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STATE REGISTER

STATE OF MINNESOTA

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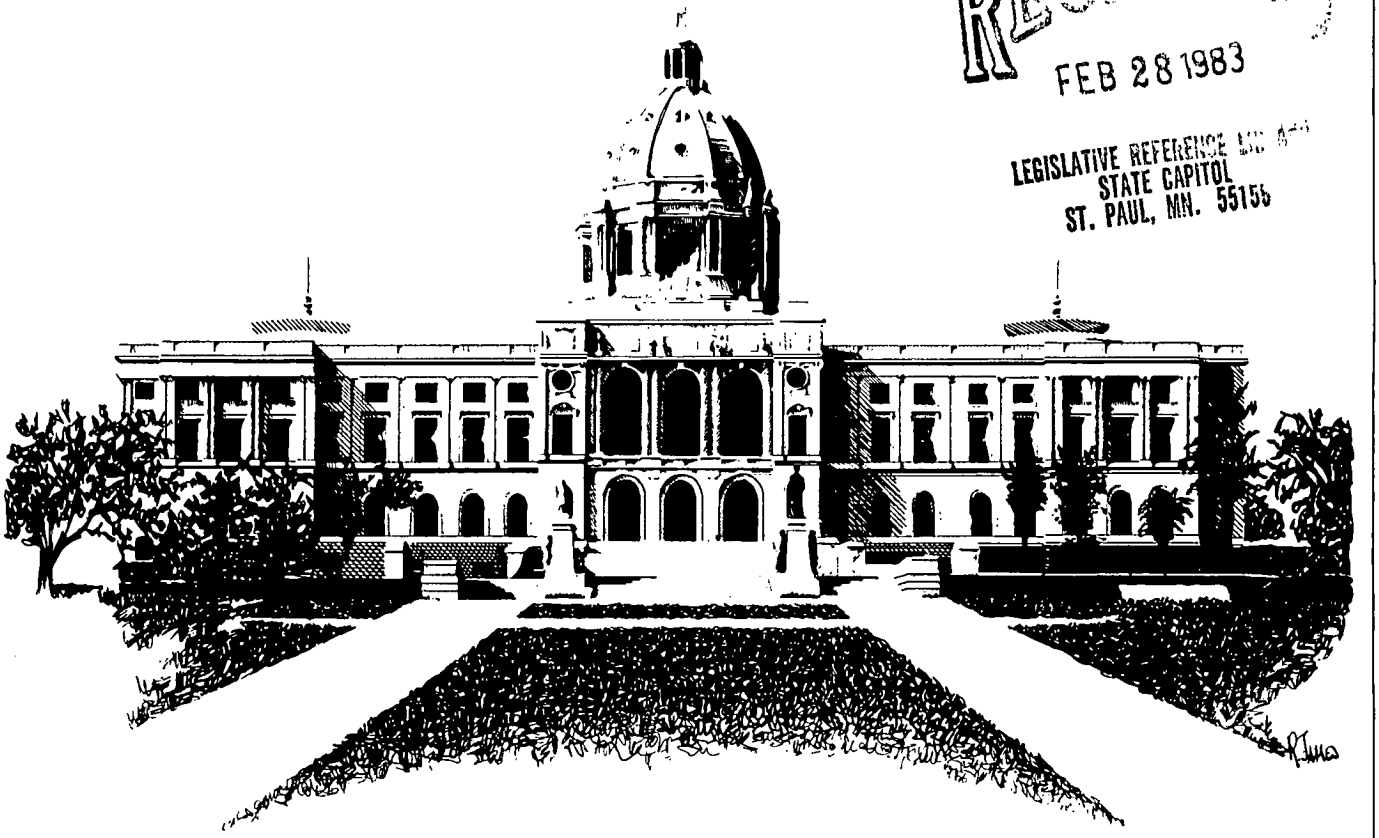

VOLUME 7, NUMBER 35

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Pages 1221-1248

STATE REGISTER

Printing Schedule for Agencies

Issue Number	*Submission deadline for Executive Orders, Adopted Rules and **Proposed Rules	*Submission deadline for State Contract Notices and other **Official Notices	Issue Date
	SCHEDULE FOR VOLUME 7		
36	Friday Feb 18	Monday Feb 28	Monday Mar 7
37	Monday Feb 28	Monday Mar 7	Monday Mar 14
38	Monday Mar 7	Monday Mar 14	Monday Mar 21
39	Monday Mar 14	Monday Mar 21	Monday Mar 28

*Deadline extensions may be possible at the editor's discretion; however, none will be made beyond the second Wednesday (12 calendar days) preceding the issue date for rules, proposed rules and executive orders, or beyond the Wednesday (5 calendar days) preceding the issue date for official notices. Requests for deadline extensions should be made only in valid emergency situations.

**Notices of public hearings on proposed rules and notices of intent to adopt rules without a public hearing are published in the Proposed Rules section and must be submitted two weeks prior to the issue date.

Instructions for submission of documents may be obtained from the Office of the State Register, 506 Rice Street, St. Paul, Minnesota 55103, (612) 296-0930.

The *State Register* is published by the State of Minnesota, State Register and Public Documents Division, 117 University Avenue, St. Paul, Minnesota 55155, pursuant to Minn. Stat. § 15.051. Publication is weekly, on Mondays, with an index issue in September. In accordance with expressed legislative intent that the *State Register* be self-supporting, the subscription rate has been established at $130.00 per year, postpaid to points in the United States. Second class postage paid at St. Paul, Minnesota. Publication Number 326630. (ISSN 0146-7751) No refunds will be made in the event of subscription cancellation. Single issues may be obtained at $3.25 per copy.

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The *State Register* is the official publication of the State of Minnesota, containing executive orders of the governor, proposed and adopted rules of state agencies, and official notices to the public. Judicial notice shall be taken of material published in the *State Register*.

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NOTICE

How to Follow State Agency Rulemaking Action in the *State Register*

State agencies must publish notice of their rulemaking action in the *State Register*. If an agency seeks outside opinion before promulgating new rules or rule amendments, it must publish a NOTICE OF INTENT TO SOLICIT OUTSIDE OPINION. Such notices are published in the OFFICIAL NOTICES section. Proposed rules and adopted rules are published in separate sections of the magazine.

The PROPOSED RULES section contains:

- Calendar of Public Hearings on Proposed Rules.
- Proposed new rules (including Notice of Hearing and/or Notice of Intent to Adopt Rules without A Hearing).
- Proposed amendments to rules already in existence in the Minnesota Code of Agency Rules (MCAR).
- Proposed temporary rules.

The ADOPTED RULES section contains:

- Notice of adoption of new rules and rule amendments (those which were adopted without change from the proposed version previously published).
- Adopted amendments to new rules or rule amendments (changes made since the proposed version was published).
- Notice of adoption of temporary rules.
- Adopted amendments to temporary rules (changes made since the proposed version was published).

ALL ADOPTED RULES and ADOPTED AMENDMENTS TO EXISTING RULES published in the *State Register* and filed with the Secretary of State before September 15, 1982, are published in the *Minnesota Code of Agency Rules 1982 Reprint*. ADOPTED RULES and ADOPTED AMENDMENTS TO EXISTING RULES filed after September 15, 1982, will be included in a new publication, *Minnesota Rules*, scheduled for publication in late summer 1983. In the MCAR AMENDMENT AND ADDITIONS listing below, the rules published in the *MCAR 1982 Reprint* are identified with an asterisk. Proposed and adopted TEMPORARY RULES appear in the *State Register* but are not published in the *1982 Reprint* due to the short-term nature of their legal effectiveness.

The *State Register* publishes partial and cumulative listings of rule action in the MCAR AMENDMENTS AND ADDITIONS list on the following schedule:

Issues 1-13, inclusive
Issues 14-25, inclusive
Issue 26, cumulative for 1-26
Issue 27-38, inclusive
Issue 39, cumulative for 1-39
Issues 40-51, inclusive
Issue 52, cumulative for 1-52

The listings are arranged in the same order as the table of contents of the *MCAR 1982 Reprint*.

MCAR AMENDMENTS AND ADDITIONS

PROPOSED RULES

Pursuant to Minn. Laws of 1980, § 15.0412, subd. 4h, an agency may propose to adopt, amend, suspend or repeal rules without first holding a public hearing, as long as the agency determines that the rules will be noncontroversial in nature. The agency must first publish a notice of intent to adopt rules without a public hearing, together with the proposed rules, in the *State Register*. The notice must advise the public:

1. that they have 30 days in which to submit comment on the proposed rules;
2. that no public hearing will be held unless seven or more persons make a written request for a hearing within the 30-day comment period;
3. of the manner in which persons shall request a hearing on the proposed rules;

and

4. that the rule may be modified if modifications are supported by the data and views submitted.

If, during the 30-day comment period, seven or more persons submit to the agency a written request for a hearing of the proposed rules, the agency must proceed under the provisions of § 15.0412, subds. 4 through 4g, which state that if an agency decides to hold a public hearing, it must publish in the *State Register* a notice of its intent to do so. This notice must appear at least 30 days prior to the date set for the hearing, along with the full text of the proposed rules. (If the agency has followed the provisions of subd. 4h and has already published the proposed rules, a citation to the prior publication may be substituted for republication.)

Pursuant to Minn. Stat. § 15.0412, subd. 5, when a statute, federal law or court order to adopt, suspend or repeal a rule does not allow time for the usual rulemaking process, temporary rules may be proposed. Proposed temporary rules are published in the *State Register*, and for at least 20 days thereafter, interested persons may submit data and views in writing to the proposing agency.

Department of Revenue
Income Tax Division

Proposed Adoption of New and Amended Rules and the Repeal of a Rule of the Department of Revenue Relating to the Taxation of a Unitary Business and Formula Apportionment (13 MCAR §§ 1.6501 to 1.6503, 1.6004, Minnesota Income Tax Rule 2019 and Repealing Rule 2017(3))

Notice of Hearing

A public hearing concerning the adoption of the proposed new and amended rules and the repeal of a rule will be held in the 5th Floor Conference Room, Veterans Building, 20 West 12th Street and Columbus Avenue, St. Paul, Minnesota (south end of the Capitol Mall) on Friday, April 8, 1983, commencing at 9 a.m. The proposed new and amended rules and the repeal of a rule may be modified as a result of the hearing process. Therefore, if you are affected in any manner by the proposed rule changes, you are urged to participate in the rule hearing process.

Following the agency's presentation at the hearing, all interested (or affected) persons will have an opportunity to ask questions and make comments. Statements may be made orally and written material may be submitted. In addition, whether or not an appearance is made at the hearing, written statements or materials may be submitted to George Beck, Office of Administrative Hearings, 400 Summit Bank Building, 310 Fourth Avenue South, Minneapolis, Minnesota 55415, (612) 341-7601, either before the hearing or within five working days after the close of the hearing. The hearing examiner may, at the hearing, order that the record be kept open for a longer period not to exceed 20 calendar days. The rule hearing procedure is covered by Minn. Stat. §§ 14.01 to 14.20 and by 9 MCAR §§ 2.101-2.112 (Minnesota Code of Agency Rules). If you have any questions about the procedure, call or write the hearing examiner.

Twenty-five days prior to the hearing a statement of need and reasonableness will be available for review at the agency and at the Office of Administrative Hearings. This statement of need and reasonableness will include a summary of all the evidence which will be presented by the agency at the hearing justifying both the need for and the reasonableness of the proposed rule. Copies of this statement of need and reasonableness may be obtained from the Office of Administrative Hearings at a minimal charge.

The proposed new and amended rules and repealed rule (13 MCAR §§ 1.6501 to 1.6503, 1.6004 and Minnesota Income Tax Rules 2019 and 2017(3)) are summarized as follows:

1. 13 MCAR § 1.6501 defines a unitary business. The rule explains that examples of a unitary business are a horizontal or vertical business or one with strong centralized management. Other examples are also provided. The rule defines what common ownership is and also the term "United States."

2. 13 MCAR § 1.6502 provides the treatment of intercompany transfers within a unitary business.

3. 13 MCAR § 1.6503 provides many special rules on how a unitary business is to report to Minnesota. Specifically, the rule deals with 100 percent Minnesota corporations, farm income, charitable contributions, credits, minimum tax, banks, new acquisitions, different accounting periods and factors, and net operating loss.

4. Minnesota Income Tax Rule 2019 sets out how a business which conducts business partly within Minnesota apportions its net income. The property factor is changed to use original cost and rented property is valued at eight times the rental rate. Obsolete language is removed.

5. 13 MCAR § 1.6004 defines Minnesota gross income for individuals who are part-year residents or non-residents. The changes conform the rule to changes made regarding construction companies and farms.

6. Minnesota Income Tax Rule 2017(3) is repealed. The main part of this rule had required that construction companies use separate accounting. The rest of the rule either copies the statute or is obsolete.

The agency's authority to adopt the proposed new and amended rules and to repeal the existing rule is contained in Minn. Stat. § 290.52.

The agency estimates that there will be no cost to local public bodies in the state to implement the rule for the next two years immediately following its adoption within the meaning of Minn. Stat. § 14.11, subd. 1.

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 re-submission to the Attorney General.

Copies of the proposed rule are now available. Persons with questions about the rule or who desire a free copy of the rule should contact:

Mr. Dale H. Busacker
Attorney, Income Tax Division
Minnesota Department of Revenue
Centennial Office Building
St. Paul, Minnesota 55145
(612) 296-3439

Minn. Stat. chapter 10A requires each lobbyist to register with the State Ethical Practices Board within five days after he or she commences lobbying. A lobbyist is defined in Minn. Stat. § 10A.01, subd. 11 (1982) as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250, not including his own travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or

(b) Who spends more than $250, not including his own traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

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.

February 9, 1983

Arthur C. Roemer
Commissioner of Revenue

Rules as Proposed (all new material)

13 MCAR § 1.6501 Definition of unitary business.

A. Definitions. The term "corporation" does not include an S corporation. The term "United States" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any possession of the United States, or any political subdivision of any of the foregoing.

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike~~ ~~outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." ADOPTED RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike~~ ~~outs~~ indicate deletions from proposed rule language.

B. Unitary business defined. Business activities or operations carried on by more than one corporation are unitary in nature when the corporations are related through common ownership and when the trade or business activities of each of the corporations are of mutual benefit, dependent upon, or contributory to one another, individually or as a group. Unity is presumed whenever there is the unity of common ownership, the unity of operation evidenced generally by staff functions such as centralized advertising, accounting, financing, management, or centralized, group, or committee purchasing, and the unity of use evidenced generally by line functions, centralized executive force, and general system of operation. All of the examples are not needed to show the unity of operation or unity of use. The unitary nature of the business activities or operations is also evidenced by contributions to income resulting from functional integration, centralized management, and economies of scale. Examples of functional integration are centralized manufacturing, warehousing, accounting, legal staff, personnel training, financing, or centralized, group, or committee purchasing. Examples of centralized management are common officers or directors, exchange of personnel, frequent communication between management of the corporations, or where the parent must approve of major financial decisions. All of the examples are not needed to show functional integration or centralized management. The term "unitary business" for purposes of filing a combined report includes only those corporations created or organized in the United States or under the laws of the United States or any state. The mere ownership of as much as 100 percent of the stock of another corporation does not, in the absence of other indicia of a unitary business, mean that the business of the group is unitary in nature. The presence of any one of the factors contained in C.-E. below creates a strong presumption that the activities of the corporations constitute a unitary trade or business.

C. Horizontal type of business. Business activities or operations carried on by more than one corporation, related through common ownership, are generally unitary when the activities of the corporations are in the same general line of business and exhibit functional integration and economies of scale. For example, separately incorporated grocery stores, related through common ownership, will usually be engaged in a unitary trade or business if they are functionally integrated, and have centralized management and economies of scale.

D. Steps in a vertical process. Business activities or operations carried on by more than one corporation, related through common ownership, are unitary in nature when the various members are engaged in a vertically structured enterprise. For example, assuming that the common ownership requirement is met, a trade or business that is functionally integrated and which benefits from centralized management and controlled interaction which involves the exploration and mining of copper ore by one of the related corporations; the smelting and refining of the copper ore by another of the related corporations; and the fabrication of the refined copper into consumer products by another of the related corporations, is unitary in nature.

E. Strong centralized management. A group of corporations, related through common ownership, which might otherwise be considered to be carrying on separate trades or businesses are considered engaged in a unitary trade or business when there is strong centralized management in determining the policies of each corporation respecting its primary business activities, coupled with the existence of centralized offices for such functions as financing, advertising, research, or purchasing. Thus, some groups of corporations are considered as carrying on a unitary trade or business when the executive officers of one of the corporations in the group are normally involved in determining the policies respecting the primary business activities of the other corporations in the group, and there are centralized units which perform for some or all of the corporations functions which truly independent corporations would perform for themselves, such as accounting, personnel, insurance, legal, purchasing, advertising, or financing. A finding of "strong centralized management" is not supported merely by showing that the requisite ownership percentage exists or that there is incidental economic benefit accruing to a group because such ownership improves its financial position. Both elements of strong centralized management, that is strong centralized management authority and the exercise of that authority through centralized operations, must exist in order to justify a conclusion that the operations of otherwise seemingly separate trades or businesses are significantly integrated so as to constitute a unitary business.

F. Common ownership. Common ownership does not exist unless the corporation is one which is a member of a group of two or more corporations and more than 50 percent of the voting stock of each member is directly or indirectly owned by a common owner or by common owners, either corporate or noncorporate, or by one or more of the member corporations of the group. The term "common owner" includes the constructive ownership of stock by related taxpayers as provided in Minnesota Statutes, section 290.10, clause (6). Examples of common ownership are:

1. Corporation P owns 51 percent of the voting stock of corporation R1 and corporation R1 owns 51 percent of the voting stock of each of corporations R2 and R3. Common ownership exists among P, R1, R2, and R3.

2. Corporation P owns 51 percent of the voting stock of corporation R1, corporation R1 owns 49 percent of the voting stock of corporation R2 and corporation R2 owns 51 percent of the voting stock of R3. Common ownership exists among P and R1 and will be identified as group A. Common ownership exists among R2 and R3 and will be identified as group B. There is no common ownership between group A and group B.

G. Examples. The provisions of A.-F. may be illustrated by examples 1.-3.

1. Sales corporation owns 51 percent of the outstanding voting stock in each of four subsidiaries—refining corporation, drilling corporation, transport corporation, and research corporation. Sales corporation markets and sells petroleum products in the United States and abroad. Some of the petroleum products are obtained from refining corporation which acquires some of the crude oil from drilling corporation. Transport corporation operates pipeline facilities to transport crude oil from drilling corporation's storage facilities to refining corporation's refineries. Research corporation conducts research and development for both sales and refining corporations. Since the corporations are operating a vertically integrated business and since there is common ownership, the five corporations are conducting a unitary business.

2. Corporation A owns 60 percent of the outstanding voting stock in each of three corporations; B, C, and D. Corporation B, in turn, owns 100 percent of the outstanding voting stock in corporation E. Corporation A is primarily engaged in operating multiline department stores in Minnesota and other midwestern states. Corporation B operates a chain of department stores in the northwestern portion of the United States. B's stores sell only high quality, top grade consumer items. Corporation C operates a chain of discount stores throughout the southwestern portion of the United States. Corporation D is a finance company, handling all of the consumer credit and financing arrangements of purchases at the stores owned by corporations A, B, and C. Corporation E is the purchasing agent for corporations A, B, and C and maintains warehouses for the stores' inventories. Corporation.A provides management services for all of the other corporations and maintains overall control in determining the policies respecting the primary business activities of the other corporations, including their budgetary and financial affairs. All of these corporations are engaged in the conduct of a unitary business since they are operating a horizontally integrated business and since they have common ownership.

3. Corporation K was incorporated in 1945 and thereafter was engaged primarily in activities connected with the manufacture and sale of canned goods. In 1960, K embarked upon a diversification campaign designed to insulate its profits from fluctuations in the demand for canned goods. One hundred percent of the voting stock of corporation L was acquired. Corporation L operated a chain of department stores throughout the United States. In 1961, K purchased 80 percent of the voting stock of corporation M which was engaged primarily in the manufacture and sale of household goods. In 1962, K acquired 75 percent of the voting stock of corporation N which developed and marketed computer software and programs. There was no significant flow of goods between any of the corporations. While these subsidiaries were relatively autonomous in their day-to-day operations, each subsidiary did not operate as a distinct business enterprise at the level of full time management. Corporation K involved itself in policy determinations respecting the primary business activities of all the corporations. The subsidiaries were required to submit annual budgets to K for approval. Capital expenditures in excess of $500,000 needed approval from K. All of the financing arrangements for the subsidiaries were made by or with the approval of K's management team which authorized and directed intercompany loans when feasible. Tax matters were supervised by K's tax department which prepared the subsidiaries' federal income tax returns. Corporation K also performed centralized warehousing and accounting functions for itself and its subsidiaries. A uniform system of inventory control for corporation K and the subsidiaries was developed and managed by corporation N. Due to the control that corporation K exerted over policy determinations respecting the primary business activities of the subsidiaries and the integration and interdependence occasioned by the centralization of various business functions, all of the corporations are engaged in a unitary business.

13 MCAR § 1.6502 Intercompany transfers within unitary business.

Elimination of income, loss, expense, or deduction items arising from transactions between members of a unitary group must be made to avoid distortion of:

1. the group's income, loss, expenses, or deductions;
2. the denominator used by all members of the group in calculating apportionment factors; or
3. the numerator used by any particular member of the group in calculating its apportionment factors.

Where a corporation can show that no distortion of income, loss, expense, or deduction will result where intercompany transactions are not eliminated, a corporation may elect to not eliminate intercompany transactions for 1. only. All intercompany transactions must be eliminated when calculating the factors as provided in 2. and 3.

13 MCAR § 1.6503 Unitary business, reporting.

A. Minnesota business. A unitary business which conducts its entire business within Minnesota may file a combined report for each corporation. The income or loss must be allocated among the corporations on the report by use of the equally weighted

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arithmetic average of the property, payroll, and sales factors. Each corporation on the report is entitled to have its first $25,000 of income taxed at the lower tax rate as provided in Minnesota Statutes, section 290.06, subdivision 1. These provisions also apply to banks and bank holding companies.

B. Required if Minnesota nexus. Except as provided in this rule, a combined report is required from every corporation that has a nexus with Minnesota and is part of a unitary business as defined in 13 MCAR § 1.6501 other than insurance companies subject to the provisions of Minnesota Statutes, section 290.35, investment companies subject to the provisions of Minnesota Statutes, section 290.36, or mining companies as provided in Minnesota Statutes, section 290.05, subdivision 1.

C. Farm income. Farm income is specifically excluded from combined reporting. Therefore, a unitary business must exclude farm income when figuring its combined income or loss and assign that income or loss to the state in which the farm is located. Where a Minnesota farm is a part of a unitary farming business which is located within and without Minnesota, the product from the Minnesota farm which is transferred outside of Minnesota for use in the unitary farming business must be treated as if it was sold at fair market value on the day of the transfer. Expenses connected with the farm are allowed under separate accounting.

D. Deductions. A corporation is allowed a charitable deduction which is subtracted from that corporation's apportioned unitary business income as determined on that corporation's combined report. The charitable contribution deduction is only allowed to a corporation which has a nexus with Minnesota and is determined as follows. The corporation is allowed to deduct:

1. those contributions it makes to an entity carrying on substantially all of its activities in Minnesota; and

2. a percentage of the charitable contributions made by the entire unitary group after reduction for all contributions qualifying under 1. made by a corporation with a Minnesota nexus. The percentage to be used is the ratio of Minnesota taxable net income of the corporation to the total net income of the unitary group.

E. Credits. Any refundable or nonrefundable credits allowed on the Minnesota return are allowed only to a corporation that has a nexus with Minnesota and must be based on that corporation's expenditures. These credits must be taken into consideration after computing the income or loss of a unitary business on the combined report.

F. Minimum tax. The minimum tax liability must be determined by using 40 percent of the corporation's federal minimum tax liability as computed on its federal return, multiplied by a fraction the numerator of which is the taxpayer's preference item income allocated to this state and the denominator of which is the taxpayer's total preference item income for federal purposes. If the corporation filed a separate federal return the minimum tax must be based on that, or if a federal consolidated return was filed the minimum tax must be based on that to the extent all corporations on the consolidated return are also on the combined return.

G. Business acquisition. When a corporation acquires another corporation and starts a unitary business with that corporation, the new corporation must be included on the combined report and its income or loss reported starting with the first taxable year of the acquiring corporation that begins on or after the date of acquisition. Acquiring another corporation does not include creating the corporation from a part of a corporation's unitary business group as it previously existed.

H. Unitary banking business. When a bank, including a bank holding company, is part of a unitary business that is doing business within and without Minnesota, a combined report must be filed for that bank as part of the unitary business. Receipts from intangible personal property must be included in the sales factor as follows:

1. Interest and other receipts from assets in the nature of loans, including federal funds sold, and installment obligations must be attributed to the state where the office is located at which the customer applied for the loan except in cases where the loan is recognized by appropriate banking regulatory authority as being made from and as an asset of an office located in another state, in which case it must be attributed to the state where that office is located. For purposes of this paragraph the word "applied" means initial inquiry, including customer assistance in preparing the loan application, or submission of a completed loan application, whichever occurs first in time.

2. Interest or service charges from bank, travel, and entertainment credit card receivables and credit card holders' fees must be attributed to the state in which the credit card holder resides in the case of an individual or, if a corporation, to the state of the corporation's commercial domicile provided the taxpayer is taxable in that state. If the taxpayer is not taxable in the state of the individual card holder's residence or commercial domicile of the corporate card holder, the receipts must be attributed to the state of the taxpayer's commercial domicile.

3. Merchant discount income derived from bank and financial corporation credit card holder transactions with a merchant must be attributed to the state in which the merchant is located, provided the taxpayer is taxable in that state. If the taxpayer is not taxable in the state in which the merchant is located, the merchant discount income must be attributed to the state in which the taxpayer's commercial domicile is located.

4. Receipts from investments of a bank in securities must be attributed to its commercial domicile with the following two exceptions. Receipts from securities used to maintain reserves against deposits to meet federal and state reserve deposit

requirements must be attributed to each state based upon the ratio that total deposits in the state bear to total deposits everywhere. Receipts from securities owned by a bank but held by a state treasurer or other public official or pledged to secure public or trust funds deposited in such bank must be attributed to the banking office at which such secured deposit is maintained.

5. Receipts (fees or charges) from the issuance of travelers checks and money orders must be attributed to the state where the taxpayer's office is located that issued the travelers checks. If the travelers checks are issued by an independent representative or agent of the taxpayer, the following rules apply. If the taxpayer is taxable in the state in which the independent representative or agent issues the travelers checks or money orders, the receipts (fees or charges) must be attributed to that state. If the taxpayer is not taxable in the state in which the independent representative or agent issues the travelers checks or money orders, the receipts (fees or charges) must be attributed to the state of commercial domicile of the taxpayer.

6. Receipts from investments of a financial corporation must be attributed to its commercial domicile unless the securities have acquired a business situs elsewhere.

I. Accounting periods. Where members of the unitary group employ different accounting periods, the income must be reported on the combined report using one of the following methods. The income or loss and factors of all the corporations involved are those amounts for the same common months contained in the accounting period of the parent corporation, or the corporation filing the Minnesota return. If there is no parent corporation, the members of the unitary group may select one corporation to be the parent corporation for purposes of this part. Once a method is selected, it must not be changed without the consent of the commissioner. For the first taxable year beginning after June 30, 1981, income or loss and the factors attributable to a month or months which were previously reflected on the corporation's separate income tax return shall not be again reflected on the corporation's combined report. For the first taxable year beginning after June 30, 1981, if all the months are not included on a combined report or on a separate return, a separate return shall be filed reflecting the income or loss and factors for those months which are omitted. The due date of the return continues to be determined with reference to the actual accounting period of the corporation.

J. Net operating loss. The provisions of Minnesota Statutes, section 290.095, subdivision 3, clause (c) must be applied as if the corporation was not included on a combined report for that year when a corporation is included on a combined report for that year, and it is carrying over a net operating loss from a taxable year which began before July 1, 1981. This provision shall apply only if the corporation was a member of the unitary group prior to July 1, 1981.

K. Factors. Where members of a unitary business employ different methods of apportioning their income to Minnesota, the method used by the predominant business activity shall be used by all members of the unitary group.

Rules as Proposed.

2019 Apportionment of net income of business conducted partly within Minnesota.

(a) Applicability of Minnesota Statutes, section 290.19. The formulae prescribed by the provisions of Minnesota Statutes, section 290.19 shall be applied to the apportionable net income of a trade or business where the business carried on within this state is ~~an integral~~ a part of a unitary business carried on both within and without this state.

(b) Apportionment of net income under Minnesota Statutes, section 290.19, subdivision 1, clause (1). If the business consists of the manufacture ~~in Minnesota or within and without Minnesota~~ of personal property and sale of said property within and without Minnesota the formula shall be as follows:

(1) Under Minnesota Statutes, section 290.19, subdivision 1, clause (1)(a), (b), (c).

$$\frac{\text{Minn. Sales}}{\text{Total Sales}} + \frac{\text{Minn. Payroll}}{\text{Total Payroll}} + \frac{\text{Minn. Tangible Prop.}}{\text{Total Tangible Prop.}} \div 3 = \% \text{ to Minn.}$$

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Using hypothetical percentages we secure a percent to Minnesota thus:

	Within Minn.	Without Minn.	Total Percent
Sales	40%	60%	100%
Payroll	50%	50%	100%
Tangible Property	70%	30%	100%
Divide by Three	~~3/160%~~ 160%/3		
Percent to Minnesota	53-1/3%		

(2) Under Minnesota Statutes, section 290.19, subdivision 1, clause (1)(d). In the alternative the following formula may be employed if a lesser percentage to Minnesota results by its use:

$$70\% \frac{\text{Minn. Sales}}{\text{Total Sales}} + 15\% \text{ of } \frac{\text{Minn. Payroll}}{\text{Total Payroll}} + 15\% \text{ of } \frac{\text{Minn. Tang. Prop.}}{\text{Total Tang. Prop.}} = \% \text{ to Minn.}$$

An illustration of the weighing of the factors in the alternative formula as provided in Minnesota Statutes, section 290.19, subdivision 1, clause (1)(d) appears thus:

	Within Minn.	Weighted	Weighted Percentage
Sales	40%	70%	28.
Payroll	50%	15%	7.5
Tangible Property	70%	15%	10.5
Weighted averages percentage to Minnesota			46.0%

Since under the fact situation used in this illustration, the weighted average formula determines a lesser Minnesota percentage ratio, the ~~lesser~~ weighted ratio may be used.

(c) Apportionment of net income under Minnesota Statutes, section 290.19, subdivision 1, clause (2). If the business does not consist of the manufacture ~~within or within and without Minnesota~~ and ~~the~~ sale of personal property within and without the state, the taxable net income from such business shall be assigned to Minnesota on the basis of the percentage obtained by taking the arithmetic average of the three factors of (1) tangible property, (2) payroll, and (3) sales, gross earnings, or receipts, or on the basis of the percentage obtained by taking the weighted average of these three factors (15 percent of the Minnesota property percentage, 15 percent of the Minnesota payroll percentage, and 70 percent of the Minnesota sales, gross earnings, or receipts percentage), whichever is the lesser. The methods prescribed in this paragraph are presumed to properly reflect the taxable net income assignable to this state.

The single factor of sales, gross earnings, or receipts may be used only if (1) the use of the arithmetic average of the three factors or the use of the weighted average of those factors, whichever is the lesser, will not properly reflect the taxable net income assignable to this state, and (2) the use of the single factor of sales, gross earnings, or receipts will properly and fairly reflect such income.

The separate or segregated accounting method may be used only where the business carried on within this state is not ~~an integral~~ a part of a unitary business carried on both within and without this state. If this method is used, it is subject to the same limitations as those set forth in the preceding paragraph.

~~Those taxpayers who apportion a part of their income to Minnesota are required to complete Schedules T and U and attach them to their returns when filed.~~

(d) Definition of terms.

(1) Manufacture. Generally, the word "manufacture" is defined as the production of an article for use from raw or prepared materials by giving such materials new forms, qualities, or combinations, whether by hand labor or machine. Whether a taxpayer's business consists of manufacture of personal property is a question of fact to be determined in each individual case.

~~In order for a business to consist of the manufacture in Minnesota of personal property within the purview of Minnesota~~

~~Statutes, section 290.19, subdivision 1, clause (1), the operations of "manufacture" must occur within the geographical territory of this state.~~

(2) The property element of the apportionment formula considered above shall include land, buildings, machinery, and equipment, inventories, and other tangible personal property actually used by the taxpayer during the taxable year in ~~producing income subject to apportionment by formula~~ carrying on the business activities of the taxpayer. Tangible property ~~from which income is derived~~ which is to be separately allocated under Minnesota Statutes, sections 290.17 and 290.18 may not be considered as property includible in the apportionment factor. Cash on hand or in banks, shares of stock, notes, bonds, accounts receivable, or other evidences of indebtedness, special privileges, franchises, and good will, are specifically excluded from the property factor. The value of tangible property which is owned by the taxpayer and which is to be used in the apportionment fraction shall be the original cost ~~or other allowable income tax basis adjusted for allowable depreciation~~ adjusted for any subsequent capital additions or improvements and partial disposition by reason of sale, exchange, or abandonment. Property which is rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals. The valuations of property both within and without Minnesota shall be the averages during the year and must be on a commensurate basis. Rents paid during the year must not be averaged. The changes made in this paragraph concerning the property factor are effective for taxable years beginning after December 31, 1982. A person filing a combined report shall use this method of calculating the property factor for all members of the group.

(3) The payroll element of the apportionment formula considered above shall be the payrolls paid or incurred by the taxpayer for the taxable year under review and wages or salaries paid or incurred in Minnesota shall be determined to be paid or incurred in Minnesota provided the individual with respect to whom such wages or salaries are paid is either employed within this state or is actually engaged in work in the territorial confines of this state or, if working without this state, is identified with or accountable to an office within this state.

The wages or salaries paid to officers and employees working from Minnesota offices are considered as Minnesota payroll even though their employment requires them to spend working time without this state. Officers and employees whose employment requires them to work without the state entirely and who are assigned to an office without Minnesota, are not considered Minnesota employees for the purpose of apportionment even though their salaries are paid from the taxpayer's general offices in Minnesota.

~~(4) Sales assignable to this state shall include sales made within Minnesota and sales made through, from or by offices, agencies, branches or stores located within Minnesota. All sales shall be deemed allocable to Minnesota unless it can be shown to the satisfaction of the commissioner that such sales were negotiated or effected by agents of the taxpayer chiefly situated at, connected with, or sent out from premises for the transaction of business, owned or rented by the taxpayer or by his agents or agencies outside the state. Minnesota sales are not restricted to acts or activities that result immediately in a sales transaction, but include preliminary negotiations of a transaction which may later be completed either in Minnesota or outside of Minnesota, including interstate business.~~

~~(e) Allocation of federal income taxes paid. See regulation 2018 (1).~~

13 MCAR § 1.6004 Minnesota gross income for individuals who are part-year residents or nonresidents of Minnesota (Federal Adjusted Gross Income).

A. Gross income.

1.-2. [Unchanged.]

3. The following types of income received by a nonresident in Minnesota are to be included in that individual's Minnesota gross income and are assignable to Minnesota:

a.-c. [Unchanged.]

d. Business income or losses.

(1) [Unchanged.]

(2) Business conducted within Minnesota and which has a nexus within Minnesota so that the business is subject to Minnesota income tax would include income or losses from sales whose destination is within Minnesota and a business

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." ADOPTED RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

dealing in personal and professional services where such services were performed in this state. Trade or business income or loss assignable to Minnesota and earned by a nonresident individual as a proprietorship or partnership which was carried on partly within and partly without Minnesota is subject to the three-factor apportionment formula contained in Minnesota Statutes, section 290.19 or apportionment under Minnesota Statutes, section 290.20 ~~except for construction business on which the three-factor formula is not permitted. A nonresident individual who has farm income from within Minnesota and from outside of Minnesota may also use the apportionment formulas contained in Minnesota Statutes, sections 290.19 and 290.20~~, except for farm income or income from personal or professional services.

B.-H. [Unchanged.]

Repealer. Income tax rule 2017 (3) is repealed.

Effective date. The repeal of the last paragraph of income tax rule 2017 (3) relating to construction projects is effective for taxable years beginning after June 30, 1981.

ADOPTED RULES

The adoption of a rule becomes effective after the requirements of Minn. Stat. § 15.0412, subd. 4, have been met and five working days after the rule is published in the *State Register*, unless a later date is required by statutes or specified in the rule.

If an adopted rule is identical to its proposed form as previously published, a notice of adoption and a citation to its previous *State Register* publication will be printed.

If an adopted rule differs from its proposed form, language which has been deleted will be printed with strike outs and new language will be underlined, and the rule's previous *State Register* publication will be cited.

A temporary rule becomes effective upon the approval of the Attorney General as specified in Minn. Stat. § 15.0412, subd. 5. Notice of his decision will be published as soon as practicable, and the adopted temporary rule will be published in the manner provided for adopted rules under subd. 4.

Department of Health Minnesota Merit System

Adopted Amendments to Existing Rules Governing the Compensation Plan; Leaves of Absence and Inter-Agency Operations

The rules proposed and published at *State Register*, Volume 7, Number 15, pages 517-528, October 11, 1982 (7 S.R. 517) are adopted as proposed.

Department of Public Safety

Adopted Amendments of Existing Rules Governing the Compensation Plan; Leaves of Absence and Inter-Agency Operations

The rules proposed and published at *State Register*, Volume 7, Number 15, pages 528-536, October 11, 1982 (7 S.R. 528) are adopted as proposed.

Department of Public Welfare

Adopted Amendments to Existing Rules Governing the Compensation Plan; Leaves of Absence and Inter-Agency Operations

The rules proposed and published at *State Register*, Volume 7, Number 15, pages 536-561, October 11, 1982 (7 S.R. 536) are adopted as proposed.

TAX COURT

Pursuant to Minn. Stat. § 271.06, subd. 1, an appeal to the tax court may be taken from any official order of the Commissioner of Revenue regarding any tax, fee or assessment, or any matter concerning the tax laws listed in § 271.01, subd. 5, by an interested or affected person, by any political subdivision of the state, by the Attorney General in behalf of the state, or by any resident taxpayer of the state in behalf of the state in case the Attorney General, upon request, shall refuse to appeal. Decisions of the tax court are printed in the *State Register*, except in the case of appeals dealing with property valuation, assessment, or taxation for property tax purposes.

State of Minnesota
County of Clay

Tax Court
Regular Division

Leon A. and Muriel Simon,

Appellants,

v.

Commissioner of Revenue,

Appellee.

Docket No. 3549

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT AND MEMORANDUM

Order dated: February 10, 1983

This is an appeal from an Order of the Commissioner of Revenue dated December 28, 1981, revised March 29, 1982, relating to the income tax liability of the Appellants for the year 1978. The matter has been submitted to the Honorable John Knapp, Chief Judge of the Tax Court, on a Stipulation of Facts and written briefs.

Edward F. Klinger, attorney at law, appeared for Appellants. Paul R. Kempainen, Special Assistant Attorney General, appeared for Appellee.

From the Stipulation of Facts and the files and records herein, the Court makes the following:

Findings of Fact

1. The Appellants, Leon A. and Muriel Simon, are cash basis, calendar year taxpayers who were, during 1978 (the taxable year at issue herein), residents and domiciliaries of Minnesota for state income tax purposes.

2. During the taxable year 1978, the Appellant Leon Simon was a shareholder in Simon's Home Furnishings, Inc. (hereinafter, "Simon's, Inc."). Simon's, Inc. was a Nevada corporation doing business entirely within the State of Nevada. During the taxable year at issue herein, Simon's, Inc. also was an electing small business corporation for federal income purposes. At no time during the year in question was an election filed by Simon's, Inc. to be a small business corporation for Minnesota income tax purposes under section 290.972 of the Minnesota Statutes.

3. During the taxable year in question Simon's, Inc. incurred losses for federal income tax purposes, and on his Form K-1 the Appellant Leon Simon received his proportionate share of such losses from Simon's, Inc. in the amount of $77,898.00.

4. For the taxable year 1978, the loss from Simon's, Inc. was reported on the Appellant's federal income tax return in arriving at their federal adjusted gross income, and was carried over by Appellants to their 1978 Minnesota Income Tax Return for the purpose of arriving at their Minnesota gross income.

5. Upon examination of the Appellants' return by the Minnesota Department of Revenue an Audit Report of Individual Income Tax Changes was issued, adding back into Minnesota gross income the amount of the loss reported from Simon's, Inc. A proposed tax liability based upon said audit report was issued on November 20, 1981. From this proposal a written administrative protest was made by the Appellants on December 21, 1981. No resolution of the issues was arrived at and the Commissioner of Revenue issued his Order assessing additional income tax on March 29, 1982.

6. The Appellants have taken a timely appeal to this Court from the Commissioner's Order dated March 29, 1982.

Conclusion of Law

1. The Order of the Commissioner must be affirmed.

LET JUDGMENT BE ENTERED ACCORDINGLY. A STAY OF 15 DAYS IS HEREBY ORDERED.

February 10, 1983.

John Knapp, Chief Judge
Minnesota Tax Court

Memorandum

The issue in this case is the use by a Minnesota resident on his individual income tax return of losses incurred by a foreign

(Nevada) corporation in which he held stock ownership. The Nevada corporation was an electing small business corporation for federal income tax purposes. However, this Nevada corporation made no election for Minnesota income tax purposes.

Under Minnesota Law, the calculation of an individual income tax liability begins with federal adjusted gross income, but with certain modifications spelled out in Minnesota Statutes, section 290.01, subd. 20. The basic error of Appellant's argument is that they begin and end solely with reference to federal adjusted gross income, without ever taking into account the specific statutory modifications required by Minnesota Statutes, section 290.01, subd. 20, one of which expressly controls the facts in issue in this case.

Although Minnesota gross income is defined as federal adjusted gross income, the Minnesota Commissioner of Revenue may adjust a taxpayer's gross income based on his own investigation of the taxpayer notwithstanding the federal government's failure to make a similar adjustment. *Specktor, et al. vs. Commissioner of Revenue,* 308 N.W. 2d 806.

The Appellant contends that Simon's, Inc. did not make an election to be treated as a small business corporation for Minnesota income tax purposes because at the time the election had to be filed, August 1977, there was no reason to make such an election. At that time Minnesota Law did not allow a deduction of losses incurred by foreign small business corporations. On April 5, 1978, the Minnesota Legislature passed a law effective December 31, 1977, which allowed out-of-state losses in determining Minnesota taxable income. Laws of Minnesota for 1978, Chapter 767, Section 18, amends Minn. Stat. section 290.17, subd. 1, to read as follows:

290.17 GROSS INCOME, ALLOCATION TO STATE. Subdivision 1. INCOME OF RESIDENT INDIVIDUALS, ESTATES AND TRUSTS. (a) The gross income of individuals during the period of time when they are residents of Minnesota and the gross income of resident estates and trusts shall be their gross income as defined in section 290.01, subdivision 20.

(b) Deductions for losses incurred in connection with income derived from sources outside the state which is included in an individual's gross income pursuant to section 290.17, subdivision 1, may be taken only to the extent of the amount of income derived from sources outside the state in the taxable year during which the loss was incurred.

(c) Any deductions for losses which could not be taken in the three immediately preceding taxable years because of the provisions of clause (b), may be taken to reduce any net income derived from sources outside the state which remain after application of clause (b) for income earned and deductions for the current taxable year; provided, however, that any deductions allowable pursuant to this clause (c) may be taken only to the extent of the amount of net income remaining after the application of clause (b).

The Appellant contends that the foregoing amendment gave him the right to deduct the losses from the small business corporation. We cannot agree with that contention. The statute makes it clear that the losses may be deducted only as provided for in section 290.01, subd. 20(c) as applied to calendar year 1978 read as follows:

(c) Modifications affecting shareholders of electing small business corporations under section 1372 of the Internal Revenue Code of 1954, or section 290.972 of this chapter.

(1) Shareholders in a small business corporation, which has elected to be so taxed under the Internal Revenue Code of 1954, but has not made an election under section 290.972 of this chapter, shall deduct from federal adjusted gross income the amount of any imputed income from such corporation and shall add to federal adjusted gross income the amount of any loss claimed as a result of such stock ownership. Also there shall be added to federal adjusted gross income the amount of any distributions in cash or property made by said corporation to its shareholders during the taxable year.

The above statute is directly applicable to the facts of this case, and is dispositive of the issue herein. The Appellant, Leon Simon, was a shareholder in a foreign corporation which had elected to be taxed as a small business corporation under Section 1372 of the Internal Revenue Code, but had not made a similar election under Minn. Stat. § 290.972. Accordingly, Leon Simon was expressly required to add back into his federal adjusted gross income, for Minnesota tax purposes, the amount of his pro rata loss which he received from Simon's Inc. as a result of his stock ownership.

Under Minnesota Statutes as they existed in 1978, corporate losses such as the ones at issue herein, are to be treated in exactly the same manner as a loss by any other corporation, unless an election is properly made under Minnesota Statutes Section 290.972. Because there was no election by Simon's, Inc., its losses may not be passed through the individual shareholders. *Bernard M. Hilton v. Commissioner of Taxation,* Minnesota Tax Court Docket No. 1379, *Benny & Iola Peterson v. Commissioner of Revenue,* Minnesota Tax Court Docket No. 2668.

The Appellant contends that this Court should exercise equity jurisdiction to grant relief because failure to do so will lead to an inequitable result. Even if the Court were to agree that the result is inequitable the Tax Court is a creature of statute and has not been granted equity powers. The Court can grant equity relief only when such authority has been granted to the Commissioner and he has failed to exercise it. In the instant case the statute does not give the Commissioner equity powers so the Court is without jurisdiction to grant relief.

The statutes in effect for calendar year 1978 are so clear that the Court has no alternative but to affirm the Commissioner's Order. The statute has since been changed so that any corporation having a valid election in effect under Section 1372 of the Internal Revenue Code is no longer subject to taxes. Minnesota Statutes, section 290.9725. That change, however, was effective only for taxable years of corporations beginning after December 31, 1980.

Appellant's Reply Brief was filed December 13, 1982. Since that date, i.e. January 19, 1983, this Court has rendered a decision in *Arnold A. Carlson, Anna C. Carlson, Fred Fredrickson, D/B/A/ Laura-Lynn, Inc. v. Commissioner of Revenue*, Docket No. 3483, which also deals with losses sustained by a small business corporation, however, that case is distinguishable from the instant case. In Carlson the corporation was a domestic corporation and a bona fide attempt was made to comply with the statute requiring the filing of an election. In the instant case we have a foreign corporation and no election was filed.

J.K.

SUPREME COURT

Decisions Filed Friday, February 18, 1983

Compiled by Wayne Tschimperle, Clerk

C6-81-448 James D. Hubbard v. United Press International, Inc., *et al.*, Appellants. Hennepin County.

We recognize the separate and independent tort of intentional infliction of emotional distress, and thereby discard the "parasitic" theory which restricted recovery to cases involving contemporaneous physical injury or the allegation of malicious conduct sufficient to constitute an underlying tort.

Our recognition of this independent tort does not signal an appreciable expansion in the scope of conduct actionable under this theory of recovery.

Hubbard failed to satisfy his burden of production in his claim of intentional infliction of emotional distress, and the trial court erred in submitting that claim to the jury.

In a claim of discriminatory discharge in violation of the Minnesota Human Rights Act, the employee has the burden of proof throughout the proceedings, and carries the initial burden of production in establishing a prima facie case. The employer may rebut the plaintiff's prima facie showing by producing evidence of nondiscriminatory purpose. The employee then has an opportunity to prove that the employer's proffered reasons are a pretext for discrimination, and to otherwise meet its overall burden of persuasion.

Assuming, without deciding, that Hubbard made out a prima facie case of discriminatory discharge, it is clear that UPI met its burden of production in establishing legitimate, nondiscriminatory reasons for its actions and that Hubbard failed to rebut these reasons or to otherwise carry his overall burden of proof.

In a claim of retaliatory discharge under the Minnesota Human Rights Act, the three part procedure of shifting production burdens, set out in *McDonnell-Douglas* and applied to Human Rights Act claims generally, is applicable.

Although Hubbard established a prima facie case of retaliatory discharge, it is clear that UPI met its burden of production in establishing legitimate, nondiscriminatory reasons for its actions and that Hubbard failed to rebut these reasons or to otherwise carry his overall burden of proof.

Reversed. Amdahl, C. J.

C6-82-492 Kurt R. Nordby and Illinois Farmers Insurance Company v. Atlantic Mutual Insurance Company, Appellants. Hennepin County.

Where an insurance policy automobile liability endorsement was not ambiguous, and clearly stated that an executive driving his own automobile was not an insured, there was no personal coverage for such employee under the policy; coverage was provided only under a theory of vicarious liability.

Proration was properly denied where one policy provided coverage for the employee's own negligence and the other policy, clearly designated as excess insurance, provided vicarious liability coverage.

An insurer has no right of action against another insurer to recover the cost of defending the insured or the cost of bringing a declaratory judgment action, since there is no contractual obligation between insurers.

Affirmed in part and reversed in part. Amdahl, C. J.

C5-82-192 Truck Crane Service Co. v. Barr-Nelson, Inc., Appellant. Hennepin County.

Employee lacked apparent authority to sign a payment guarantee agreement on behalf of employer where employer had specifically denied liability, and there was no affirmative course of conduct by employer that would constitute holding out or knowingly permitting employee to contract for company.

Reversed and remanded. Amdahl, C. J.

C8-82-882 State of Minnesota, Appellant, v. Larry Michael Nelson. Ramsey County.

A defendant's willingness to succeed in treatment is a ground for a dispositional departure in the form of a stay of execution of sentence but is not a justification for a downward durational departure.

Remanded for resentencing. Amdahl, C. J.

C4-82-135 State of Minnesota v. Daniel H. Vazquez, Appellant. Hennepin County.

Evidence was sufficient to support conviction of criminal sexual conduct in the first degree.

Fact that accomplice received a more lenient sentence does not mandate reduction of defendant's sentence under the circumstances of this case.

Affirmed. Peterson, J. Conc. in part; dis. in part, Wahl, J. Took no part, Simonett, J.

C0-82-231 In Re the Marriage of: JoAnn Joy Smoot, petitioner, Appellant, v. John Patrick Smoot. Hennepin County.

The trial court did not abuse its discretion in its award of maintenance or its division of marital and nonmarital property. The case is remanded, however, for a re-evaluation of the maintenance award, in view of appellant's changed medical condition, which arose after entry of the judgment and decree.

The order finding appellant in willful contempt of court is valid.

Remanded. Peterson, J.

C0-82-441 State of Minnesota v. Robert A. Jones, Appellant. Hennepin County.

Defendant received a fair trial on the charge of criminal sexual conduct in the first degree, and evidence was sufficient to support the jury verdict finding him guilty of that charge.

Affirmed. Peterson, J.

C7-81-1043 State of Minnesota v. James Michael Patch, Appellant. Mower County.

Evidence was adequate to support convictions of kidnapping and criminal sexual conduct in the first degree.

Trial court was not biased against defendant and did not commit prejudicial error in denying a motion for a change of venue, in ordering defendant shackled, in refusing to submit the lesser offense of criminal sexual conduct in the third degree, and in refusing to instruct the jury on the defense of involuntary intoxication.

Pursuant to Minn. Stat. § 609.04 (1982), defendant's second conviction of kidnapping, based on the same act as the other kidnapping conviction, must be vacated.

Pursuant to Minn. Stat. § 609.035 (1982) and Minnesota Sentencing Guidelines and Commentary (1982), defendant's sentence for the kidnapping conviction is vacated and defendant's sentence for the sexual assault is reduced from 240 months to 140 months or two times the maximum presumptive sentence duration.

Affirmed in part; reversed in part. Yetka, J.

C4-82-572 State of Minnesota v. Arnold R. Williams, Appellant, Hennepin County.

Evidence was sufficient to support defendant's conviction of aggravated robbery, however, case is remanded for resentencing in light of *State v. Olson*, 325 N.W. 2d 13 (Minn. 1982).

Remanded for resentencing. Yetka, J.

C4-81-1145 State of Minnesota v. Michael Dean Dornack, Appellant. Ramsey County.

Evidence was sufficient to establish that sexual penetration was nonconsensual, and trial court did not err in excluding evidence concerning the victim's previous sexual conduct.

Affirmed. Wahl, J.

C2-81-1211 State of Minnesota v. Charles Patterson, Appellant. Hennepin County.

Defendant received a fair trial on charges of criminal sexual conduct and soliciting a person under age 16 to practice prostitution, and evidence was sufficient to support his convictions on those charges.

Affirmed. Wahl, J.

STATE CONTRACTS

Pursuant to the provisions of Minn. Stat. § 16.098, subd. 3, an agency must make reasonable effort to publicize the availability of any consultant services contract or professional and technical services contract which has an estimated cost of over $2,000.

Department of Administration procedures require that notice of any consultant services contract or professional and technical services contract which has an estimated cost of over $10,000 be printed in the *State Register*. These procedures also require that the following information be included in the notice: name of contact person, agency name and address, description of project and tasks, cost estimate, and final submission date of completed contract proposal.

Minnesota Housing Finance Agency

Cancellation of Bid Request for Installation of Meters in 48 Minnesota Homes

This is to notify that the Bid Request for Installation of Meters in 48 Minnesota Homes, published in the *State Register*, pp. 1179-1180, Monday, February 14, 1983 is being withdrawn in its entirety.

A modified bid request is being processed by the Procurement Division of the Minnesota Department of Administration. Please contact the Procurement Division (Information (612) 296-6152) for the modified bid request.

Department of Natural Resources

Notice of Request for Proposals to Operate Summer Work/Learn Camp

The Department of Natural Resources requests proposals to staff, manage and provide food for two residential and several non-residential Youth Conservation Corps (YCC) camps throughout the state. YCC is a work/learn program for high school aged youth.

A copy of the RFP may be obtained between February 28th and March 21st from John F. Grix, Office of Youth Programs, Centennial Office Building, Box 4, St. Paul, MN 55155. (612) 296-2144.

Proposals must be received by 2:00 p.m. on March 22, 1983. The approximate amount of funds available for this contract is $80,000.

OFFICIAL NOTICES

Pursuant to the provisions of Minn. Stat. § 15.0412, subd. 6, an agency, in preparing proposed rules, may seek information or opinion from sources outside the agency. Notices of intent to solicit outside opinion must be published in the *State Register* and all interested persons afforded the opportunity to submit data or views on the subject, either orally or in writing.

The *State Register* also publishes other official notices of state agencies, notices of meetings, and matters of public interest.

Department of Agriculture
Agronomy Services Division

Notice of Special Local Need (SLN) Registration for: "Copper Sulfate" EPA Registration Number 1278-5

Pursuant to Minnesota Statutes § 18A.23, and 3 MCAR § 1.0338 B., the Minnesota Department of Agriculture (MDA), on February 17, 1983, issued a Special Local Need (SLN) Registration for Copper Sulfate, manufactured by Phelps Dodge Refining Corporation, New York, New York 10022.

The Commissioner of Agriculture, based upon information in the application, has deemed it in the public interest to issue such a registration, and has deemed that the information in the application indicates that the pesticide does not have the potential for unreasonable adverse environmental effects.

In addition to the uses prescribed on the product label, this Special Local Need (SLN) Registration permits the use of this product in an aquatic environment to control snails and leeches.

The application and other data required under Minnesota Statutes §§ 18A.22, subdivision 2(a-d), 18A.23, and 40 CFR 162.150-162.158, subpart B., relative to this registration (identified as SLN No. MN83-0006) is on file for inspection at:

Minnesota Department of Agriculture
Agronomy Services Division
Pesticide Control Section
90 West Plato Boulevard
St. Paul, Minnesota 55107
Telephone: (612) 296-8547

A federal or state agency, a local unit of government, or any person or group of persons filing with the Commissioner a petition that contains the signatures and addresses of 500 or more individuals of legal voting age has thirty (30) days to file written objections with the Commissioner of Agriculture regarding the issuance of this Special Local Need Registration. Upon receipt of such objections and when it is deemed in the best interest of the environment or the health, welfare, and safety of the public, the Commissioner of Agriculture shall order a hearing pursuant to Minnesota Statutes, Chapter 15, for the purpose of revoking, amending, or upholding this registration.

February 17, 1983

Jim Nichols, Commissioner
Department of Agriculture

Department of Agriculture
Agronomy Services Division

Notice of Special Local Need (SLN) Registration for: "Overtime 25% Wettable Powder"

Pursuant to Minnesota Statutes § 18A.23, and 3 MCAR § 1.0338 B., the Minnesota Department of Agriculture (MDA), on February 14, 1983, issued a Special Local Need (SLN) Registration for "Overtime 25% Wettable Powder," manufactured by Philips Roxane, Inc., St. Joseph, Missouri.

The Commissioner of Agriculture, based upon information in the application, has deemed it in the public interest to issue such a registration, and has deemed that the information in the application indicates that the pesticide does not have the potential for unreasonable adverse environmental effects.

This Special Local Need (SLN) Registration permits the use of this product as a farm and kennel premise spray for control of house flies, stable flies or dog flies, and false stable flies or sand flies.

The application and other data required under Minnesota Statutes §§ 18A.22, subdivision 2(a-d), 18A.23, and 40 CFR 162.150-162.158, subpart B, relative to this registration (identified as SLN No. MN83-0004) is on file for inspection at:

Minnesota Department of Agriculture
Agronomy Services Division
Pesticide Control Section
90 West Plato Boulevard
Saint Paul, Minnesota 55107
Telephone: (612) 297-2530

A federal or state agency, a local unit of government, or any person or group of persons filing with the commissioner a petition that contains the signatures and addresses of 500 or more individuals of legal voting age has thirty (30) days to file written objections with the Commissioner of Agriculture regarding the issuance of this Special Local Need Registration. Upon receipt of such objections and when it is deemed in the best interest of the environment or the health, welfare, and safety of the public, the Commissioner of Agriculture shall order a hearing pursuant to Minnesota Statutes, chapter 15, for the purpose of revoking, amending, or upholding this registration.

February 14, 1983

James Nichols, Commissioner
Department of Agriculture

Department of Education
Instruction Division

Notice of Availability of Federal Funds for Adult Education

The Minnesota Department of Education announces the availability of funds to conduct Adult Education under Public Law 91-230, as amended.

The purpose of Public Law 91-230 is to expand educational opportunities for adults and to encourage the establishment of programs of adult education that will:

"(1) enable all adults to acquire basic skills necessary to function in society,

(2) enable adults who so desire to continue their education to at least the level of completion of secondary school, and

(3) to make available to adults the means to secure training that will enable them to become more employable, productive, and responsible citizens."

Applications for grants to carry out the purposes of this Act may be submitted by local educational agencies and by public or private non-profit agencies, organizations and institutions.

Application procedures and forms may be obtained after March 1, 1983, by writing to: Robert O. Gramstad, Supervisor, Community and Adult Education, State of Minnesota, 639 Capitol Square Building, 550 Cedar St., St. Paul, MN 55101.

All applications must be delivered to the Department of Education, Community Education Section on or before June 1, 1983.

Department of Education Instruction Division

Notice of Availability of Federal Funds for Adult Education Special Experimental Demonstration Projects and Teacher Training

The Minnesota Department of Education announces the availability of funds to conduct Special Experimental Demonstration Projects and Teacher Training under Section 310 of Public Law 91-230, whose purpose is to provide funds for:

"(1) Special projects which will be carried out in furtherance of the title and which:

(A) Involve the use of innovative methods, including methods of teaching persons of limited English speaking ability, systems, materials, or programs which may have national significance or be of special value in promoting effective programs under this title; or,

(B) Involve programs of adult education, including education of persons of limited English speaking ability, which are part of community school programs, carried out in cooperation with other federal, federally assisted, state, or local programs which have unusual promise in promoting a comprehensive or coordinated approach to the problems or people with educational deficiencies; and

(2) Training persons engaged, or preparing to engage, as personnel in programs designed to carry out the purpose of this title."

Applications for grants to carry out the purposes of this Act may be submitted by local education agencies and by public or private non-profit agencies, organizations and institutions.

Application procedures and forms may be obtained after March 1, 1983, by writing to: Robert O. Gramstad, Supervisor, Community and Adult Education, State of Minnesota, 639 Capitol Square Building, 550 Cedar St., St. Paul, MN 55101.

All applications must be delivered to the Department of Eduction, Community Education Section on or before June 1, 1983.

State Board of Education Department of Education Instruction Division

Notice of Public Hearings before Department of Education Staff on the Minnesota State Plan for Fiscal Years 1984 through 1986 for Meeting the Requirements of Public Law 94-142, the Education of All Handicapped Children Act (45 C.F.R. 300a.)

Three public hearings on the proposed Minnesota State Plan for Fiscal Years 1984 through 1986 will be conducted by Department of Education staff during the week of April 4-7, 1983. Each hearing will begin at 9:00 a.m. and continue until all parties have had ample opportunity to participate. The hearings will be held on the following dates:

(1) April 4, 1983: Mankato, MN

Mankato State University
Room 101 Centennial Student Union
Mankato, MN
(Parking in ramp lot #4 on the southside of the Student Union)

(2) April 5, 1983: St. Paul, MN

Sheraton-Midway Auditorium
Highway I 94 and Hamline Ave.
St. Paul, MN

(3) April 7, 1983: Grand Rapids, MN

Holiday Inn
Blandin Hall
Grand Rapids, MN

The State Plan is a grant application for Minnesota's P.L. 94-142 Education for All Handicapped Children Act entitlement funds. It outlines Minnesota's policies and procedures to insure that all eligible handicapped children and youth in Minnesota receive a free appropriate public education. The proposed State Plan is essentially similar to the current plan but has been reviewed and updated.

The State Plan may be modified as a result of the hearing process. Therefore, if you are affected by the activities included in the proposed State Plan, you are urged to participate in the hearing process. An interpreter for the hearing impaired will be present upon request.

Following the agency's brief overview of the plan, all interested persons will have an opportunity to ask questions and make comments. Statements may be made orally and written material may be submitted. In addition, whether or not an appearance is made at the hearing, written comments may be submitted through April 14, 1983 to Barbara S. Burke, State Department of Education, Instruction Division, Special Education Section, 550 Cedar Street, St. Paul, MN 55101.

Copies of the plan will be available upon request from the Special Education Section by March 14, 1983. Additional copies will be available at the hearings. If you have any questions on the content of the plan, contact Barbara Burke, (612) 296-8588.

State Board of Investment Investment Advisory Council

Notice of Regular Meetings

The State Board of Investment will meet on Wednesday, March 9, 1983 at 1:00 p.m. in the Conference Room, Veterans Service Building, 20 West 12th Street, Saint Paul.

The Investment Advisory Council will meet at 7:30 a.m. on Wednesday, March 9, 1983 in the MEA Building Conference Room, 41 Sherburne, Saint Paul.

Public Utilities Commission

Notice of Intent to Solicit Outside Opinion Concerning Intrastate Telephone Access Charges for Intrastate Toll Telecommunications

Notice is hereby given that the Minnesota Public Utilities Commission (the commission) is seeking information or opinions from sources outside the commission in preparation to promulgate rules governing the appropriate methods to determine the rates interexchange carriers (long-distance telephone companies) and end users (telephone customers) will pay for access to local telephone company facilities used to complete intrastate service offerings within the State of Minnesota.

The promulgation of these rules is authorized by Minnesota Statutes section 237.10, which requires the commission to prescribe uniform rules and classifications pertaining to the conduct of intrastate telephone business; and by Minnesota Statutes sections 237.06, 237.07, 237.081 and 237.12, under which the commission may inquire into the rates and regulations for service.

On December 23, 1982, the Federal Communications Commission (the FCC) adopted rules that will determine the rates long-distance telephone companies and telephone customers will pay for access to local telepyone company facilities used to complete interstate toll calls. The new FCC rules will become effective on January 1, 1984.

It now becomes the responsibility of state regulatory commissions to determine the rates interexchange carriers and telephone customers will pay for access to local telephone company facilities used to complete intrastate toll calls.

BACKGROUND

The Modified Final Judgement (MFJ) which settled the U.S. Department of Justice's antitrust suit against the American Telephone and Telegraph Company (AT&T) requires the use of interstate and intrastate access charges to recover the costs incurred by the local Bell Operating Companies (the BOCs) in providing local access to interstate and intrastate long distance telecommunications carriers.

The FCC's access charge plan establishes a method to recover the costs of the local telephone plant devoted to interstate access. In its plan, the FCC seeks to carefully balance four basic goals, namely: (1) the continued assurance of universal service; (2) the elimination of unjust discrimination or unlawful preferential rates; (3) the encouragement of network efficiency; and, (4) the prevention of uneconomic bypass.

The FCC's access charge plan provides for the recovery of both the traffic-sensitive and non-traffic-sensitive (NTS) telephone plant devoted to interstate service.

Interstate traffic-sensitive costs will be recovered from the interconnecting long-distance carriers and will not be collected directly from telephone customers. During a five-year transition period, interstate NTS costs will be recovered, in part, from each telephone customer and, in part, from each interexchange carrier. Each telephone customer will pay an increasing share of the interstate NTS costs in each succeeding year of the transition period. At the end of the five year period, each telephone customer will pay all of the interstate NTS costs directly.

In 1982, nationwide interstate NTS costs approached $8.4 billion. During the first year that the FCC's access charge plan is in place (1984), all telephone customers will be required to directly pay for half of the $8.4 billion through a $4.00 monthly access charge per customer line, whether or not they make long-distance telephone calls. This charge will be collected from telephone customers through a combination of flat and usage based charges. The discretion of local telephone companies in setting these charges is limited by two rules. First, there must be a minimum monthly flat rate charge of $2.00 per residential customer line and a $4.00 flat rate charge per business customer line. Second, the maximum charge that may be recovered from any individual customer may not exceed the local telephone company's rate for an equivalent dedicated interstate private line. Interstate NTS costs in excess of the amount covered by the $4.00 charge will be collected from the long distance companies in the form of "carrier's carrier" charges. Part of this carrier's carrier charge will also go into a "Universal Service Fund." The Universal Service Fund is designed to ensure the continued availability of quality telephone service in high cost and rural areas.

The FCC has set up the five-year transition period to gradually require telephone customers to pay the entire interstate NTS costs directly. Thus, after the fifth year of the plan, telephone customers will be paying the entire $8.4 billion of interstate NTS costs via a flat rate interstate access charge of approximately $7.75 per month.

In addition to paying for the interstate NTS costs through an interstate access charge, telephone customers may also have to pay for a portion or all of the intrastate NTS costs through an intrastate access charge or through an increase in their local service access charge. It is the goal of the commission in this proceeding to determine a method for calculating intrastate access charges to be collected by local telephone companies serving telephone customers in the State of Minnesota and also to determine who will pay the intrastate access charges (the long-distance companies, the telephone customer, or both).

The commission encourages telephone customers, telephone companies, interested state agencies, and any other interested or affected parties to comment on the appropriate method for recovering the intrastate NTS and traffic sensitive costs associated with the provision of intrastate long distance service. The commission has not formulated its final opinions on the matter. The attached Staff Discussion Paper is exactly that and should not be understood to reflect any commission decisions. The Staff Discussion Paper is provided to focus comments on specific issues and ideas that the Commission may wish to consider in developing its intrastate access charge plan.

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

Randall D. Young
Executive Secretary
Minnesota Public Utilities Commission
780 American Center Building
160 East Kellogg Boulevard
St. Paul, Minnesota 55101
Reference: Docket No. P-999/R-83-101

Oral statements will be received during the regular business hours by Karin F. Leonard over the telephone at (612) 296-8994 and in person at the above address.

All statements of information or comment shall be accepted until March 31, 1983. Any written material received by the Commission will become part of the record in the event that the rules are promulgated.

INTRASTATE ACCESS CHARGE PLAN
STAFF DISCUSSION PAPER

After an extensive proceeding in Docket 78-72, the Federal Communications Commission (the FCC) adopted an interstate access charge plan on December 23, 1983. State regulatory commissions are now faced with the task of developing an intrastate access charge plan and having it in place by January 1, 1984 in order to conform with the requirements of the Modified Final Judgement (MFJ). The MFJ, in Appendix B discusses the obligation of each divested Bell Operating Company (BOC) to provide non-discriminatory access to interexchange carriers on an unbundled, tariffed basis. The MFJ is only directed at the divested BOCs; it imposes no requirements on independent telephone companies. The FCC, however, contemplates that its interstate access charge plan will apply equally to the divested BOCs as well as independent telephone companies.

This means that within less than one year's time, each state regulatory commission must develop a detailed and complete mechanism for allocating, between users, the traffic-sensitive and non-traffic sensitive (NTS) costs of the local telephone plant devoted to the provision of intrastate access between the divested BOC Local Access and Transport Areas (LATAs) and within LATAs. Each state commission must also ensure that the tariffs, under which such costs are recovered, are established by local telephone carriers (BOCs and Independent telephone companies) according to the access charge plan adopted by each State commission.

It is reasonable to begin the development of an intrastate access charge plan by asking and addressing questions such as, what are the intrastate NTS costs of providing interexchange access, what objectives should an intrastate access charge plan achieve, how should the plan be structured, how it should be administered, which telephone companies should file access charge tariffs, and finally, who should pay what charges. The following questions and brief responses are intended only to generate discussion and comment. They should not be interpreted to be the position of the commission or its staff.

Questions to be Addressed:

1) What portion of the total NTS costs are recovered by the FCC's interstate access charge plan and what portion of the total NTS costs will be recovered through the Minnesota Commission's intrastate access charge plan?

The Minnesota commission finds that at this point in this proceeding there is not enough information available to determine the answer to this question. The commission, however, believes that a final decision in the current Joint Board separations proceeding in FCC Docket No. 80-286 may provide some answers.

2) What objectives should an intrastate access charge plan achieve?

First and foremost, an intrastate access charge plan should balance the goals of economic efficiency with customer equity. To address concerns regarding local exchange bypass on an intrastate-interLATA basis and on an intrastate-intraLATA basis, if the plan achieves economic efficiency by modeling cost causation as closely as possible it will most likely relegate the potential for local exchange bypass to future market conditions.

In addition to balancing economic efficiency and customer equity, an intrastate access charge plan must meet the requirements of the MFJ. That is, it must fulfill the equal access requirements imposed on the BOC's by the MFJ and it must account for the scope and operation of the Local Access and Transport Areas (LATAs).

Although it must fulfill the requirements of the MFJ, an intrastate access charge plan must also be flexible in allowing for unequal access arrangements and differing costs among local telephone companies.

Finally, an intrastate access charge plan must exercise firm control over access charges in order to minimize controversy between local carriers, interexchange carriers, and telephone customers.

3) How should an intrastate access charge plan be structured?

The answer to the question of how an intrastate access charge plan should be structured should begin with an examination of what types of access services exist today. The cost associated with each service could then be recovered through various function-specific rate categories.

Basically, there are three types of access services, namely, switched access (such as local telephone service), dedicated access (such as private line service), and ancilliary access (such as billing services).

An intrastate access charge plan should be structured such that the costs associated with the access services provided to interexchange carriers and telephone customers are recovered on an unbundled basis by rate category. In other words, the access charge plan should be structured such that exchange-related investments assigned to intrastate services are distributed

into several generic access pricing and cost allocation categories. The following rate category division may be reasonably applied to the switched and dedicated access services in an intrastate access charge plan:

a) Access Connections—These charges would be traffic-sensitive and would recover the costs associated with connecting the interexchange carriers' point of presence in the LATA or independent exchange to the serving wire center. This charge could be billed monthly and be based on average busy day/busy hour units of traffic capacity.

b) Local Transport—These charges would be traffic-sensitive and would recover the cost of transporting the intrastate, interexchange call from the switching center serving the interexchange carrier to the end office exchange switch. The charge could be usage and/or distance sensitive.

c) End Office Switching and Features—This charge would recover the costs of using office switching equipment to originate and terminate an interexchange carrier's traffic and to provide certain features.

d) End User Connections—This charge would be NTS and would recover the costs associated with the use of the Subscriber Plant between the End Office and the End User (customer) premises.

Ancilliary services are functions such as billing, message recording, directory assistance and testing. The costs of these services could be recovered through a recurring or non-recurring charge.

To subsidize high cost areas and possibly help telephone customers with the transition to paying access charges, it may be necessary to establish a Universal Service Fund on an intrastate basis. Interexchange carriers would be required to contribute to this fund.

4) How should an intrastate access charge plan be administered?

The Minnesota Public Utilities Commission will be responsible for the regulation of access charge tariffs that are submitted in compliance with the commission's intrastate access charge plan.

The question of who would administer an intrastate Universal Service Fund requires outside comment prior to a final commission decision.

5) Which telephone companies are legally required to file access charge tariffs?

All telephone companies serving telephone customers in the State of Minnesota will file access charge tariffs with the Minnesota Public Utilities Commission, but only the access charge tariff rates of all telephone companies organized as corporations and serving more than 2,500 telephone customers in the State of Minnesota will be regulated by the Minnesota Public Utilities Commission.

6) Who should pay what?

The interexchange carriers will most likely be required to directly pay the access connection charge, the local transport charge, and the end office switching and features charge.

Telephone customers may be required to pay all or a portion of the end user connection charge.

In conclusion, the commission staff realizes that many issues may not have been mentioned in this paper (such as what happens to Extended Area Service and Community Calling arrangements under an access charge system). Therefore, the reader of this paper is encouraged to provide additional comment on any issue that may have been neglected.

Errata

The Notice of Intent to Amend Rules without a Public Hearing which was published by the Securities and Real Estate Division of the Department of Commerce on February 14, 1983 at 7 S.R. 1170 should be amended to correct a typographical error in the third paragraph.

The first sentence of that paragraph should read: "Unless seven or more persons submit written requests for a public hearing on the proposed amendments within the 30-day comment period, a public hearing will not be held."

The 30-day comment period shall commence February 29, 1983.

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