1979

/s/

ALGERNON H. JOHNSON
Director

Exhibit B

MINNESOTA AUTOMOBILE DEALERS ASSOCIATION

277 UNIVERSITY AVE. ● ST. PAUL, MN 55103 ● LOCAL (612)291-2400 ● TOLL FREE 1-800-652-9029 ● GARY D. RIPPENTROP, EXECUTIVE VICE PRESID

January 12, 1979

Mr. Richard A. Wallen
980 American Center Building
160 East Kellogg Boulevard
St. Paul, MN 55101

Dear Mr. Wallen:

As a representative of almost 800 franchised new automobile and truck dealers in the State of Minnesota, MADA would like to take this opportunity to comment on the draft rules of the Minnesota Energy Agency governing outdoor display lighting. Minnesota automobile dealers have a great deal at stake when it comes to the regulation of outdoor lighting. They are no doubt large consumers of both outdoor display and outdoor security lighting. In order to effectively market cars during the evening hours, a great deal of display lighting is necessary not only to enable customers to better judge the vehicles, but to provide a safe place in which to shop. As business invitees, a dealer owes his customers a significant duty to provide them a safe location. And maybe more importantly, because of their large investment in inventory which must be left outdoors, dealers have the highest concern for security lighting. In talking to area dealers, the comments have been to the effect that "If I can't have lights, I'm out of business," or "My insurance company wants more lighting." Use of armed guards, guard dogs or other security measures has been largely ruled out by insurance considerations.

Automobile dealers are very experienced users of outdoor display and security lighting. As generally highly competent businessmen, they have responded to the huge increases in energy costs over the last few years. In preparation for commenting on these draft rules, a number of dealers in the metropolitan area were contacted. In each case, the change-over to more efficient lighting had already been made. Each one contacted used lighting at least as efficient as mercury vapor for both display and security purposes. This leads to a fundamental issue: Have rising energy costs and consumers' response to that rise made these rules unnecessary? I would assume also that there will be some cost-benefit analysis offered when hearings are held pursuant to Chapter 15.

Another fundamental issue concerns the authority of the Energy Agency to promulgate these proposed rules. If that authority does exist, does it extend to the adoption of final rules? It had been our understanding that the 1977 Legislature granted the Agency authority to draft proposed rules by October 1, 1977. The idea was that the 1978

Legislature would then have the opportunity to review them and decide on a course of action. Since the deadline is past and the 1978 Legislature has adjourned, has the grant of authority also lapsed? Even assuming continuing authority to adopt proposed rules, the language of Minn. Stat. §116H.12 (1b) appears to limit that authority to proposed rules thereby prohibiting the adoption of final rules. With this in mind, it would appear to us that the July 1, 1979, date cited in EA 2102(A) is premature.

With regard to specific provisions of the draft rules, we feel that a general exception should be included within EA 2102(D) for lighting which is required by other laws or regulations. For example, provision should be made for local and state fire codes which incorporate OSHA Regulation §1910.110(d)(2)(12)(ii) to require that a bulk L-P Gas tank with a capacity of 2000 gallons or more which is normally loaded or unloaded at night must be illuminated.

In our opinion the definition of "security lightin" under EA 2104 (I) may be too narrow. We feel it should definitely include not only lighting at the exterior or perimeter of a building or lot, but also security lighting for the interior portions of a lot. The provision as now constituted is capable of being interpreted to limit the definition to the exterior or perimeter. Our dealers must be able to provide security lighting within their lots, especially those lots of considerable square footage.

With regard to EA 2110, the implication of subdivisions (D) and (E) is that security lighting may be operated during non-daytime hours. However, we feel that this should be more specifically spelled out by clearly authorizing security lighting during non-daytime hours.

We appreciate the opportunity to make these initial comments on the draft rules.

Sincerely,

Louis W. Claeson
MADA Counsel

LWC:jf

Exhibit C

MINNESOTA AUTOMOBILE DEALERS ASSOCIATION

277 UNIVERSITY AVE. ● ST. PAUL, MN 55103 ● LOCAL (612)291-2400 ● TOLL FREE 1-800-652-9029 ● GARY D. RIPPENTROP, EXECUTIVE VICE PRESIDE

June 6, 1979

Mr. Myron Greenberg
Hearing Examiner
Room 300
1745 University Avenue
St. Paul, Minnesota 55104

Re: Proposed rules of the Energy Agency governing outdoor display lighting

Dear Mr. Greenberg:

As a representative of 800 franchised new automobile and truck dealers in the State of Minnesota, MADA is pleased to have this opportunity to comment on the proposed rules of the Minnesota Energy Agency governing outdoor display lighting. This memorandum is intended to support and supplement our oral comments made at the public hearing held on May 24, 1979. These comments will carefully examine the statutes upon which the Agency relies for authority to promulgate these rules and will address the issue of the Agency's authority to conduct this rule making proceeding to regulate display lighting in general and security lighting in particular. These comments will also address the issue of whether the Agency has met its burden of demonstrating the need for and the reasonableness of the proposed rules. With respect to this issue, a specific concern is that the reasonableness of the quantity figure for security lighting has not been sufficiently demonstrated. These comments will also pursue a technical drafting issue which we raised at the public hearing concerning the need for the proposed rules to specifically authorize the use of security lighting during nighttime hours. In conclusion, we will recommend several amendments to the proposed rules. (See Appendix G.)

The Minnesota Energy Agency relies on two sections of the Minnesota Statues for authority to initiate this proceeding - §116H.08(a) and §116H.12(1b). Section 116H.08(a) provides that the director may "Adopt rules pursuant to Chapter 15 necessary to carry out the purposes of sections 116H.01 to 116H.15." Section 116H.12(1b) provides that "The director shall develop proposed rules, pursuant to Chapter 15, by October 1, 1977, setting standards covering permissible hours of operation, quantity and efficiency of outdoor display lighting and defining 'outdoor display lighting (Emphasis supplied)'" Section 116H.08(a) contains the general grant of authority for the Agency to promulgate rules. Section 116H.12(1b) is a specific provision authorizing the Agency to "develop proposed rules" governing outdoor display lighting. This latter provision also sets out in part the subject matter which may be regulated.

An authoritative analysis of the statues in question must be prefaced with a discussion of the Minnesota law of statuatory construction. Minnesota Statutes Chapter 645 provides guidance in this area. A fundemental principal of construction is contained in Minn. Stat. §645.16 which states:

> "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all of its provisions."

In the event of irreconcilable provisions, a particular provision will govern over a general provision according to Minn. Stat. §645.26(1) which reads as follows:

> "When a general provision in a law is in conflict with a special provision in the same of another law, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions be irreconcilable, the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted at a later session and it shall be the manifest intention of the legislature that such general provision shall prevail."

A number of Minnesota Supreme Court Decisions have construed this provision. In Butler v. Engel, 68 N.W. 2d 226 (1955), the Court was called on to reconcile two confliciting provisions of the Minnesota Traffic Code, Minn. Stat. Chapter 169. The Court cited Minn. Stat. §645.26 and held that a specific provision applicable to one part of the Traffic Code governed over a general provision which if read literally would apply to all parts of the Traffic Code. If the meaning of particular words and phrases is at issue, they should be construed according to the rules of grammar and according to their common and approved usage unless they are technical or unless such a construction would be contrary to the manifest intent of the legislature. (Minn. State §645.08(1))

It is MADA's position that the specific limitation set out in §116H.12(1b) governs over the general grant of authority contained in §116H.08(a), and that the Agency has exceeed its authority by proceeding with the hearing process to have these proposed rules adopted as final rules having the force and effect of law. When this issue was raised at the public hearing, it was the opinion of the Hearing Examiner that the purpose of this proceeding is to ultimately adopt final fules. This is supported by the notice of hearing document and a reference in the Statement of Need requesting a recommendation of adoption to the Agency. If the intent of this present proceeding is not to develop proposed rules to serve as guidelines only, then no effect has been given to the limiting language of §116H.12(1b). Such a reading of the statute is contrary to the cannons of statutory construction and in our opinion seriously flaws this proceeding. A review of the history of the adoption of M.S. 116H.12, subdivisions 1a and 1b may be instructive. As originally introduced in 1977, neither H.F. No. 522 nor its companion measure, S.F. No. 669 contained any provision relating to outdoor

display lighting. In fact, the Senate version never included a display lighting provision. The House Committee on Environment and Natural Resources adopted a version of the outdoor display lighting provision in a strike-everything amendment. (See 1977 House Journal page 771.) Note that this original version contained a flat prohibition on outdoor display lighting from 11 pm to 4 am and authorized the Energy Agency to "promulgate rules" relating to hours, quantity and efficiency (Emphasis Supplied). An attempt by Senator Luther to amend an even more restrictive outdoor display lighting provision onto the Senate bill was rejected. See 1977 Senate Journal p. 2433.

With this clear rejection of a tough outdoor display lighting provision by the Senate, it became clear to members of the House [illegible] that their version of the display lighting provision would be rejected by the Senate with the result that the Final Conference Committee Report which became Laws 1977 Ch. 381 and the outdoor display lighting provision (Section 12) deleted the prohibition during 11 pm to 4 am and directed the Agency to adopt "Proposed" rather than final rules and if one were to listen to tapes of Conference Committee debate and Floor debate, one will find that the intent of the authors and the Legislature was that the proposed rules would be reviewed by the House Environment and Natural Resources Committee and the Senate Energy and Housing Committee in the 1978 session to determine their reasonableness. That the Agency failed to adopt the proposed rules by October 1, 1977 in view of their legislative history is, MADA believes, grounds for invalidating the present rules. In support of our position, the Energy Agency apparently recognized this defect in its authority and attempted to cure it through legislation amending Minn. Stat. §116H.12. The Agency's bill H.F. 990, (See Appendix A), extended the time from July 1, 1979 to July 1, 1980 as the date for limiting outdoor display

lighting and more importantly amended §116.h12(1b) to give the Agency authority to promulgate final rules by July 1, 1979. This bill which failed to pass during the regular session was introduced and passed as S.F. No. a during the Special Session and has been signed into law by Governor Quie. With this amendment to §116.12(1b), the authority to initiate a proceeding to promulgate final rules now exists. However, the Agency should not be allowed to go forward with the present proceeding to adopt final rules since its authority has just now been vested.

MADA believes that the Energy Agency also exceeded its authority by proposing rules regulating the permissible quantity of security lighting. Minn. Stat. §116H.12(1a) sets out several types of lighting which the legislature deemed to be outdoor display lighting. They are "building facade lighting, other decorative lighting, and all billboards and advertising signs except those which advertise a commercial establishment which is open for business at that hour."

In order to determine what may be regulated under this statute, it must be examined to ascertain the intent of the Legislature. Since general words are to be construed to be restricted in their meaning by preceeding particular words, (See generally M.S. 645.08) the meaning of the word "display" becomes very important. The Websters New World Dictionary defines the word when used as an adjective as "designating printing type in larger sizes, used for headings, advertisements, etc." Use of the word connotes setting something off - exhibiting something. The examples of outdoor display lighting which the Legislature offers in the statute are all consistent with this definition. The purpose of each is to call attention to a business establishment or product - to advertise it or exhibit it. The Statute makes absolutely no mention of lighting used for purposes other than display, such as security lighting. Security

lighting has a specific purpose of protecting persons or property from the threat or occurrence of harm. It is totally different from display lighting and should not be regulated pursuant to Minn. Stat. 116H.12. Apparently the position of the Agency is that since the Statute gives it authority to define the term "outdoor display lighting it can tailor its definition to include any outdoor lighting it pleases We disagree. The Agency must be confined solely to the task it was authorized by statute to perform. As the Minnesota Supreme Court recently emplasized in State v. Fry Roofing Co., 246 N.W. 2d 696, 698 (1976), an adminstrative agency is a "creature of statute whose authority and jurisdiction are strictly prescribed by the legislature...." According to the Court in the Fry decision:

> "Courts cannot properly aid the agency by construing the statute to confer upon it implicit authority, when to do so would contravene the legislature's apparently deliberate failure to explicitly grant it such authority."

This judicial principle was again restated in Minnesota-Dakotas Retail Hardware Association v State of Minnesota, Minnesota Supreme Court, May 11, 1979. Security lighting is not display lighting and for the Agency to regulate it is clearly contrary to the legislative mandate.

Leaving the authority issues and moving to the proposed rules themselves, it is MADA's position that the Energy Agency has not made a sufficient affirmative presentation of facts to demonstrate the need and reasonableness of the proposed rules. Some facts are containe in the Statement of Need and Reasonableness; almost none were offered by the Agency at the public hearing. According to the Statement of Need and Reasonableness, the major reason for the rules is to conserve our energy resources. According to the Agency, there would be direct savings as a result of a reduced demand for electricity. In addition, it is anticipated that there will be a secondary, symbolic

effect of stimulating energy conservation by the general public. The argument goes: If the public perceives that all sectors are participating in conservation efforts, this will stimulate individual energy savings. In support of the symbolic effects of the proposed rules, the Agency cites a standby conservation plan proposed at the federal level by the Department of Energy. This plan would prohibit the illumination of advertising signs and window displays after business hours during an energy emergency.

Upon a close examination, the need for the regulations can be questioned. The Agency offers no figures on the amount of energy which would be directly conserved if these regulations were to be adopted. Apparently electricity used in Minnesota is generated from relatively abundant fuels. Also, in response to the energy crisis, the Minnesota Building Code has already adopted some standards regulating the efficiency of lighting including outdoor lighting (See Appendix B). Any direct energy savings resulting from the rules would probably be minimal and in any event there would be no conservation of our least abundant fuel - oil. The indirect effects of the proposed rules as stimulating energy conservation in other sectors is not well documented. In its Statement of Need and Reasonableness, the Agency uses as an example the long strings of incandescent light bulbs on car lots to display automobiles. This conspicuous waste of energy supposedly deters individual energy conservation. The Agency does not seem to take into account that over the last two or three years, these strings have largely disappeared. The reason is economic; the cost of electricity has risen to the point that the used of incandescent bulbs for display lighting is just too expensive. Also with respect to the validity of the symbolic effects, the Standby Conservation Plan cited by the Agency was rejected by the U.S. House of Representatives. At the

hearings, the General Accounting Office (GAO) commented on the plan as follows:

> "Extinguishing illuminated advertising signs appears to be primarily a symbolic gesture to raise the Nation's energy emergency consciousness. DOE estimated oil savings from this plan to be 4,000 B/D. Signs which direct customers to, or inform them of an open business, are exempt from this restriction, minimizing much of the adverse impact this plan could have on motels, restaurants, etc.
>
> DOE expects this plan to cost $3 million to administer. Given the small savings, DOE might be better off dropping this plan as a mandatory measure, saving $3 million, and then putting it in force on a voluntary basis." (See Appendix C)

Symbols must be handled very carefully. The architect who spoke at the public hearing seemed to grasp the importance of symbols and symbolic effect. Perhaps the lighted domes on the Capitol or the Cathedral convey a message which far outweighs the absence of that light as a symbol of energy conservation.

With respect to the reasonableness of the proposed rules, the Statement of Need and Reasonableness seeems to emphasize the amount of public comment as bearing on the reasonableness of the proposed rules. It also emphasizes the long lead time during which the rules can be adjusted. There is a broad statement that the Agency consulted professional illumination engineers and government agencies in developing the rules, but there is very little indication of what input these sources had. The reasonableness of the quantity figure established in 6 MCA §2.2120(B) may be supported because it references a respected engineering handbook.

MADA's position is that this is not a sufficient demonstration of the reasonableness of the proposed rules. Because of the language of Minn. Stat. §116H.12(1b), it was our understanding that this hearing process was for the purpose of developing proposed rules only. There would be an opportunity for the legislature to evaluate the proposed rules before they went into effect. (See our letter

and the earlier discussion of legislative intent - Appendix D. The reasonableness of the rules is not supported by a strong cost-benefit analysis. The Statement of Need and Reasonableness calculates anticipated savings when more efficient lighting is substituted for incandescent bulbs, but no analysis is done on the impact of other provisions of the proposed rules. There should be a complete analysis calculating such costs as lost revenues resulting from turning out advertising lights and signs. The most important cost which need evaluation is that which results from increased vandalism and theft if security lighting must be reduced.

Regarding specific provisions, 6 MCAR §2.2120(B) is unreasonable as it applies to the automobile retail dealer. The provision reads:

> "No person shall operate any other outdoor display lighting that exceeds the recommended minimum standards set forth in the "IES Lighting Handbook" (5th edition) published by the Illuminating Engineering Society by more than 20 percent."

The argument could be made that since the standard is tacked to the minimum requirements of the "IES Lighting Handbook" that therefore it is reasonable. However, when applied to outdoor lights used to display automobiles, the standard does not make sense. As written, the standard covers all outdoor display lighting except security lighting. Looking to the definition of outdoor display lighting contained in 6 MCAR §2.2104(H), the standard would cover outdoor building facade lighting, any outdoor decorative lighting, any illuminated off premise advertising, and any on-premise outdoor lighting. Presumably, "any on-premise outdoor lighting" would include lighted signs and any lighting used to display merchandise outdoors. Therefore, as written, 6 MCAR §2.2120(B) would restrict the quantity of light used to display merchandise outdoors to not more than 20 percent in excess of the recommended minimum standards contained in the "IES Lighting Handbook." Since automobile retailers are perhaps the only businessmen who use display lighting to illuminate merchandise

outdoors(as well as to provide a safe place for business invitees to which the dealer owes a clear duty of care), this aspect of the standard applies strictly to them. But yet when a search is made of the "IES Lighting Handbook" to determine what standard applies, it is discovered that there is no standard which would apply to the outdoor display of merchandise or the protection of business invitees. We feel that it is unreasonable for the Agency to set a standard which has no application. 6 MCAR §2.2120(B) should be amended to exclude lighting for which no minimum standard is offered. (See Appendix G)

Another particular provision which troubles us is 6 MCAR §2.2120(A) relating to the permissible quantity of security lighting. Aside from the argument that the Agency is not authorized to regulate security lighting, it is our opinion that the reasonableness of the figure has not been adequately demonstrated. 6 MCAR §2.2120(A) provides

> "Beginning July 1, 1980, the provisions of 6 MCAR §2.2102 B and C notwithstanding, no person shall operate security lighting that exceeed .05 watts per square foot for the area lighted for security purposes."

In the Statement of Need and Reasonableness, the Agency states that it "has determined that this level is adequate for security purposes." There is no supporting material to document the adequacy of the figure in any way. The standard is not tied to the "IES Lighting Handbook", so its reasonableness cannot be supported by a reference to respected authority. The regulations as originally proposed gave an additional standard - .2 footcandles. From conversations with the Energy Agency prior to the hearing, it was our understanding that the amount of light allowed under each standard (.05 watts/square foot and .2 footcandles) would be roughly equivalent if mercury vapor lights were used. Since the "IES Lighting Handbook" does provide some standards for security lighting in terms of footcandles, we can

make some effort to judge the reasonableness of the .05 watts/square foot. According to the standard embodied in the IES Lighting Handbook, .2 footcandles is the recommended figure for protective lighting in coal yards and protective lighting for general inactive area on dairy and poultry farms. (See Appendix E)

It is conceivable that the standard may be reasonable depending on particular security needs. However, the standard seems clearly arbitrary when applied to the automobile retailer. The standard does not vary when applied to high crime areas as distinct from low crime areas. The standard takes no account of whether an area is fenced or wide open. It does not seem to take into account the huge amount of extremely vulnerable and mobile inventory which a new car dealer keeps on his lot. At a minimum, the dollar figure is $100,000 and for large dealers the figure runs into the millions. Theft and vandalism rates are already very high and the product is very desirable and mobile. (See Appendix F)

We see two more issues with respect to 6 MCAR §2.2120(A) governing the permissible quantity of security lighting. First, in making the calculation we were confronted with the problem of determining exactly what is "the area lighted for security purposes." It is not clear from the regulations if this area is to include sides of buildings or square footage of doors. We have recommended amendment to clear up this ambiguity (See Appendix G). Second, the statute authorizes the Agency to regulate the "quantity" of outdoor display lighting. Even if it is determined that security lighting is display lighting, it is our opinion that it is not appropriate to regulate the "quantity" of security lighting in terms of watts per square foot. This is a measure of energy use only and has no bearing on the quantity of light actually used. Depending on the efficiency of the light source, the amount of light produced from

a constant wattage could vary by a factor of 5. It is indeed arguable that such an arbitrary quantity standard is not in compliance with the Agency's Statement of Need and Reasonableness in that various forms of lighting operate at widely different effiency levels. Flourescent lighting conceivably might meet the .05 watt maximum and yet consume more energy than sodium or mercury vapor lighting which exceeds the .05 maximum. How does that result square with the overall purpose of conserving energy resources. It may well be that the Agency is trapped in a hopeless dilemma on this issue, but that is precisely why these proposed rules should be rejected and the Agency instructed to conduct further studies.

Our final comment concerns the drafting of 6 MCAR §2.2110 Permissible Hours of Outdoor Display Lighting Operation. In 6 MCAR §2.2110 (A) it states that "no person shall operate outdoor display lighting during hours other than those specified by these rules." 6 MCAR §2.2100(E) states when security lighting may not be operated, yet there are no designated hours when security lighting may be operated. 6 MCAR §2.2100(D) states in part that "all other outdoor display lighting except security lighting may be operated from one half hour before sunset until one hour after the close of a business day." By implication, this section requires that security lighting may not be operated during the same period. This means that security lighting may not be switched on until an hour after close of business. Apart from the fact that we see it as important that these regulations be amended to specifially authroize the use of security lighting during all nighttime hours (See Appendix G) we suggest that in Minnesota, the result is extremely dangerous to our members. Consider the fact that sunrise is as late as 7:50 am in winter months and that sunset is as late as 9:04 pm in summer months. and one can readily see that there will be times when a dealer's lot

and building must under these regulations remain in total darkness awaiting the appropriate time to turn on or off security lighting. The alternative is to open at 7 am in the winter and stay open until 10 pm in the summer. This, of course, ignores the fact that by law (recently upheld by court decision in Minnesota) auto dealers must be closed all day on Sundays.

Based on the forgoing analysis it is our opinion that the proposed rules governing outdoor display lighting should not be recommended for adoption by the Energy Agency.

Respectfully Submitted,

Louis W. Claeson

Louis Claeson
MADA Counsel

APPENDIX G

RECOMMENDED AMENDMENTS

1. Relating to 6 MCAR §2.2104 Definitions. Add a subdivision:

   L. "Area lighted for security purposes" means the gross surface area lighted for security purposes including the surface area of the tops, sides and doors to a building if they are lighted for security purposes.

2. Relating to 6 MCAR §2.2110(E) Permissible hour of operation. Amend to read as follows:

   E. Security lighting may not be operated during daytime hours but may be operated during non-daytime hours.

3. Relating to 6 MCAR §2.2120(A) Permissible quantity of security lighting.

   Alternative A - Strike 6 MCAR §2.2120(A) in its entirety. We strongly urge Alternative A because the Agency has clearly failed to demonstrate the need and reasonableness of this standard, particularly as it is applied to automobile and truck dealerships. The Agency should be instructed to conduct additional study in an effort to develop a reasonable standard.

   Alternative B - Amend 6MCAR §2.2120 by adding a paragraph to read:
   D. Rule 6 MCAR §2.2120(A) shall not apply to any establishment which maintains the majority of its inventory outdoors.
   (In the alternative simply provide that 6 MCAR §2.2120(A) shall not apply to any business licensed as a motor vehicle dealer under Minnesota Statutes Section 168.27)

   Alternative C - Amend 6 MCAR §2.2120 (A) to read:
   A. Beginning July 1, 1980, the provisions of Rule 6 MCAR §2.2102 B and C notwithstanding, no person shall operate security lighting that exceeds ~~.05~~ .1 watts per square foot for the area lighted for security purposes.

4. Relating to 6 MCAR §2.2120(B) Permissible quantity of other display lighting. Amend to read as follows:
   B. No person shall operate any other outdoor display lighting except for lighting to display merchandise outdoors and to provide a safe area for business invitees, that exceeds the recommended minimum standards set forth in the "IES Lighting Handbook" (5th edition) published by the Illuminating Engineering Society by more than 20 percent.

Midway Ford Company
of
Roseville

June 1, 1979

Mr. Gary Rippentrop
MADA
277 University Avenue
St. Paul, Minnesota 55103

Dear Mr. Rippentrop:

With the recent discussions relative to the State Of Minnesota considering legislation which would limit our use of outdoor display and protective lighting, I thought that the following information might benefit you.

During the year of 1978, Midway Ford had losses totaling nearly $50,000 for theft and vandalism. This total does not include the new vehicles which were stolen which would increase that total by about $20,000.00. These figures are appaling and our insurance carrier is constantly checking up on us to see that we follow all their recommended loss prevention procedures which includes lights being turned on all night.

For the first five months of this year we have had ca. $16,000.00 worth of theft and vandalism to new and used vehicles including the loss of tires, seats, radios, wheel covers, batteries, spare tires & wheels, bumpers, door trim panels, engine and transmission parts etc. from vehicles. These thefts are taking place during the evening hours and weekends (Sunday) when we are closed in spite of the fact that we are patrolled by both the Roseville Police and a private patrol service four times each night.

It is my considered opinion that if the State Of Minnesota passes legislation which requires us to turn off our lights at night that they should pass companion legislation to provide on site guard service to protect businesses such as ours. With no lights I am sure our losses will increase and if that is the case, I am certain we will be unable to secure insurance.

I hope you will present facts such as these to the legislators so that they give some rational thought to this matter before making a decision which is adverse to business. A business that ceases to function also ceases to have employees. Best that they not forget the relationship.

Sincerely,

Edward J. Tichenor

Edward J. Tichenor
President and General Manager

Exhibit D

July 13, 1979

Mr. Duane R. Harves
Chief Hearing Examiner
Hearing Examiners Office
1745 University Avenue
St. Paul, MN 55104

Re In the Matter of Adoption of Rules Regulating Outdoor Display Lighting. Report HA-79-005-MC.

Dear Mr. Harves:

I am writing in regard to the Report of the Hearing Examiner in the above matter. In the course of your review of the proposed rules and the report thereon, I urge you to review the record carefully. The Minnesota Automobile Dealers Association is vitally interested in these proposed rules as the record will indicate. There are several areas of concern to us in the report which I will briefly outline to you.

On page 3 of the Report, Mr. Greenberg rejects our contention that the Energy Agency lacks statutory authority to adopt final rules. I would refer you to pages 3 and 4 of my letter of June 6, and specifically to the legislative history discussion of the then existing M.S. 116H.12, subd. 1a and 1b. I do not believe Mr. Greenberg fully understood the thrust of our argument that during the course of passage of that subdivision the legislature deleted authority to 'promulgate rules' and replaced it with authority to adopt "proposed rules." Consider also that Extra Session Laws 1979 Chapter 2, amended that same subdivision to delete the term "proposed." It is therefore obvious that the legislature did not itself believe the Agency had authority to adopt final rules until Extra Session Laws 1979, Ch. 2, was signed into law.

Additionally on page 2 of the Report, Mr. Greenberg refers to testimony that automobile dealerships consider display lighting and security lighting to be one and the same. I am puzzled by that reference and can only conclude that Mr. Greenberg refers to the lighting fixtures as physical entities being one and the same. While physically they are one and the same, they serve separate and distinct purposes. One purpose is to display the inventory for public inspection and the other is to protect that inventory from theft and vandalism. I would refer you to pages 5 and 6 of my letter of June 6 for a further elaboration of this point.

As to justifying adoption of those rules on the psychological concept of a "lights out" policy which appears to be the only justification given any credence in the Report, I would refer you to pages 8 and 9 of my letter of June 6, particularly the quote from a report by the General Accounting Office.

Perhaps one of the most serious flaws in the Report of the Hearing Examiner in defense of the rules appears on page 6 wherein Mr. Greenberg refers to testimony of Dr. Wallen of the Energy Agency that "these standards are intended as a guide" and that the Agency "does not intent to institute a major inspection program to ensure strict compliance with the rules." Does Mr. Greenberg mean to suggest that one should not worry about a rule having the force and effect of law because one individual on the staff of the Agency considers it only a guide and perhaps will not pursue enforcement? There is certainly nothing in the regulation to suggest that it is intended as a guide. Consider that 42 U.S. 110H.15 provides specific penalties for violation as well as injunctive relief. If a rule is invalid, unwise, arbitrary, unreasonable, or beyond the authority of an Agency to adopt, it cannot and should not be considered valid simply because the Agency or its staff do not intend to enforce it.

Finally I would refer you to the last full paragraph number 15 on page 6 wherein Mr. Greenberg apparently acknowledges that our industry has specific concerns not adequately addressed by the proposed rule. If further discussions between the Agency and MADA are considered wise by Mr. Greenberg, it seems to be an admission that as applied to motor vehicle dealers, the rules may well be unreasonable. We suggest that the rules should therefore be amended to specifically exclude automotive retailers until reasonable standards can be worked out. Rules of questionable reasonableness should not be recommended for adoption especially when they are justified not on the basis of energy efficiency or conservation but on an illusory psychological "lights out" concept.

If you have any questions regarding our concerns, please do not hesitate to contact me. For your easy reference, I am enclosing a copy of my June 6 letter to Mr. Greenberg.

Yours sincerely,

Louis W. Claeson
MADA Counsel

LWC:jf
Enclosures

Exhibit E

MINNESOTA AUTOMOBILE DEALERS ASSOCIATION

277 UNIVERSITY AVE. ● ST. PAUL, MN 55103 ● LOCAL (612)291-2400 ● TOLL FREE 1-800-652-9029 ● GARY D. RIPPENTROP, EXECUTIVE VICE PRESIDENT

September 27, 1979

Mr. Algernon H. Johnson, Director
Minnesota Energy Agency
980 American Center Building
150 East Kellogg Boulevard
St. Paul, MN 55101

Dear Mr. Johnson:

First, let me apologize for not acknowledging your September 12 letter before this time, but I was in Washington D.C. all last week. I am sure by this time that you have been advised by Duane Harves or Dwight Wagenius that whereas the Hearing Examiner and your agency had previously rejected almost out of hand our argument as to lack of authority to promulgate rules, the Minnesota Supreme Court with respect to similar legislation has agreed with MADA's position. While in my previous correspondence to the Hearing Examiner I did not cite authority for our opinion that a new hearing process must be commenced, I intend to research that issue in detail. At this point I would offer the observation that to allow an agency to hold hearings on proposed final rules in advance of the actual authority to adopt rules is totally at variance with the entire purpose of the rule-making hearing requirements and violates the due process protections embodied in the Minnesota Administrative Procedures Act. There is a careful, well-considered time frame woven into our APA which would go by the boards if agencies were permitted to anticipate legislative grants of authority. Finally, as to this issue lest there be any doubt as to our timely raising this issue, I would refer to my letter of January 12, 1979, directed to Richard Wallen in which I raised the lack of authority issue, well in advance of the hearing.

In the third paragraph on page 1 of your letter, you discuss enforcement of the rules. I am in total agreement that these rules will have the force and effect of law, and individuals and organizations must comply with them. The reason I raised this issue is that the Hearing Examiner in his report (Examiner's Report, Finding 14, page 6) seems to rely on testimony of Mr. Wallen that the standards "are intended as a guide; reasonable compliance is the goal of the agency." My point is that the validity of a rule cannot rise or fall on the basis of intended enforcement policy or compliance levels anticipated by the agency or its staff.

In the fourth paragraph on page 1 of your letter, you state that "MADA has not submitted any empirical evidence that the rules are unreasonable or unworkable," and that "the record establishes that the rules are necessary and reasonable." In reviewing the entire file on record in the Hearing Examiner's office, I believe your statement overstates the case in behalf of the agency. While the Statement of Need and Reasonableness on page 2 indicates the agency staff consulted professional illumination engineers and other government agencies, there is nothing in the record to indicate the full nature and extent of these discussions. Walking the streets of Minneapolis and driving the freeways was a noble effort, but again the statements based thereon are conclusory only. Additionally in the Statement of Need and Reasonabless on pages 2-3, there is reference to the DOE Standby Conservation Plan and display lighting. I believe the written comments of MADA (June 6, 1979) with respect to that plan fairly well destroy the value of that proposal as offering any basis for validity of the proposed rules. The Standby Plan was rejected by the U.S. House of Representatives, and the General Accounting Office commented that given the small savings of energy compared with high administrative costs, the DOE would be "better off dropping this plan as a mandatory measure..." The Hearing Examiner noted that Mr. Wallen conceded that energy savings were only a secondary goal (Examiner's Report, Finding 10, page 4) and further noted that the amount of energy saved by implementing the rules would be "extremely small." One last point with regard to the Statement of Need and Reasonableness is that the security lighting issue is virtually ignored. In fact, my recollection is that security lighting is mentioned only once and then only to refer to its advertising benefits - see pages 6-7 of the statement.

In his report, the Hearing Examiner states that "evidence regarding the .05 watts per square foot standard is slight" (Examiner's Report, Finding 14, page 6). The only real empirical evidence as to the reasonableness of this standard offered by the Agency was the lighting at the Monticello power plant, a facility bearing absolutely no real relationship to auto dealerships. Again the Hearing Examiner acknowledges the lack of evidence in Finding 14 on page 6 regarding the IES Lighting Handbook and the fact that it gives little guidance to our members. While we do intend to work with the agency in developing additional information regarding the impact of the standard, we are concerned that any change from the rules as adopted will require a new and lengthy hearing procedure before any amendment can be adopted. Just what will happen in the meantime is a source of concern, particularly given your statement that "known violators will be subject to the appropriate statutory enforcement processes and penalties." Our further surveys may well indicate violations of the .05 watt standard. Are we therefore submitting our members who cooperate in these surveys to possible prosecution?

Our continued feeling is that the agency did not sustain its burden to demonstrate the reasonableness of the rules. The letter of Edward J. Tichenor, President of Midway Ford, dated June 1, 1979, demonstrates that dealers have genuine security problems, and as the Hearing Examiner found, the IES handbook heavily relied upon by the agency, offers little help to dealers (Examiner's Report, Finding 14, page 6). While we intend to cooperate with the agency as suggested by the Hearing Examiner, and as I have indicated to Mr. Wallen in telephone conversations, I must reiterate that our ultimate goal must be to protect the interests of our dealer members. Therefore, we cannot rule out other options available to us to challenge the rules if a challenge becomes necessary.

Sincerely,

Louis W. Claeson
MADA Counsel

LWC:jf

Exhibit F

MINNESOTA ENERGY AGENCY
980 AMERICAN CENTER BUILDING
150 EAST KELLOGG BOULEVARD
ST. PAUL, MINNESOTA 55101
612-296-5120

September 12, 1979

Louis W. Claeson, Counsel
Minnesota Automobile Dealers Association
277 University Avenue
St. Paul, Minnesota 55103

Re: Proposed Adoption of Rules of the Minnesota Energy Agency Governing Permissible Hours of Operation, the Quantity and the Efficiency of Outdoor Display Lighting

Dear Mr. Claeson:

On September 5, 1979, I adopted the rules in question. A copy of my Decision and a copy of the rules as adopted are attached.

I cannot agree with you that the Agency lacks authority to adopt the subject rules. However, this is a matter that will be reviewed by the Attorney General's Office of Administrative Rules. I also cannot agree with your contention that the rules are not supported by the record.

Regarding enforcement, these rules, when effective, will have the force of law. Therefore, individuals and groups will be expected to comply with them. The Agency has no intention of adopting meaningless rules. While the Agency does not have the budget and staff necessary to ensure compliance by everyone, known violators will be subject to the appropriate statutory enforcement processes and penalties.

Finally, it is my opinion that MADA has not demonstrated any particular problems it would have in complying with the rules. That is, MADA has not submitted any empirical evidence that the rules are unreasonable or unworkable. On the contrary, the record establishes that the rules are necessary and reasonable. Nevertheless, when the rules are published in the State Register, the

Agency will also publish a notice seeking comments from automobile dealers and others. The Agency will consider adding specifics to the rules to meet industry concerns if evidence of the need for such specifics is shown.

I hope this procedure is satisfactory to the Association.

Sincerely,

ALGERNON H. JOHNSON
Director

AHJ:DJ:mb
Enclosures

Exhibit G

Minnesota AUTOMOBILE DEALERS ASSOCIATION

GARY D. RIPPENTROP, Exec. Vice Pres. • 277 UNIVERSITY AVE. • ST. PAUL, MINN. 55103 • (612) 291-2400

296-5120

June 27, 1977

Richard A. Wallen
Minnesota Energy Agency
740 American Center Building
150 East Kellogg Boulevard
St. Paul, Minnesota 55101

Reference: Outdoor Display Lighting

Dear Mr. Wallen:

Pursuant to notice filed in the State Register on Monday, June 13, 1977, I am writing to make certain comments regarding the development of proposed rules regulating outdoor display lighting. Our organization is very much concerned as to how outdoor display lighting is to be defined. Outdoor advertising signs are obvious items of display and their use may well be subject to restriction although on premises advertising signs and lighting ought to be permitted during the normal business hours of the particular Firm. Of paramount concern to our organization however is the use of lighting for security purposes. Because both new and used vehicles must be stored outside, a considerable amount of lighting is necessary during the hours of darkness to prevent theft and vandalism. In no way should this lighting be considered as display lighting although it may have that incidental effect. The important point is that the primary purpose of such lighting during non business hours is for security. Moreover in virtually all cases, economical Mercury or Sodium Vapor or similar lighting is utilized which consumes very little energy.

The security element of outdoor lighting in the automotive industry is not just the idea of the individual auto dealer, but is the recommendation of insurance carriers. If dealers are going to continue to be covered by adequate insurance protection, they must provide adequate security. It is our understanding that dealers have been advised that if they eliminate or materially curtail outdoor security lighting, they will lose their coverage.

For your further information, we are enclosing a copy of recommendations for open lot security distributed by Federated

(continued)

Insurance Company of Owatonna. Note that security lighting is high on the list. If you have any questions regarding these comments, please feel free to call or write. We would be happy to discuss proposed language or exclusions with you. In any event, we propose to follow the development of these rules very closely.

Yours very truly,

Louis W. Claeson
MADA Counsel

LWC/pam

Enclosure

MINNESOTA ENERGY AGENCY

PROPOSED RULES GOVERNING

THE PERMISSIBLE HOURS OF

OPERATION, THE QUANTITY AND THE

EFFICIENCY OF OUTDOOR DISPLAY LIGHTING

Chapter 21
6 MCAR §§ 2.2101-2.2120

6 MCAR § 2.2101 Purpose of rules. The purpose of these rules is to define outdoor display lighting, to specify permissible hours of operation of outdoor display lighting, and to establish quantity and efficiency standards for outdoor display lighting pursuant to Minnesota Statutes Section 116H.12, subdivision 1b.

6 MCAR § 2.2102 Applicability of rules.

A. Beginning July 1, 1980, no person shall operate outdoor display lighting during hours other than those specified by these rules.

B. Beginning July 1, 1981, no person shall install outdoor display lighting in a quantity that exceeds, or at an efficiency less than, that provided by these rules.

C. Beginning July 1, 1985, no person shall operate outdoor display lighting which does not comply with rules 6 MCAR § 2.2115 (efficiency) and 6 MCAR § 2.2120 B (quantity).

D. Exceptions.

1. These rules shall not apply to temporary or seasonal outdoor display lighting;

2. These rules shall not apply to outdoor display lighting which

2

provides information as to the time of day, temperature, weather conditions, or other matters concerning the public health, safety and welfare;

3. These rules shall not apply to penal institutions;

4. These rules shall not apply to airplane obstruction lighting as defined by the Federal Aviation Administration nor to any other lighting that is required by federal, state, or local governmental law or regulation.

6 MCAR § 2.2104 Definitions. For purposes of these rules, the following definitions shall apply:

A. "Business day" means that portion of a 24-hour period when an establishment is open for business;

B. "Ballast" means a device used with an electric discharge lamp to obtain the necessary circuit conditions for starting and operating;

C. "Daytime hours" means the time between one half hour after sunrise and one half hour before sunset, or when the ambient light level is greater than two foot candles;

D. "Establishment" means a place of business or a public or private institution;

E. "Foot candle" means a standard measure of light intensity;

F. "Luminous sign tubing" means lights commonly known as neon lights;

G. "Lumens per watt" means a standard unit of measure of light efficiency;

H. "Outdoor display lighting" means any outdoor building facade lighting, any outdoor decorative lighting, any illuminated off-premise advertising, and any on-premise outdoor lighting including security lighting;

I. "Security lighting" means a type of outdoor display lighting located on, or around the exterior or perimeter of, a building, structure, fence, lot, or other

outdoor area, the purpose of which is to protect persons or property against the threat or occurrence of harm;

J. "Standardized Outdoor Display Signs" means off-premise outdoor display advertising commonly known as billboards;

K. "Temporary or seasonal display lighting" means display lighting that, on at least 300 consecutive days in any 12-month period, is not illuminated.

6 MCAR § 2.2110 Permissible hours of outdoor display lighting operation.

A. Standardized outdoor display signs may not be artificially illuminated during daytime hours.

B. Standardized outdoor display signs may not be artificially illuminated during the period between midnight and 6:00 a.m. or one half hour after sunrise, whichever is earlier, except for the hours during that period when the establishment(s) being advertised is (are) open for business.

C. Outdoor display lighting that is used to illuminate an historic landmark as defined in Minnesota Statutes ch. 138 or Section 4.077 may be operated between one half hour before sunset and 10 p.m.

D. All other outdoor display lighting except security lighting may be operated from one half hour before sunset until one hour after the close of a business day and from the beginning of a business day until one half hour after sunrise.

E. Security lighting may not be operated during daytime hours.

6 MCAR § 2.2115 Permissible efficiency.

A. No person shall install or use outdoor display lighting in which the light source produces light at an initial efficiency, including ballast, of less than 40 lumens per watt.

B. Exceptions.

1. Rule 6 MCAR § 2.2115 A shall not apply to luminous sign tubing.

2. Rules 6 MCAR § 2115 A shall not apply to any establishment whose total outdoor display lighting system has a demand of 1500 watts or less.

6 MCAR § 2.2120 Permissible quantity.

A. Beginning July 1, 1980, the provisions of Rule 6 MCAR § 2102 B and C notwithstanding, no person shall operate security lighting that exceeds .05 watts per square foot ~~or .2 foot-candles~~ for the area lighted for security purposes.

Deletion at hearing.

B. No person shall operate any other outdoor display lighting that exceeds the recommended minimum standards set forth in the "IES Lighting Handbook" published by the Illuminating Engineering Society by more than 20 percent.

C. Rule 6 MCAR § 2.2120 A shall not apply to an establishment whose total security lighting system has a demand of 1500 watts or less.