

STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION

In the Matter of the Proposed
Permanent Rules Establishing a
Code of Conduct, Minn Rules Parts
7845.0100 to 7845.1000

STATEMENT OF NEED
AND REASONABLENESS

I. INTRODUCTION

The Minnesota Public Utilities Commission (Commission) proposes to adopt as permanent rules Minn. Rules pts. 7845.0100 to 7845.1000, rules establishing a Code of Conduct (Code) for Commissioners and Commission employees. The proposed Code is designed to preserve the integrity and independence of Commission decision making and to promote public confidence in Commission decisions.

The proposed rules were previously promulgated by the Commission as emergency rules. These emergency rules were effective October 10, 1986, and were published in the State Register as adopted on October 20, 1986 (11 S.R. 715). By publication of notice in the State Register on March 23, 1987 (11 S.R. 1743), the rules were continued in effect for an additional 180 days, until October 6, 1987, or until they are replaced by these permanent rules, whichever is earlier.

II. STATEMENT OF COMMISSION'S STATUTORY AUTHORITY

The Commission's statutory authority to adopt the rules is set forth in Minn. Stat. § 216A.037, subd. 3 (1986), which provides:

Except as limited by subdivision 1, 1/ the commission shall adopt rules prescribing a code of conduct for commissioners and employees of the commission. The code of conduct must include standards to preserve the quasi-judicial function of the commission.

Under this statute the Commission has the necessary statutory authority to adopt the proposed rules.

III. STATEMENT OF NEED

Minn. Stat. ch. 14 (1986) requires the Commission to make an affirmative presentation of facts establishing the need for and reasonableness of the rules as proposed. In general terms, this means that the Commission must set forth the reasons for its proposal, and the reasons must not be arbitrary or capricious. However, to the extent that need and reasonableness are separate, need has come to mean that a problem exists which requires administrative attention, and reasonableness means that the solution proposed by the Commission is appropriate. The need for the rules is discussed below.

The need for the proposed rules arises from the Commission's responsibility to protect the public interest through its regulatory activities and its role as a "quasi-judiciary" with respect to ascertaining facts or law and drawing conclusions from them in order to issue orders and directives governing the

1/ The reference in the statute to subdivision 1 concerns the Commission's authority to adopt rules prescribing permissible and impermissible ex parte communications. The Commission has adopted separate rules addressing ex parte communications, Minn. Rules pts. 7845.7000 to 7845.7600.

conduct of regulated persons or businesses. The Commission's "quasi-judicial" function consists of "the promulgation of all orders and directives of particular applicability governing the conduct of the regulated persons or businesses, together with the procedures inherently judicial." Minn. Stat. § 216A.02, subd. 4 (1986). Quasi-judicial action has been elsewhere described as ascertaining the facts or the law and drawing conclusions from them. Black's Law Dictionary, 4th ed. at 1411; United States v. Florida East Coast Railway, 410 U.S. 224, 245 (1973). In order for the Commission to properly carry out its responsibilities and role, it is essential that both the public and the regulated community have complete confidence in the integrity and independence of the Commissioners and the Commission staff.

In order for the public and the regulated community to have confidence in the integrity and independence of the Commission, it is essential that Commissioners and staff refrain from taking actions which would compromise such integrity and independence or which would create, in the minds of the public, the appearance of impropriety. The establishment of a code of conduct defining appropriate and inappropriate action is therefore needed to enhance public confidence in the Commission and its decision making process. Establishment of a code of conduct is also necessary for the Commission to carry out the mandate of Minn. Stat. § 216A.037, subd. 3 (1986). Therefore the proposed rules are needed.

IV. STATEMENT OF REASONABLENESS

The Commission is required by Minn. Stat. ch. 14 to make an affirmative presentation of facts establishing the reasonableness of the proposed rules. Reasonableness is the opposite of arbitrariness or capriciousness. It means that there is a rational basis for the Commission's proposed action. The reasonableness of the proposed rules is discussed below.

A. Reasonableness of the Rules as a Whole

The Commission approached the problem of establishing a code of conduct for itself by reviewing the various other codes of conduct that have previously been established for government officials and employees and for members of the judiciary. For example, the Commission reviewed the Minnesota Code of Judicial Conduct, the Minnesota Ethics in Government Act (Minn. Stat. ch. 10A), the Minnesota Code of Ethics for Employees in the Executive Branch (Minn. Stat. § 43A.38), and the Federal Standards of Ethical Conduct for Government Officers and Employees (Executive Order No. 11222, 30 Fed. Reg. 6469, May 8, 1965, hereinafter referred to as "Federal Standards"). After this review, the Commission determined which portions of these existing codes and standards had applicability to its own composition, functions, and responsibilities as they relate to the Commission's quasi-legislative and quasi-judicial roles. The proposed rules reflect many of these existing codes and standards, modified as necessary to fit the circumstances applicable to the Commission and its

staff. In addition, prior to formally proposing the rules, the Commission compared the proposed rules to the Code of Ethics for Governor's Appointees, which was established by Executive Order No. 87-4 on March 16, 1987 (11 S.R. 1694) (hereinafter referred to as the "Governor's Code of Ethics"). The Governor's Code of Ethics and the proposed rules are consistent with each other.

This approach to formulating the Code is reasonable because it draws on the past experiences of similar public bodies in drafting and implementing workable codes of conduct.

B. Reasonableness of Individual Rules

The following discussion addresses the specific provisions of the proposed rules.

Part 7845.0100, Definitions

Subparts 1, 2, and 3 of this part provide that the term "code" refers to the proposed rules (pts. 7845.0100 to 7845.1000); that "Commission" refers to the Minnesota Public Utilities Commission; and that "Commissioner" refers to a member of the Commission. These definitions serve to shorten terminology used elsewhere in the rules and are reasonable because they clarify these terms for the reader.

Subpart 4 of this part defines "employee" as the Executive Secretary of the Commission or a member of the Commission's professional, secretarial, or clerical staff. It is reasonable to define the term "employee" broadly because all employees of the Commission may at some point interact with the public or

regulated persons or may play a role in the Commission's decision making process.

Subpart 5 of this part incorporates the definition of "public utility" set forth in Minn. Stat. § 216B.02, subd. 4 (1986) and adds to that definition a "municipal utility or a cooperative electric association that produces or furnishes natural, manufactured, or mixed gas or electric services and its agents, officers, and representatives." It is reasonable to expand the definition of "public utility" for the purposes of these rules because, although these entities are not regulated by the Commission as to rates, they are subject to regulation by the Commission in its quasi-judicial capacity as to provision of service standards and service areas. See Minn. Stat. §§ 216B.17 and 216B.37 - 216B.46 (1986).

Subpart 6 of this part incorporates the definition of "telephone company" set forth in Minn. Stat. § 237.01 (1986) and adds to that definition an independent telephone company as defined in Minn. Stat. § 237.01, subd. 3 (1986); a radio common carrier as defined in Minn. Stat. § 237.01, subd. 4; and their agents, officers, and representatives. It is reasonable to expand the definition of "telephone company" for the purposes of these rules because independent telephone companies are regulated by the Commission as to standards and service practices. The Commission can also regulate their rates upon complaint or upon its own motion. Radio common carriers frequently appear before

the Commission in cases regarding interconnection with regulated telephone companies.

Subpart 7 of this part defines the term "party" as a person by or against whom a proceeding before the Commission is commenced or a person permitted to intervene in a proceeding before the Commission. The term is also defined to include a petitioner, complainant, intervenor, applicant, and respondent, and their attorneys, agents, or representatives. This definition is needed because the term is used elsewhere in the rules, (e.g., part 7845.0700, subp. 1). This definition is consistent with the Commission's rules of practice, Minn. Rules pt. 7830.0010, subp. 8 and with the Rules of the Office of Administrative Hearings, Minn. Rules pt. 1400.5100, subp. 7. This definition is reasonable because it provides clarity as well as consistency with other rules relating to the exercise of quasi-judicial functions.

Subpart 8 of this part defines the term "proceeding" as a formal or informal undertaking of the commission, on its own motion or otherwise, in which it seeks to resolve questions or issues raised in a complaint, in a petition, or during rulemaking. It is reasonable to define the term "proceeding" broadly because the Commission handles all of these matters on a regular basis, and ethical concerns can arise in all of them.

Part 7845.0200, Authority

Part 7845.0200 provides the statutory references to the

basis for the Code, Minn. Stat. §§ 216A.037 and 216A.05. This provision is reasonable because it alerts the reader to the legislative support for adoption of the proposed rules.

Part 7845.0300, Purpose and Construction

Part 7845.0300 provides that the purpose of the Code is to preserve the integrity and independence of Commission decision making and to promote public confidence in the objectivity of Commission decisions. This part also provides that Commissioners and employees should maintain high standards of conduct to prevent a conflict or the appearance of a conflict between private interests and official duties. Finally, this part provides that the Code must be construed to secure these objectives in keeping with the quasi-judicial function of the Commission.

The language of the proposed rule combines the ideas expressed in Section 101 of the Federal Standards and Canon 1 of the Minnesota Code of Judicial Conduct. Section 101 of the Federal Standards provides:

Where government is based on the consent of the governed, every citizen is entitled to have complete confidence and integrity of his government. Each individual officer, employee, or advisor of government must help to earn and must honor that trust by his own integrity and conduct in all official actions.

Canon 1 of the Minnesota Code of Judicial Conduct states:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the

integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

These statements are consistent with the high standards the Commission seeks to observe and reflect in the Code.

It is reasonable to include a general statement of the rule's purpose and construction in order to clarify to Commissioners, staff, and the general public the general objectives of the rules and the high standards of conduct which the Code establishes. The content of the statement is reasonable because it is consistent with the legislative mandate contained in Minn. Stat. § 216B.037, subd. 3 (1986) that the Commission adopt a code of conduct and that the code include standards to preserve the quasi-judicial function of the Commission.

Part 7845.0400, Conflict of Interest; Impropriety

Part 7845.0040, subp. 1, General behavior

Subpart 1 of this part provides that a Commissioner or employee shall respect and comply with the law and shall behave in a manner that promotes public confidence in the integrity and impartiality of the Commission's decision making process. The language of this rule is similar to Canon 2.A. of the Minnesota Code of Judicial Conduct, which provides:

A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

This rule is reasonable because it states common-sense principles

for conduct which are no more stringent than that which the public should be able to expect from persons who are charged with the protection of the public interest.

Part 7845.0400, subp. 2, Actions prohibited

Subpart 2 of this part provides that Commissioners and employees shall avoid any action that might result in or create a conflict of interest or the appearance of impropriety, including using public office for private gain; giving preferential treatment to an interested party or entity; impeding the efficiency or economy of Commission decision making; losing independence or impartiality of action; making a commission decision outside official channels; and affecting adversely the confidence of the public in the integrity of the commission.

The language of the proposed rule is similar to the language of Section 201(c) of the Federal Standards, which states:

It is the intent of this section that employees avoid any action, whether or not specifically prohibited by subsection (a), which might result in, or create the appearance of --

- (1) using public office for private gain;
- (2) giving preferential treatment to any organization or person;
- (3) impeding government efficiency or economy;
- (4) losing complete independence or impartiality of action;
- (5) making a government decision outside official channels; or
- (6) affecting adversely the confidence of the

public in the integrity of the Government.

The proposed rule is also consistent with the Minnesota Code of Ethics for Employees in the Executive Branch, Minn. Stat.

§ 43A.38, subds. 5(a) and 6(a). These statutes set forth actions which are deemed to be conflicts of interest. Minn. Stat.

§ 43A.38, subd. 5(a) deems the following a conflict of interest:

use or attempted use of the employee's official position to secure benefits, privileges, exemptions or advantages for the employee or the employee's immediate family or an organization with which the employee is associated which are different from those available to the general public.

Minn. Stat. § 43A.38, subd. 6(a) deems "the use for private gain or advantage of state time, facilities, equipment or supplies or badge, uniform, prestige or influence of state office or employment" a conflict of interest.

The proposed rule is consistent with that portion of the Governor's Code of Ethics which provides:

That my appointees shall not use or attempt to use their official position to secure benefits, privileges, exemptions, or advantages for the official or the official's immediate family or an organization with which the official is associated which are different from those available to the general public.

The language of the proposed rule is reasonable because it requires Commissioners and staff to avoid actions which a reasonable person would perceive to result in, or give the appearance of, compromising the integrity or independence of the Commission and its staff.

Part 7845.0500, Inappropriate Influences

Part 7845.0500, subp. 1, Inappropriate influences

Subpart 1 of this part provides that Commissioners shall not be swayed by partisan interests, public clamor, or fear of criticism. The language of this rule is similar to Canon 3.A(1) of the Minnesota Code of Judicial Conduct, which provides:

A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

The proposed rule is reasonable because Commissioners exercise functions which are similar to those performed by a judge and should therefore be subject to the same code of conduct with respect to the avoidance of improper influences on the conduct of proceedings or the making of decisions.

Part 7845.0500, subp. 2, Orderly proceedings, behavior

Subpart 2 of this part requires Commissioners to maintain order and decorum in proceedings before the Commission. It requires Commissioners in their official capacity to be patient, dignified, and courteous to litigants, witnesses, lawyers, commission staff, and others appearing before them. Finally, it requires Commissioners to require similar conduct from persons appearing before them.

The language of this rule is similar to Canon 3.A(3) of the Minnesota Code of Judicial Conduct, which provides:

A judge should be patient, dignified, and courteous to

litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to this direction and control.

The proposed rule is reasonable because decorous and orderly conduct of proceedings engenders respect and public confidence in any public proceeding and is especially appropriate in a quasi-judicial setting. It is reasonable to hold Commissioners to the same standards of decorum that judges have set for themselves.

Part 7845.0600, Disqualification

Part 7845.0600, subp. 1, Disqualifying factors

Subpart 1 of this part requires Commissioners and employees to disqualify themselves if they have a personal bias or prejudice concerning a party; or, before employment with the Commission, served or participated as a lawyer or material witness in the pending proceeding; or have an interest, other than that of the general public, that could be substantially affected by the outcome of the proceeding.

The language of the proposed rule is similar to the language of Canon 3.C(1)(a) through (c) of the Minnesota Code of Judicial Conduct, which provides:

A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as a lawyer in the matter in

controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

Subpart 1 of the proposed rule is reasonable because the Commissioners exercise functions which are similar to those exercised by a judge and should therefore be subject to the same code of conduct with respect to disqualifying themselves in matters where their impartiality could be affected by a personal bias, previous activity, or a financial interest.

Part 7845.0600, subp. 2, Written disclosure;
withdrawal

Subpart 2 of this part requires a Commissioner or employee to disclose in writing within 48 hours to the Commission the disqualifying interest and to withdraw, taking no part in the pending proceeding. Subpart 2 is more stringent than Canon 3.D. of the Minnesota Code of Judicial Conduct, which provides:

A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

The reason that the proposed rule is more stringent than this Canon relates to the fact that there are five Commissioners and more than one Commission employee involved in any Commission proceeding, as opposed to one judge involved in most court proceedings. Disqualification of a judge in a court proceeding causes greater hardship to the court than does disqualification of one of the five Commissioners or one of the Commission employees in a Commission proceeding.

The proposed rule is reasonable because the immediate withdrawal of a Commissioner or employee from a matter involving a disqualifying interest will contribute to the public's confidence in the integrity and independence of the Commission.

Part 7845.0700, Prohibited Activities

Part 7845.0700, subp. 1, In general; exceptions

Subpart 1 of this part prohibits a Commissioner or employee from directly or indirectly soliciting or accepting for the Commissioner or employee, or for another person, any compensation, gift, gratuity, favor, entertainment, meal, beverage, loan, or other thing of monetary value from a public utility, telephone company, or party that exceeds nominal value. This prohibition does not apply to books or printed material or to an educational program devoted to improving the regulatory process or the administration of the Commission that is open to other interested groups or state agencies under the same terms and conditions. Meals associated with the program must be paid for by a

Commissioner or employee who attends the program.

The language of the proposed rule is consistent with the Minnesota Code of Ethics for Employees in the Executive Branch, Minn. Stat. § 43A.38, subd. 2 (1986), which provides:

Employees in the executive branch in the course of or in relation to their official duties shall not directly or indirectly receive or agree to receive any payment of expense, compensation, gift, reward, gratuity, favor, service or promise of future employment or other future benefit from any source, except by the state for any activity related to the duties of the employee unless otherwise provided by law. However, the acceptance of any of the following shall not be a violation of this subdivision:

(a) Gifts of nominal value or gifts or textbooks which may be accepted pursuant to section 15.43.

(b) Plaques or similar mementos recognizing individual service in a field of specialty or to a charitable cause.

(c) Payment of reimbursement expenses for travel or meals, not to exceed actual expenses incurred, which are not reimbursed by the state and which have been approved in advance by the appointing authority as part of the work assignment.

(d) Honoraria or expenses paid for papers, talks, demonstrations or appearances made by employees on their own time for which they are not compensated by the state.

The proposed rule is consistent with that portion of the Governor's Code of Ethics which provides:

Gubernatorial appointees in the executive branch in the course of or in relation to their official duties shall not, directly or indirectly, receive or agree to receive any payment of expense, compensation, gift, reward, gratuity, favor, service or promise of future employment or other future benefit from any source for any activity related to the duties of the official, with the exception of:

- (a) Gifts of nominal or symbolic value;
- (b) Plaques or similar mementos recognizing individual services;
- (c) Payment of reimbursement expenses for travel or meals, not to exceed actual expenses incurred, which are not reimbursed by the state;
- (d) Honoraria or expense paid for papers, talks, demonstrations or appearances made by officials on their own time for which they are not compensated by the state.

The language of the proposed rule represents an adaptation of Section 201(a) of the Federal Standards and Canon 5.C(4) of the Minnesota Code of Judicial Conduct to the Commission's circumstances. Section 201(a) of the Federal Standards provides:

Except in accordance with regulations issued pursuant to subsection (b) of this section, no employee shall solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from any person, corporation, or group which --

- (1) has, or is seeking to obtain, contractual or other business or financial relationships with his agency;
- (2) conducts operations or activities which are regulated by his agency; or
- (3) has interests which may be substantially affected by the performance or nonperformance of his official duty.

Agency heads are authorized by subsection (b) of this section to adopt regulations providing such exceptions to the above prohibition "as may be necessary and appropriate in view of the nature of their agency's work and the duties and responsibilities of their employees." Examples of such exceptions are given in subsection

(b), such as "permitting acceptance of food and refreshments available in the ordinary course of a luncheon or dinner or other meeting or on inspection tours where an employee may properly be in attendance."

Canon 5.C.(4) of the Minnesota Code of Judicial Conduct provides:

Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to attend a bar-related function or activity devoted to the improvement of the law, the legal system, judicial administration, or the administration of justice;

(b) a judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interest have come or are likely to come before him, and, if its value exceeds \$100, the judge reports it in the same manner as he reports compensation in Canon 6C.

The proposed rule bans the acceptance of everything from a public utility, telephone company, or party except items of "nominal value," books or printed material relevant to the

official responsibilities of the Commission, 2/ and appropriate educational programs. The establishment of a ban, with limited exceptions, is reasonable because the acceptance of gifts by a person exercising regulatory and quasi-judicial functions from an entity regulated by that person or from a party does create the appearance of impropriety or impartiality. The proposed rule does not impose an unreasonable hardship upon Commissioners and staff because the pool of persons and entities from whom the acceptance of gifts, etc., is prohibited is relatively small and well-defined, in contrast to the situation faced by a judge, who could potentially preside over persons and entities of all descriptions.

The creation of limited exceptions to the ban is also reasonable because the items listed are not the kind of items that most people would believe would cause a Commissioner or employee to be unduly swayed in favor of the donor. For example, the views and opinions of most people would not be swayed toward a person who provided them with a cup of coffee or a doughnut. In addition, the exception concerning books and printed material relevant to the official responsibilities of the Commission is reasonable because the receipt of this type of information is designed to improve the decision-making process by helping

2/ Receipt of books and printed material which constitute prohibited ex parte communications is governed by a separate rule, Minn. Rules pt. 7845.7200.

Commissioners and staff to be better informed. The proposed rule properly draws the line between improper influence and the openness needed to encouraged informed decision-making.

Part 7845.0700, subp. 2, Outside income

Subpart 2 of this part provides that a Commissioner or professional employee shall not receive personal income, directly or indirectly, from a public utility or telephone company subject to regulation by the Commission. The rule provides that a Commissioner or professional employee may receive dividends or other earnings from a mutual fund or trust so long as the mutual fund or trust does not hold a significant portion of its investments in public utilities or telephone companies subject to regulation by the Commission.

The requirements of Subpart 2 reflect the statutory requirement of Minn. Stat. § 216A.035(a) (1986), which provides:

No person, while a member of the public utilities commission, while acting as executive secretary of the commission, or while employed in a professional capacity by the commission, shall receive any income, other than dividends or other earnings from a mutual fund or trust if these earnings do not constitute a significant portion of the person's income, directly or indirectly from any public utility or other organization subject to regulation by the commission.

The proposed rule interprets the statutory reference to "income" as meaning "personal income," which does not include income received by a spouse or other person in the Commissioner's or employee's household. This interpretation was proposed following review of all of the codes of conduct and ethics referenced at

page 4, supra. Under these codes, income or compensation is viewed narrowly so as to apply only to the income or compensation received by the person to whom the code applies. For example, Canon 6.C. of the Minnesota Code of Judicial Conduct provides:

A judge should report the date, place and nature of any activity for which he received compensation, and the name of the payor and the amount of compensation so received. . . . Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge.

Similarly, the Minnesota Ethics in Government Act does not require a public official to report income or compensation received by a spouse. See Minn. Stat. § 10A.09 (1986). One of the reasons that income or compensation received by a spouse is not considered may be the potential effect such a requirement may have on employment opportunities of the spouse. Considering the income or compensation to the spouse very likely runs counter to the Minnesota Human Rights Act, Minn. Stat. § 363.03 (1986), which prohibits employment discrimination on the basis of marital status.

The proposed rule's interpretation of the statutory requirements of Minn. Stat. § 216A.035(a) (1986) is reasonable because it is consistent with other similar codes of conduct and for the further reason that it would be unfair to put a spouse or household member in the position of being required to resign from or refuse employment with a public utility or telephone company whenever a person accepts a position as a Commissioner or

professional employee of the Commission.

The provision of the proposed rule which allows a Commissioner or professional employee to receive dividends or other earnings from a mutual fund or trust interprets Minn. Stat. § 216A.035(a) (1986). The statute allows a Commissioner to receive earnings so long as the earnings do not constitute "a significant portion of the person's income." The Commission finds an ambiguity in the statute: it is unclear whether the statute is designed to limit the earnings from a mutual fund or trust to any individual or to limit the source of the mutual fund's or trust's earnings. The Commission believes that the legislature intends to foster impartiality and fairness in the regulatory process by prohibiting earnings from a mutual fund or trust when a significant portion of the fund's earnings, and thus the employee's earnings from the fund, comes directly or indirectly from any public utility or other organization subject to regulation by the Commission.

The proposed interpretation of the statute is reasonable for several reasons. First, because a mutual fund or trust could have no investment or a very small investment in a regulated organization and yet provide the Commissioner or professional employee with a significant portion of his or her income. The latter situation cannot reasonably be perceived to foster partiality or bias or the appearance of either on the part of the Commissioner or professional employee. On the other hand, if a

Commissioner or employee invested in a the mutual fund or trust which received a significant portion of its income as a result of holdings in regulated entities, that investment could become an indirect means for a Commissioner to benefit from decisions over which he or she would have influence and still avoid the direct prohibition. The proposed rule avoids this result.

Second, if the fund or trust has minimal holdings in such stock or no holdings at the time of the investment, the Commissioner or professional employee should be able to invest with a good conscience. It would be unfairly burdensome to require a Commissioner or professional employee to move investments in and out of a fund or trust because of the occasional utility investment by that fund or trust. Further, since most people investing in a mutual fund or trust do so passively (after the initial determination to invest at all), the Commission finds that it would be unfair to require Commissioners or professional employees to scrutinize or monitor every turnover of the fund.

The proposed rule reflects the Commission's interpretation of the intent of the statute by restricting Commissioners and professional employees from receiving income from mutual funds or trusts where the mutual fund or trust holds a significant portion of its investments in public utilities or telephone companies subject to regulation by the Commission. This imposes a duty on Commissioners and professional employees to review and evaluate

the investments of mutual funds and trusts to determine the degree of utility investment. This is reasonable because a person can readily determine if a mutual fund or trust has invested a significant amount in utility or other regulated entity stock by examining the mutual fund's or trust's periodic reports. Once this initial determination has been made, a Commissioner or professional employee can make a reasoned, principled investment decision. If a significant portion of the earnings come from a public utility or other organization regulated by the Commission, the Commissioner or professional employee is prohibited from investing in the fund or trust. Therefore the proposed rule relating to investments in mutual funds or trusts is reasonable.

Part 7845.0700, subp. 3, Interests in utilities

Subpart 3 of this part provides that a Commissioner or professional employee shall not invest in a public utility or telephone company, acquire a legal or equitable interest in it, however small, become its director or advisor, or actively participate in its affairs. This prohibition does not apply to ownership in a mutual fund or trust fund that holds securities in a telephone company or public utility unless the Commissioner or professional employee participates in the management of the fund; or to holding office or title in an educational, religious, charitable, fraternal, or civic organization that owns securities in a telephone company or public utility; or to purchasing

services from a telephone company or public utility on the same terms and conditions as a member of the general public; or to holding membership in a cooperative association under the same terms and conditions as other members of the cooperative.

The proposed rule imposes requirements similar to the requirements of Canon 4.C(1) through (3) of the Minnesota Code of Judicial Ethics and Section 203 of the Federal Standards. Canon 4.C(1) through (3) of the Minnesota Code of Judicial Ethics states:

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as an officer, director, manager, advisor, or employee of any business.

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.

Section 203 of the Federal Standards provides:

Employees may not (a) have direct or indirect financial interests that conflict substantially, or appear to conflict substantially, with their responsibilities and duties as Federal employees, or (b) engage in, directly or indirectly, financial transactions as a result of, or primarily relying upon, information obtained through their employment. Aside from these restrictions, employees are free to engage in lawful financial

transactions to the same extent as private citizens. Agencies may, however, further restrict such transactions in the light of the special circumstances of their individual missions.

The proposed rule is reasonable because it restricts activities that would be likely to impair the impartiality of Commissioners and professional employees but contains exceptions for those types of activities which a reasonable person would not perceive to create a conflict of interest. The reasonableness of the exceptions is discussed below.

The exemption provided in subp. 3.A. relates to "ownership in a mutual fund or trust that holds securities in a telephone company unless the Commissioner or professional employee participates in the management of the fund." This exemption bears a relationship to proposed Minn. Rules pt. 7845.0700, subp. 2, which restricts Commissioners and professional employees from receiving income from mutual funds where the mutual fund or trust holds "a significant portion of its investments in public utilities or telephone companies subject to regulation by the Commission." The statute and proposed part 7845.0700, subp. 2 allow for some limited investment in mutual funds with public utility or telephone company holdings. The proposed exemption of subp. 3.A. is reasonable because it is consistent with Minn. Rules pt. 7845.0700, subp. 2 allowing some limited investments, so long as the Commissioner or professional employee with the investment does not play a managerial role with respect to the

fund.

The exemption provided in subp. 3.B. relates to "holding office or title in an educational, religious, charitable, fraternal, or civic organization that owns securities in a telephone company or public utility." This exemption is reasonable because, presumably, one would hold office or title in these organizations due the interest in the purpose of the organization rather than the investments of the organization. The income from the investments would belong to the organization rather than to the office or title holder. This exemption is reasonable for the further reason that, without it, a Commissioner or professional employee would be subject to the unusual and burdensome requirement to investigate, in detail, every investment of every religious and community organization in which he or she participates and to withdraw from those who hold the "wrong" investments, however small those investments may be. Finally, the Commission does not wish to discourage participation in worthwhile activities that benefit the public or to force the organizations to forego making beneficial investments as a result of participation by a Commissioner or Commission employee as an officer or title holder.

The exemptions provided in subps. 3.C. and 3.D. relate to "purchasing services from a telephone company or public utility on the same terms and conditions as a member of the general public" and "holding membership in a cooperative association

under the same terms and conditions as other members of the cooperative." These exemptions are reasonable because, without these exemptions, Commissioners and professional employees would be unable to obtain telephone and utility service. Such a restriction would probably result in people being unwilling to serve as either Commissioners or employees of the Commission. The exemptions are reasonable for the further reason that these exemptions are unlikely to be perceived as creating a condition that would compromise the integrity or independence of the Commission. In addition, the language of the proposed rule prevents utilities from offering Commissioners and professional employees a gift of free or lower-cost service, the acceptance of which would create a conflict of interest.

Part 7845.0700, subp. 4, Outside employment

Subpart 4 of this part provides that a Commissioner or employee shall not negotiate for or accept outside employment or other involvement in a business or activity that will impair the person's independence of judgment in the exercise of official duties.

The proposed rule is consistent with, but more restrictive than, the statutory prohibition set forth in Minn. Stat.

§ 216A.036(a), which provides:

A person who serves as (1) a commissioner of the public utilities commission, (2) director of the department of public service, or (3) deputy director of the department, shall not, while employed with or within one year after leaving the commission, or department,

accept employment with, receive compensation directly or indirectly from, or enter into a contractual relationship with an entity, or an affiliated company of an entity, that is subject to rate regulation by the commission.

The proposed rule is more stringent than the statute because it applies to all outside employment that will impair the person's independence of judgment, not just organizations subject to rate regulation and their affiliates. However, the proposed rule is consistent with Minn. Stat. § 43A.38, subd. 5 (b) (1986), which provides that the "acceptance of other employment or contractual relationship that will affect the employee's independence of judgment in the exercise of official duties" is deemed a conflict of interest which could lead to disciplinary action. It is also consistent with Minn. Stat. § 43A.38, subd. 6(c) (1986), which provides that "employment by a business which is subject to the direct or indirect control, inspection, audit, or enforcement of the employee" is deemed a conflict of interest. Finally, the proposed rule is consistent with that portion of the Governor's Code of Ethics which provides: "That my appointees shall not accept other employment or contractual relationships that will affect the official's independence of judgment in the exercise of official duties."

The language of the proposed rule is consistent with Canon 4.C(1) through (3) of the Minnesota Code of Judicial Ethics (quoted supra at pages 24-25) and Section 202 of the Federal Standards, which provides:

An employee shall not engage in any outside employment, including teaching, lecturing, or writing, which might result in a conflict, or an apparent conflict, between the private interests of the employee and his official government duties and responsibilities, although such teaching, lecturing, and writing by employees are generally to be encouraged so long as the laws, the provisions of this order, and Civil Service Commission and agency regulations covering conflict of interest and outside employment are observed.

The proposed rule is reasonable because it requires Commissioners and staff to avoid outside employment which would constitute a conflict of interest under Minn. Stat. § 43A.38, subd. 5(b) (1986). In addition, because Commissioners perform functions which are similar to those exercised by judges, it is reasonable to hold Commissioners to the same code of conduct to which judges have subjected themselves.

Part 7845.0700, subp. 5, Inside information

Subpart 5 of this part provides that a Commissioner or employee shall not directly or indirectly use, or permit others to use, information not made available to the general public, to advance a private interest.

The proposed rule is consistent with the statutory provisions of Minn. Stat. § 43A.38, subd. 3 (1986), which provides:

An employee in the executive branch shall not use confidential information to further the employee's private interest, and shall not accept outside employment or involvement in a business or activity that will require the employee to disclose or use confidential information.

The proposed rule is consistent with that portion of the

Governor's Code of Ethics which provides:

That my appointees shall not use confidential information to further the official's private interest, and shall not accept outside employment or involvement in a business activity that will require the official to disclose or use confidential information.

The language of the proposed rule is similar to Section 205 of the Federal Standards, which provides:

An employee shall not directly or indirectly make use of, or permit others to make use of, for the purpose of furthering a private interest, official information not made available to the public.

The rule is also similar to Canon 5.C(7) of the Minnesota Code of Judicial Ethics, which provides:

Information acquired by a judge in his official capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

The proposed rule is reasonable because it requires Commissioners and staff to avoid using information in a manner that would constitute a conflict of interest under Minn. Stat. § 43A.38, subd. 3 (1986). In addition, because Commissioners exercise functions which are similar to those exercised by judges, it is reasonable to hold Commissioners to the same code of conduct to which judges have subjected themselves.

Part 7845.0800, Future Employment

Part 7845.0800, subp. 1. One-year restriction

Subpart 1 of this part provides that, while employed with the Commission or within one year after leaving it, a Commissioner shall not accept employment with, receive

compensation directly or indirectly from, or enter into a contractual relationship with a public utility or telephone company subject to rate regulation by the Commission.

The proposed rule reflects the statutory prohibition of Minn. Stat. § 216A.036(a) (1986), quoted supra at page 28. It is also consistent with Minn. Stat. § 43A.38, subd. 6(c), which provides that "employment by a business which is subject to the direct or indirect control, inspection, audit, or enforcement of the employee" is deemed a conflict of interest.

The proposed rule is reasonable because it requires Commissioners to avoid behavior that would constitute a violation of Minn. Stat. 216A.036(a) (1986) and that would constitute a conflict of interest under Minn. Stat. § 43A.38, subd. 6(c) (1986).

Part 7845.0800, subp. 2, Commissioner
communication with parties

Subpart 2 of this part prohibits a Commissioner from communicating, directly or indirectly, with a party to a pending proceeding before the Commission regarding past or future benefits or compensation to be received from that party. The rule requires a Commissioner to disclose in writing to the Commission any communication regarding past or future benefits or compensation within 48 hours after the communication is made. The rule provides that the Commission may dismiss a proceeding if an applicant, petitioner, or complainant violates this subpart.

The proposed rule reflects that statutory prohibition of

Minn. Stat. § 216A.037, subd. 2 (1986), which states:

A commissioner shall not communicate, indirectly or indirectly, with a person or entity who is a party to a pending proceeding before the commission regarding past or future benefits or compensation to be received from that person or entity. The commission may dismiss a proceeding if an applicant, petitioner, or complainant violates his subdivision.

If the prohibited conduct occurs, there has also been a violation of Minn. Stat. § 216A.036(b) (1986), which provides:

An entity or an affiliated company of an entity that is subject to rate regulation by the commission, or a person acting on behalf of the entity, shall not negotiate or offer to employ or compensate a commissioner, the director, or the deputy director, while the person is so employed or within one year after the person leaves that employment.

The proposed rule is reasonable because it requires Commissioners to avoid behavior that would constitute a violation of Minn. Stat. 216A.037, subd. 2 (1986) and alerts applicants, petitioners, or complainants of the sanctions which may be imposed for violation of the statute and proposed rule. It is reasonable to require prompt disclosure of communications which violate the statute and the proposed rule because the advance knowledge that such communications will be disclosed should have the effect of discouraging Commissioners, applicants, petitioners, or complainants from making such communications.

Part 7845.0800, subp. 3, Employee communication with parties

Subpart 3 of this part provides that a professional employee shall disclose in writing to the Commission any communication

regarding future benefits, compensation, or employment with a party to a pending proceeding before the Commission within 48 hours after the communication is made. Reprisals must not be taken against a professional employee who complies with this subpart.

The proposed rule reflects the statutory requirement of Minn. Stat. § 216A.035(d) (1986), which provides:

A professional employee of the commission or department must immediately disclose to the commission or to the director of the department, respectively, any communication, direct or indirect, with a person who is a party to a pending proceeding before the commission regarding future benefits, compensation, or employment to be received from that person.

The proposed rule is reasonable because it requires professional employees of the Commission to avoid behavior that would constitute a violation of Minn. Stat. 216A.035(d) (1986). It is reasonable to require prompt disclosure of communications which violate the statute and the proposed rule because the such disclosure will allow the Commission to reassign the employee in a manner that will eliminate conflicts of interest. At the same time, the employee is not prohibited from having discussions that may eventually result in a career change. It is reasonable to prohibit reprisals from being taken against a professional employee who complies with this prohibition because fear of such reprisal might otherwise discourage employees from complying with the disclosure requirement.

Part 7845.0900, Postemployment Representation

Part 7845.0900, subp. 1, By Commissioner

Subpart 1 of this part prohibits a Commissioner from representing a public utility or telephone company subject to rate regulation by the Commission, formally or informally, before the Commission for one year after leaving the Commission. The rule provides that at no time shall a Commissioner represent a party on a proceeding that was pending before the Commission during the Commissioner's term in office.

The proposed rule is intended to supplement the provisions of Minn. Stat. § 216A.036(a), quoted supra at page 28, restricting future employment for one year after leaving the Commission. Representing a public utility or telephone company subject to rate regulation by the Commission creates the same conflict of interest as that created by subsequent employment. This has been recognized in federal law, 18 U.S.C. § 207, which limits the participation of former officers and employees in proceedings involving the federal government. It is reasonable to restrict Commissioners from representing regulated utilities and telephone companies for one year after leaving the Commission because such a restriction will remove the conflict, or appearance of conflict, which such representation would create.

Part 7845.0900, subp. 2, By employee

Subpart 2 of this part prohibits an employee from representing before the Commission a public utility or telephone

company subject to rate regulation by the Commission for one year after leaving the Commission with respect to a proceeding that the employee participated in during employment with the Commission.

It is reasonable to restrict employees from representing before the Commission public utilities or telephone companies subject to rate regulation by the Commission for one year because such representation creates, at a minimum, the appearance of a conflict of interest. See 18 U.S.C. § 207. The proposed rule will eliminate the potential conflict of interest, or appearance of conflict of interest.

Part 7845.1000, Sanctions

Part 7845.1000, subp. 1, Against commissioner

Subpart 1 of this part provides that a Commissioner who intentionally fails to comply with the Code is subject to disciplinary action under Minn. Stat. § 15.0575 and 216A.036, and in accordance with Minn. Stat. § 43A.33. Minn. Stat. § 15.0575, subd. 4 (1986) provides, in relevant part:

A member [of a board] may be removed by the appointing authority at any time (1) for cause, after notice and hearing, or (2) after missing three consecutive meetings.

Minn. Stat. § 216A.036(d) (1986) provides:

A person who violates this section is subject to a civil penalty not to exceed \$10,000 for each violation. The attorney general may bring an action in district court to collect the penalties provided in this section.

Minn. Stat. § 43A.33 (1986) provides procedures for discipline and discharge of employees.

It is reasonable to cross reference in the rules the statutes which provide for violation of statutes prohibiting certain behavior by Commissioners because it alerts the reader to the seriousness and implications of noncompliance with the Code.

Part 7845.1000, subp. 2, Against employee

Subpart 2 of this part provides that an employee who intentionally fails to comply with the Code is subject to disciplinary action under the applicable collective bargaining agreement, Commissioner's or manager's plan, or in accordance with Minn. Stat. § 43A.33.

It is reasonable to cross reference in the rules the statutes which provide for violation of statutes prohibiting certain behavior by Commission employees because it alerts the reader to the seriousness and implications of noncompliance with the Code.

V. SMALL BUSINESS CONSIDERATIONS IN RULEMAKING

Minn. Stat. § 14.115, subd. 2 (1986) requires the Commission, when proposing rules which may affect small businesses, to consider the following methods for reducing the impact on small businesses:

- (a) the establishment of less stringent compliance or reporting requirements for small businesses;
- (b) the establishment of less stringent schedules or deadlines for compliance or reporting requirements for

small businesses;

- (c) the consolidation or simplification of compliance or reporting requirements for small businesses;
- (d) the establishment of performance standards for small businesses to replace design or operational standards required in the rule; and
- (e) the exemption of small businesses from any or all requirements of the rule.

The proposed rules do not affect small businesses as defined in Minn. Stat. § 14.115 (1986), except to the extent that they require all members of the public to conduct themselves in a manner that is consistent with the integrity and independence of the Commission and its staff. Therefore the Commission has not included in the rules any of the above-listed methods with respect to small businesses.

VI. CONCLUSION

Based on the foregoing, the proposed Minn. Rules pts. 7845.0100 to 7845.1000 are both needed and reasonable.

Dated: May 4, 1987



Mary Ellen Hennen
Executive Secretary