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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to Rules Governing Administrative Rulemaking Hearings, Contested Case Hearings, Revenue Recapture Act Hearings, Power Plant Siting and Power Line Routing Hearings, Minn. Rules Chapters 1400 and 1405.

FINDINGS OF FACT, CONCLUSIONS AND ORDER ADOPTING RULES WITHOUT PUBLIC HEARING

Notice of the Office's Intent to Adopt the above-entitled rule amendments was published in the State Register on August 13, 1990 and was sent by United States Mail to all persons on the list maintained by the Agency pursuant to Minnesota Statutes, Sections 14.14, subd. 1a and 14.22 on August 7, 1990. The Statement of Need and Reasonableness was prepared before the Notice of Intent to Adopt a Rule without a Public Hearing was mailed to all persons on the rulemaking mailing list and published in the State Register and was available to the public.

All persons were given the opportunity to submit comment on the rule for more than 30 days after notice of the proposed rulemaking. The Office received one request for a public hearing. Therefore, the Office did not receive requests for a public hearing from 25 or more persons.

The Office did, however, receive a number of comments and suggestions for changes to the proposed rules.

Based on the comments and evidence in the record before the Office, I find the following:

1. That the proposed amendment to existing Rules 1400.0250, 1400.5100, 1400.8510 and 1405.0200 (the proposed amendment was the same in each case) could be improved. The proposed amendment merely specified that a document could be served upon the Office by facsimile transmission, and that filings or service would be effective at the time that the facsimile transmission was received by the Office. A comment was received from the Administrative Law Committee of the Office of the Attorney General. This comment urged that the rule be clarified to specify the fate of a document when the transmission is commenced before 4:30 p.m., but not completed until after 4:30 p.m. The comment urged that the proposal be amended to specify that if a transmission was commenced before 4:30 p.m., then the paper would be deemed to be filed on that date. This is a desirable addition to the proposed amendment because it will eliminate the potential for dispute. While the proposed amendment was needed and reasonable as originally drafted, adopting the Committee's proposal will improve the rule. Moreover, adopting the Committee's proposal will not constitute a substantial change. The classes of persons who would not be reasonably have been expected to comment on this change is the same as the class of persons who would not reasonably have been expected to comment on proposed rules as originally noticed -- the

persons affected are those who are interested in using facsimile transmission to submit things to the Office. Secondly, the proposed change does not introduce a new subject matter because the subject matter of facsimile transmission was clearly noticed in the rulemaking proceeding. Finally, it does not make a major substantive change that will catch people by surprise because it is only a minor clarification within the context of the rule as proposed.

2. The sole request for a hearing came from a person who was concerned about the mediation rule. The comment (from Otter Tail Power) raised two concerns. The Office is proposing to change the rule to satisfy one of those concerns, but has decided not to change the rule to meet the other. The proposed change will require that mediation be initiated only when neither the agency nor any party to a contested case is opposed to mediation in that contested case. If either the agency or any party is opposed to mediation, then it cannot be initiated. This is a return to the existing rule. Existing Rule 1400.5950, subp. 3C. and D. allows any party or the agency to have a veto power over the initiation of mediation. The Office had proposed an amendment which would have allowed mediation to be initiated despite the opposition of a party, if at least two parties, including the agency, had agreed to it. Otter Tail Power opposed this change, arguing that mediation can be effective only if all parties are willing to use it, and the proposed change could allow the agency and a party to "gang up" on other unwilling parties. The Office, after consideration, has decided that it is undesirable to attempt mediation in a case where any party is opposed to it because it has a high probability of being a waste of time. To avoid this, the Office has decided to withdraw its proposed amendment and allow the rule to remain in its existing form. This is not a substantial change because the class of persons affected are those interested in mediation, and they are the same class of persons who were affected by the initial change. Secondly, the subject matter of who must agree to mediation is the same as the subject matter raised by the proposed change. Finally, the proposed rule clearly invited reaction on the subject of who must agree to mediation, and thus this change is certainly within the scope of that proposal in connection with inviting reaction.

3. The final set of changes relates to the rule on reconsideration or rehearing. The changes logically break down into two separate items for discussion: what is the time limit for filing a petition for reconsideration or rehearing, and what are the standards to be used in granting or denying such a petition. Each will be dealt with separately below.

4. The rule which is currently in effect does not contain any provision relating to when a petition for reconsideration or rehearing must be filed. It is totally silent on the subject. The Office had originally proposed a rule which would have provided that the petition could be filed at any time until the time for appeal had elapsed or until an appeal were taken. This proposal drew criticism from the Attorney General's Administrative Law Committee and from Legal Services. The former opposed the rule because it established too short a period, while the latter (albeit for different reasons)

opposed the rule because it provided too long a time period. After analyzing the comments, and the Rules of Civil Procedure on which this proposed rule is based, the Office has determined to more closely follow the Rules of Civil Procedure, thereby satisfying the concern of the Attorney General's Committee. The Office is also adding a caveat to meet the concerns of Legal Services. The rule as now proposed allows the filing of a petition until an appeal is taken or until one year elapses. It avoids the "trap" of giving attorneys a long time to file such petitions, but allowing them to inadvertently waive the tolling of the appeal period by including a warning to alert them to the tolling problem. It is probably unrealistic to expect practitioners to be aware of differences between the Rules of Civil Procedure and the Office's rule in such an arcane area, and thus it is reasonable to warn them of such a difference that could substantially jeopardize their clients' rights to appeal.

5. The second group of changes to the rule on reconsideration and rehearing relates to the standards to be used in granting or denying a petition. The existing rule that is currently in effect does not contain any standards to guide the judge. To cure this problem, the Office had proposed that four enumerated standards be added. These four standards were taken from the Rules of Civil Procedure, Rules 59, 60 and 61. However, comments from the Attorney General's Committee and Legal Services both questioned why some of the criteria in the civil rules had been adopted, when others were rejected. Legal Services urged that Rule 59.01(g) should have been included, while the Attorney General's Committee urged that both Rule 59.01(g) and Rule 60.02(a) ought to be added. The Office looked at those provisions in the administrative context and determined that, in fact, it was appropriate to add them. They would allow for reconsideration or rehearing in situations where errors of law or mistakes had occurred. It is important to cure such problems as quickly and as cheaply as possible. Without allowing them to be cured at the administrative level, a party who was seriously prejudiced would be forced to go to the Court of Appeals, which is more costly, time consuming, and an unnecessary waste of the State's judicial resources. It is appropriate, therefore, to allow these problems to be cured at the trial level, in the same manner that the civil rules provide. By adding these two additional standards, the substantial change prohibition has not been violated. They do not affect classes of persons who could not reasonably have been expected to comment on the original four standards, as the classes of persons likely to comment on both are the same. Secondly, they are not a significant new subject matter which could not have been anticipated -- they are in the same subject area as the four standards initially proposed. Finally, they do not make a major substantive change in a manner not raised by the proposed rule. Adding these two standards is just not a "major substantive change".

Although the Office did receive the comments set forth above, it did not receive any requests for notice of submission of the adopted rule to the Attorney General.

The above-captioned rule amendments are needed and reasonable, as amended.

NOW, THEREFORE, IT IS ORDERED that the rule amendments identified as "Adopted Permanent Rules Relating to Rulemaking, Contested Case, and Revenue Recapture Act Hearings, as modified, are adopted this 21st day of November, 1990, pursuant to the authority vested in me by Minnesota Statutes, Sections 3.764, 14.51 and 116C.66 (1988).

William G. Brown

WILLIAM G. BROWN
Chief Administrative Law Judge