

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Proposed Rules of the  
Public Utilities Commission Governing Ex  
Parte Communications,  
Minnesota Rules, Chapter 7845

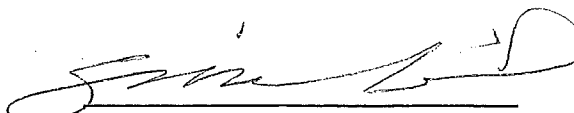
**ORDER ON REVIEW OF  
RULES UNDER MINNESOTA  
STATUTES, SECTION 14.26**

The Minnesota Public Utilities Commission ("Commission") is seeking review and approval of the above-entitled rules, which were adopted by the Commission without a hearing. This review and approval is governed by Minn. Stat. § 14.26. On September 23, 2009, the Office of Administrative Hearings received the documents that must be filed by the Commission under Minn. Stat. § 14.26 and Minn. R. 1400.2310. Based upon a review of the written submissions and filings, and for the reasons set out in the Memorandum which follows,

**IT IS HEREBY ORDERED:**

1. The Commission has the statutory authority to adopt the rules.
2. The rules were adopted in compliance with all procedural requirements of Minnesota Statutes, chapter 14, and Minnesota Rules, chapter 1400, with one exception as discussed below.
3. The rules are needed and reasonable, with the exception of the following rule part: 7845.7900, subparts 1, 2, and 3. Accordingly, this rule part is **DISAPPROVED** as not meeting the requirements of Minnesota Rules part 1400.2100, items D and E.
4. The change made to the rules subsequent to publication in the State Register on May 11, 2009, does not make the rules substantially different.
5. Pursuant to Minnesota Statutes, section 14.26, subdivision 3(b), and Minnesota Rules, part 1400.2300, subpart 6, the rules will be submitted to the Chief Administrative Law Judge for review.

Dated: October 7, 2009

  
STEVE M. MIHALCHICK  
Administrative Law Judge

## MEMORANDUM

Pursuant to Minnesota Statutes, section 14.26, the agency has submitted these rules to the Administrative Law Judge for review. The rules of the Office of Administrative Hearings<sup>1</sup> identify several types of circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge. These circumstances include situations in which a rule was not adopted in compliance with procedural requirements, unless the judge finds that the error was harmless in nature and should be disregarded; the rule is not rationally related to the agency's objectives or the agency has not demonstrated the need for and reasonableness of the rule; the rule is substantially different than the rule as originally proposed and the agency did not comply with required procedures; the rule grants undue discretion to the agency; the rule is unconstitutional<sup>2</sup> or illegal; the rule improperly delegates the agency's powers to another entity; or the proposal does not fall within the statutory definition of a "rule."

### I. Procedural Defect – Harmless Error

Effective August 1, 2009, pursuant to Minn. Stat. § 14.128, an agency "must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule." This determination must be made before the close of the hearing record or before the agency submits the record to the administrative law judge if there is no hearing. The administrative law judge must review the determination and approve or disapprove it. When the Commission made its rule submission on September 23, 2009, the record did not contain a determination under Minn. Stat. § 14.128.

A procedural defect can be considered a harmless error under Minn. Stat. § 14.26, subd. 3 (d), if: "(1) the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or (2) the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process."

By way of an electronic mail message dated September 30, 2009, the Administrative Law Judge (ALJ) requested that the Commission make this

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<sup>1</sup> Minn. R. 1400.2100 (2007).

<sup>2</sup> In order to be constitutional, a rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies. See, *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N. W.2d 763, 768 (Minn. 1980).

determination and supplement the rule record. The Commission supplemented the rule record with a written determination under Minn. Stat. § 14.128 on October 1, 2009. The Administrative Law Judge finds that the delay in making the determination under Minn. Stat. § 14.128 did not deprive any person of the opportunity to meaningfully participate in the rulemaking process. Accordingly, this procedural defect is a harmless error under Minn. Stat. § 14.26, subd. 3 (d)(1) and (2).

## **II. Defects in Part 7845.7900**

Proposed part 7845.7900 is a new rule part that provides interested persons the opportunity to comment on the Administrative Law Judge's recommendation regarding sanctions prior to the Commission making a final determination.

### **Subpart 1 - Notice**

Subpart 1 states:

After receiving the administrative law judge's report, the commission shall provide notice of the report to all persons on the commission's official service list for the affected proceeding.

As written, proposed subpart 1 directs the Commission to provide notice of the Administrative Law Judge's report to the service list for the affected proceeding, but the rule language does not set forth a deadline or time period in which this notice must be given. Accordingly, the proposed subpart lacks specificity and allows the Commission discretion in deciding when the notice will be given.

The language of Minn. Stat. § 216A.037, subd. 4, describes the process by which complaints regarding ex parte communications are made. The language of subdivision 4 contains several deadlines that expedite the complaint process. In addition, the Commission states in its Statement of Need and Reasonableness (SONAR) that proposed part 7845.7900 "strikes an even balance between providing opportunity to be heard and efficiency in making a final decision."<sup>3</sup> It seems clear that the Legislature and the Commission intend for these types of complaints to be resolved in an expedited manner.

To correct this defect, but still allow some flexibility in the administration of the rule, the Administrative Law Judge recommends the following:

After receiving the administrative law judge's report, the commission shall promptly provide notice of the report to all persons on the commission's official service list for the affected proceeding.

This change, or a substantially similar one, is needed and reasonable and is not a substantial change from the rules as proposed.

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<sup>3</sup> SONAR at 20.

## **Subpart 2 – Comment period**

Subpart 2 states:

Any person wishing to comment on the judge's report regarding the recommendation of sanctions must do so within ten days of the commission's notice of the report. *The commission may vary the notice period as it deems appropriate.*

(Emphasis added). In the Statement of Need and Reasonableness (SONAR), the Commission states that this proposed subpart provides flexibility in setting a hearing and allows the Commission to extend the notice period as needed. "A ten day notice period for comment will foster efficient and timely resolution of the complaint so that there is not undue delay in determining the outcome of a pending case affected by alleged ex parte violations."<sup>4</sup>

As written, this subpart gives the Commission unbridled discretion to change the length of the notice period. Such a standard-less grant of discretion to itself is in excess of the Commission's statutory authority and constitutes a defect in the proposed rules.<sup>5</sup> In addition, the language of the proposed subpart and the SONAR are not entirely consistent with one another. The proposed rule language allows the Commission to *vary* the notice period, while the SONAR says the Commission may *extend* the notice period.

To cure these defects, the Administrative Law Judge proposes that the Commission amend subpart 2 in the following, or substantially similar, manner:

Any person wishing to comment on the judge's report regarding the recommendation of sanctions must do so within ten days of the commission's notice of the report. The commission may vary extend the notice period as it deems appropriate for reasonable cause.

This change, or a substantially similar one, is needed and reasonable and is not a substantial change from the rules as proposed.

## **Subpart 3 – Decision**

Subpart 3 states:

Following the comment period, and with notice, the commission shall hold a hearing and render its decision regarding the imposition of sanctions.

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<sup>4</sup> SONAR at 21.

<sup>5</sup> See, Minn. R. 1400.2100 (D) (2007).

Notice of the hearing must be sent to those on the commission's official service list for the affected proceeding.

This subpart requires the Commission to hold a hearing, but does not set forth a deadline or time period in which to hold the hearing. Accordingly, the proposed subpart lacks specificity and allows the Commission discretion in deciding when the notice will be given. As discussed above as to subpart 1, these types of complaints require a timely resolution, and the failure to include a deadline for the Commission runs counter to that goal.

To cure this defect, the Administrative Law Judge proposes that the Commission amend subpart 3 in the following, or substantially similar, manner:

If possible, within 30 days following the comment period, and with notice, the commission shall hold a hearing and render its decision regarding the imposition of sanctions. Notice of the hearing must be sent to those on the commission's official service list for the affected proceeding. In no case shall the decision be rendered later than 60 days after the end of the comment period.

This suggested language is based upon the time periods proposed to regulate the Administrative Law Judge's hearing and report in part 7845.7800, subpart 2. It is reasonable to impose a similar deadline upon the Commission to increase efficiency and add certainty to the Commission's actions. This change, or a substantially similar one, is needed and reasonable and is not a substantial change from the rules as proposed.

### **III. Recommended Technical Corrections**

The Administrative Law Judge recommends two technical corrections to the rules. The technical corrections are not defects in the rules, but are recommendations for corrections to the rules that the agency may adopt if it chooses to do so to aid in the administration of the rule. Each of the changes recommended below is needed and reasonable and would not be a substantial change from the rules as originally proposed.

#### **Part 7845.7700, subparts 3 and 4**

Subparts 3 and 4 list who must be served with the complaint and the answer. In each instance, the proposed rule requires that "the department" be served. The Administrative Law Judge understands that this language is taken directly from Minn. Stat. § 216A.037, subd. 4, and that the reference is in all likelihood to the Department of Commerce. However, the proposed rule language would be clearer if the Commission stated the full name of the department.

**S. M. M.**