

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF COMMERCE

In the Matter of the Adoption of  
the Rules of the Department of  
Commerce Governing Electronic  
Funds Transfer Terminals.  
Minn. R., Chapter 2675.

ORDER ON REVIEW OF  
RULES UNDER MINN.  
STAT. § 14.26

The Minnesota Department of Commerce (agency) is seeking review and approval of the above-entitled rules, which were adopted by the agency pursuant to Minn. Stat. § 14.26. On January 21, 1998, the Office of Administrative Hearings (OAH) received the documents from the agency required to be filed under Minn. Stat. § 14.26 and Minn. R. 1400.2310. Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and for the reasons set out in the Memorandum which follows,

**IT IS HEREBY ORDERED:**

1. The agency has the statutory authority to adopt the rule.
2. The rules were adopted in compliance with the procedural requirements of Minn. Stat., chapter 14 and Minn. R., chapter 1400, with the following exceptions:
  - the Statement of Need and Reasonableness (SONAR) was dated July 31, 1997 and the Notice of Intent to Adopt Rules was dated on the same day, July 31, 1997. Pursuant to Minn. Stat. § 14.23, before the date of the notice, the agency shall prepare a SONAR, which must be available to the public. Therefore, the SONAR should have been dated or finalized before the date of the Notice of Intent to Adopt Rules; and
  - the SONAR did not contain information on the anticipated effect of the rules on state revenues as required by Minn. Stat. § 14.131, clause 2.


The administrative law judge finds that the omissions did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process and therefore constitutes harmless error under Minn. Stat. § 14.26(3)(d)(1).

3. The adopted rules are not substantially different from the rule as originally proposed.

4. The record for the adopted rules demonstrates a rational basis for the need for and reasonableness of the proposed rule.

5. Minn. R. 2675.8120, item G and 2675.8190, item B, of the adopted rules are being **DISAPPROVED** as not meeting the legal standards of Minn. R. 1400.2100, items D and E. (See Memorandum.)

Dated this 4th day of February, 1998.

  
George A. Beck  
Administrative Law Judge

### MEMORANDUM

Pursuant to Minn. Stat. § 14.26, the agency has submitted these rules to the administrative law judge for a review of their legality. As stated in the above order, the rules meet the statutory authority, procedural, substantial difference, and rational basis requirements of Minn. Stat. § 14.26 and Minn. R. 1400.2100. However, Minn. R. parts 2675.8120, item G and 2675.8190, item B, are being disapproved as not meeting the standards under Minn. R. 1400.2100, items D and E, because of excessive agency discretion and vagueness.

Minn. R. 2675.8120, item G, provides as follows:

**2675.8120 Application for Authorization.**

...Such application shall include the following information:

G. a complete description of the physical and technical operation standards pertaining to the terminal, including information and specifications necessary to enable a financial institution that is eligible to share the terminal to obtain interface with the terminal, which description may be limited by the commissioner to the manufacturer, model number, and type of the terminal;

The use of the word "may" in item G, allows for excessive discretion by the commissioner without adequate criteria as to when such information would be limited. In its Statement of Need and Reasonableness (SONAR, pg. 7), the agency explains that, "To reduce regulatory burden on applicants, we have reserved the discretion to omit the requirement for a complete physical and technical operations standard once a model of terminal has been certified. Subsequent applications need only include identification of the terminal by manufacturer and model number."

The administrative law judge recommends that item G be amended to remove the excessive discretion. The excessive discretion can be omitted by adding the criteria that is outlined in the SONAR. For example, the requirement in item G could be rewritten as follows: "...which description may be limited to the manufacturer, model number, and type of the terminal after a model of a terminal has been certified by the commissioner." This language, or other similar language proposed by the agency, would correct the problem of excessive agency discretion. Such an amendment to the rule would provide the necessary language for the approval of the rule part.

The other provision which is being disapproved is Minn. R. 2675.8190, item B. Item B provides:

**2675.8190 Other Permissible Activities, Electronic Benefits Transfer, Consumer Convenience Services.**

The limitation on the financial transactions authorized to be performed at a terminal does not prohibit using the terminal's capability to:

B. deliver other consumer convenience services. These consumer convenience services include, but are not limited to, services that affect the payment for and dispense postage stamps, tickets, coupons, phone cards, or other media under agreements with affiliated or nonaffiliated businesses. *In determining the suitability of consumer convenience services, consideration shall be given to other applicable law, rule, or the effect on the safety and soundness of the terminal provider where a financial institution is under the supervision of the commissioner. (Emphasis added.)*

The administrative law judge finds that the italicized sentence in item B is vague. The provision is vague in that it does not indicate who will be making this suitability determination. In a February 3, 1998 submission, the department has proposed that the above italicized sentence in item B be stricken. The administrative law judge agrees that deleting this sentence would be an acceptable correction to obtain approval of the rule part.

In addition, the agency has also proposed that Minn. R. part 2675.8100, subp. 3, as adopted, be amended as follows:

**Subp. 3. Card.** "Card" means the access device used to activate a terminal, including a credit card, or debit card, ~~or stored value card.~~ "Card" does not include an access device issued by a government agency solely for the purpose of electronic benefit transfer programs or stored value cards, except that a stored value card that also serves as an access device for electronic terminal transactions is considered to be a card to the extent it performs the functions of a credit card or debit card.

The administrative law judge finds the proposed amendment to be clarifying in nature and that the amendment would not result in a substantially different rule than the proposed rule. Final approval of the rule provision will be made upon resubmission of the adopted rule by the agency in accordance with Minn. R. 1400.2300, subp. 8.

Pursuant to Minn. Stat. § 14.26, subd. 3(b) and Minn. R. 1400.2300, subp. 6, this order will be submitted to the chief administrative law judge for approval. Under Minn. R. 1400.2300, subp. 8, the agency may resubmit the rule to the chief judge for review after changing it and may request that the chief judge reconsider the disapproval.

G. A. B.