MINNESOTA

LEGISLATIVE COMMISSION TO REVIEW ADMINISTRATIVE RULES

1987-1988 BIENNIAL REPORT

LCRAR

Legislative Commission to Review Administrative Rules

Representative Peter Rodosovich
Chair

Senator Gene Waldorf
Vice-Chair

Maryanne V. Hruby
Executive Director

Members of the Legislature:

We hereby submit to you the 1987-1988 Biennial Report of the Legislative Commission to Review Administrative Rules, as required by Minnesota Statutes, Section 14.40.

Since 1974 when it was created, the LCRAR continues to "promote adequate and proper rules by state agencies and an understanding on the part of the public respecting them." (Minnesota Statutes, Section 14.40) We take seriously our role of monitoring agency compliance with both the Administrative Procedure Act and with the intent of various specific statutory grants of rulemaking authority.

This report describes our activities for the last two years and demonstrates that legislative oversight is important and necessary, albeit time-consuming and complex at times.

We are proud of the service we perform for the entire legislature and invite your concerns or questions about agency rulemaking activity.

Sincerely,

Representative Peter Rodosovich, Chair

Senator Gene Waldorf, Vice-Chair

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The Legislative Commission to Review Administrative Rules

Biennial Report 1987 - 1988

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Representative Kathleen Blatz
Representative Dave Gruenes
Representative Sandra Pappas
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This report was written by Commission Staff, with special thanks to Kristi Hendricks and Michele Swanson.

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PART I EXECUTIVE SUMMARY

During the 1987 - 1988 biennium, the LCRAR has continued to serve the legislature and the public in its role as the chief legislative body to review executive agency rules and rulemaking. The Commission's mission continues to be "to promote adequate and proper rules by agencies and an understanding on the part of the public respecting them". (Section 14.40) This biennium the Commission translated its mission into the following activities.

The Commission received 60 complaints, of which 37 required a detailed investigation by staff. Six of these complaints resulted in full Commission attention to rule issues. The full Commission held 9 meetings; the Subcommittee on Exemptions met 7 times.

I. Two significant rule reviews occurred:

- **Department of Jobs and Training rules providing a funding formula for sheltered workshops. (Minnesota Rules, Parts 3300.1950 - 3300.3050).**

As a result of Commission interest in resolving a dispute about the funding formula, the department and the workshops directors worked with a mediator and agreed on a workable formula. The legislature then enacted a bill incorporating this agreement.

- **Department of Human Services rule relating to Nursing Home Property Rental Reimbursement (Minnesota Rule, Part 9549.0060, subpart 8).**

The Commission held two meetings to listen to problems with the reimbursement formula. It encouraged DHS to establish a task force as a forum to discuss these issues with the industry.

II. The Commission reviewed two complaints about agency policies that seemed to be rules:

- **Department of Human Services bulletin on Background Checks for License Applicants.**

After the preliminary assessment, the Commission was prepared to hold a public hearing on this issue. However, the department officially suspended the bulletin until legislation clarified some policy issues.

- **Board on Aging policies and procedures for area agencies on aging.**

The Commission began its assessment of whether the Board needed to proceed to rulemaking. No formal action was taken when the board and the complainants agreed to begin mediation on substantive policy issues. The staff was directed to monitor this issue.

III. The Subcommittee on Exemptions worked for months examining the extent of statutory exemptions to rulemaking, agency rationales for the exemptions, and ways to stem the tide of these exemptions. Two results of the Subcommittees work were passage of an amendment to Senate Rule 35 which requires bills with exemptions to be referred to the Committee on Governmental Operations, and passage of Laws 1989, Chapter 155 which requires publication of most exempt rules.

IV. At the request of the Public Utilities Commission the Commission gave its advise and comment on the need and reasonableness of proposed rules relating to Extended Area Service. The PUC considered the Commission's advice and did not immediately adopt the proposed rules.

V. The Commission continued to monitor the APA to encourage agencies to adopt rules in a timely fashion after the Legislature delegates authority to make rules (Section 14.12).

VI. The Commission toured the Joint Committee on Administrative Rules (JCAR) in Springfield, Illinois. The JCAR reflects a much larger Legislative commitment to review of both proposed and adopted rules. There is no executive review in Illinois, comparable to the Minnesota Office of Administrative Hearings and Attorney General's office.

The Commission's work during this biennium has been diverse, far reaching, and purposefully supportive of the goals of the Administrative Procedure Act.

PART II LCRAR PROCEDURES

A. RULE REVIEW

The following is a general description of the usual LCRAR process for reviewing complaints about existing rules. It is a product of the Commission's statutory authority, Procedural Rules, and institutional history.

Complaints or inquiries about rules come to the Commission staff from Commission members, other legislators, individual citizens, or interest groups.

Staff discusses the complaint or inquiry with the complainant and, if appropriate, with the agency whose rule is in question. Some preliminary research into the rule's history and statutory authority usually occurs at this early stage.

Sometimes the complaint can be handled with an explanatory phone call or letter from staff. At other times, if a complaint appears to raise issues that require the attention of the Commission, staff prepares a preliminary assessment to present at a Commission meeting. This report summarizes staff research and analysis to date and may recommend a course of action for the Commission.

The Commission meets to hear a staff presentation of the preliminary assessment and brief testimony to assist the Commission to decide if the complaint is meritorious and worthy of attention.

Unless a complaint requires no further attention, staff then continues to investigate the issues raised and to accomplish other recommendations of the Commission.

At this point the Commission has the option to hold a public hearing about the rule in question and related issues. A public hearing is generally held for the most controversial rules under review.

After the hearing, staff prepares a final report based on the testimony presented, and offers recommendations for Commission action.

The Commission decides its course of action. Many options are available. For example, the Commission may refer issues to legislative policy committees for consideration; it may request an agency to amend or adopt a rule; it may initiate the process of suspending a rule, or may proceed to suspend a rule (see B. below); it may decide no LCRAR action is necessary; or it may have staff continue to monitor an agency's rulemaking process.

B. LCRAR RULE SUSPENSION PROCESS

Suspension of a rule is a Commission action that temporarily repeals an agency rule. Minnesota Statutes, Sections 14.40, 14.42, and 14.43 provide procedural requirements for a rule suspension. The process is briefly described as follows:

A majority of the Commission votes to initiate the suspension process, thereby requesting the Speaker of the House and the President of the Senate to refer the question of suspension to appropriate policy committees in each house for committee recommendations. These recommendations are advisory only.

The Commission must wait until it receives the committees' recommendations, or until 60 days have elapsed since the question of suspension was referred to the Speaker of the House and the President of the Senate. The Commission meets to consider suspending a rule. A rule is suspended upon an affirmative vote of at least six members of the Commission.

As soon as possible after the Commission votes to suspend and after proper notice in the State Register is given, the Commission must place before the Legislature, at the next year's session, a bill to repeal the suspended rule.

If the bill is passed by both houses and signed by the Governor, the suspension of the rule is confirmed and the rule is effectively repealed.

Failure to enact the bill during the session reinstates the rule suspended by the Commission.

C. ADVICE AND COMMENT ON PROPOSED RULES: Section 14.15, subdivision 4

While most proposed rules are adopted without a public hearing before an Administrative Law Judge (ALJ), a minority are controversial and need further public participation.

While the LCRAR usually does not review proposed rules, Section 14.15, subdivision 4, provides a way for agencies to seek the LCRAR's advice and comment on the need and reasonableness of a proposed rule. If an ALJ finds that the agency has not established on the record the need and reasonableness of a proposed rule, the ALJ will suggest in a report a way to cure the rule so that it would be needed and reasonable, often by changing or adding language to the proposed rule.

At this point an agency has a choice: to follow the ALJ's suggested cure or to ask the LCRAR for its (non-binding) advice and comment on the need and reasonableness of the rule. This is in effect a check on the analysis of the ALJ. The agency need not follow the LCRAR's advice, but to adopt the rule as it wishes it must at least ask for the LCRAR advice.

The LCRAR has been asked to conduct this kind of review only three times. Commission practice is to hold two meetings. At the first meeting, the staff presents an initial report of the issues, and the agency testifies in defense of the need and reasonableness of the rule. Other testimony may be heard.

At the second meeting, staff presents a final report with recommendations to be discussed and voted on by the members. Generally no testimony is taken at the second meeting.

These two meetings are held with 30 days of the initial request by the agency for the LCRAR opinion.

D. LCRAR PROCEDURAL RULES

During the summer of 1987 the chair appointed a Subcommittee to draft procedural rules for the Commission. The chair was Representative Dave Gruenes and the members were Representative Pappas and Senators Schmitz and Belanger.

The rules represent the past practice of the Commission and establish rules governing its operation, membership, officers, meetings, reports, and order of business.

The complete rules were published in the State Register after adoption on August 13, 1987. They appear in Appendix B of this report.

PART III LCRAR REVIEW OF EXISTING RULES

A. DEPARTMENT OF LABOR AND INDUSTRY, MINNESOTA RULES, PART 5225.1100 ABSENCE FROM PLANT

The LCRAR held a preliminary assessment on this rule during the 1985-1986 Biennium. (See p. 12-13 of 1985-1986 LCRAR Biennial Report for more details.) In March, 1987 the staff gave an oral report as an update on its earlier review. The issue had involved a long-standing departmental rule that prohibited engineers who attend high-pressure boilers in plants from leaving the plant for more than 15 minutes or from being more than 200 feet away from the plant, unless the attending engineer is replaced with an engineer possessing a license not more than one license level below that of the engineer being replaced.

This proved to be a controversial rule review, involving opposition by business to the labor-backed regulation.

In 1987, staff reported that the Department had finally appointed a Boiler Operating Engineers Task Force, scheduled to meet monthly as a forum for opposing parties to discuss various boiler rules.

B. DEPARTMENT OF JOBS AND TRAINING, MINNESOTA RULES, PARTS 3300.1950-3300.3050 SHELTERED WORKSHOPS FUNDING FORMULA

This issue came to the Commission in June 1987 at the request of Senator Don Storm, who represented one of the 30 sheltered workshops to be affected by the formula when it became effective in October, 1987. A sheltered workshop is a nonprofit organization that works with mentally ill, mentally retarded, and physically handicapped people. A workshop provides jobs in the workshop and training for community-based and competitive employment outside the workshop.

The rule at issue was part of a new funding formula to be used by the department to allocate 9 million dollars to sheltered workshops. The formula assigned 51% of the allocation to performance factors and 49% to base factors. Of the 51%, 23% is attributed to the "economic conditions", one of 8 performance factors.

At issue was whether this 23% attributed to economic conditions was too high and thereby contrary to the legislative intent of Section 129A.08 because it placed too much emphasis on economic conditions at the expense of other measures of a workshop's effectiveness. Would metro area workshops suffer unfairly at the expense of out-state workshops who perhaps needed more weight assigned to economic factors to offset poorer economic conditions?

At the preliminary assessment, the Commission examined the intent of Section 129A.08 which was designed to replace the existing cost-based funding mechanism with a funding formula that would be an incentive for workshops to move more people out of the workshops and to serve more severely handicapped clients. The law listed factors to consider in the new funding rule but it did not weight the factors.

The rule as originally proposed by the department assigned only 10% of the formula to economic factors. However the Chief Administrative Law Judge and the Administrative Law Judge (ALJ) who presided at the rule hearing concluded in their reports that the percentages assigned in the proposed rule were contrary to the legislative intent, and that a significant portion of the total performance percentage must be allocated to economic conditions, or at least 23% of the total funds. To meet the ALJ concerns and still adopt the rule, the department conceded to the 23%.

There being no quorum present at the preliminary assessment, the Commission took no formal action. Staff, however, continued to work with the department and encouraged them to employ a professional mediator to develop a compromise with the affected workshops.

A compromise was reached and most parties supported a departmental bill in 1988 to amend Section 129A.08 (Laws 1988, Chapter 689, Art. 2, Sec. 25) to provide that 15% of the funds be allocated based on economic conditions.

The Commission took no formal action on this issue.

C. DEPARTMENT OF HUMAN SERVICES, MINNESOTA RULES, PART 9549.0060, SUBPART 8, RELATING TO THE NURSING HOME PROPERTY RENTAL REIMBURSEMENT FACTOR

In 1987 Senators Waldorf and Belanger, along with Senators Benson, Metzen, Knutson, Dean Johnson and Representatives Seaberg and Tompkins requested LCRAR review of this rule, based on a complaint by Care Providers of Minnesota, an organization representing numerous for profit and non-profit long-term care facilities affect by the rule.

The focus of the complaint was the 5.33% property rental reimbursement factor, which is part of the formula used to make rental payments to nursing homes. Care Providers of Minnesota requested the LCRAR to consider and refer the reimbursement rate issues to the appropriate policy committees.

In 1987 Care Providers petitioned the Department of Human Services to amend this rule to increase the rental factor form 5.33% to 11.75%. The Department denied the petition, thereby refusing to amend the rule.

Also, during the 1987 session, Care Providers worked for a change in the rental factor but was unsuccessful in getting legislation passed.

Care Providers claimed that tax law changes were reducing the cash flow for nursing home facilities, making it more difficult for facilities to make their mortgage payments. They predicted that, by 1990, some 20% of nursing homes would not be able to meet their mortgage payments. The end result would be foreclosures and loss of beds.

The Commission conducted a preliminary assessment of the issue on September 16, 1987. Testimony was taken from Care Providers of Minnesota, the Minnesota Association of Homes for the Aging, representatives from nursing home facilities, and the Department of Human Services. The Commission voted and approved the staff recommendation to hold a public hearing on the issue.

On October 29, 1987 the Commission held a public hearing, receiving testimony from representatives of the Department of Health, the Department of Human Service, Care Providers of Minnesota, the Minnesota Association of Homes for the Aging, and several nursing home facilities.

In February 4, 1988 staff presented its final report to the Commission. Staff recommendations included:

1. that the Commission take no action to refer the issue to policy committees. Since the time the nursing home industry requested the LCRAR to consider and refer these reimbursement rate issues to the appropriate policy committees, the issue had been brought to the attention of the Long Term Care Commission and legislators from the Health and Human Services Committees of both houses; and

2. that the Commission support the establishment of a task force that represents all parties affected by the reimbursement formula.

The Commission voted and approved the recommendations. It took no further action on the issue.

PART IV LCRAR REVIEW OF AGENCY POLICIES

Under the Commission's general authority in Sections 14.40 and 14.41, it can review complaints about agency policies (guidelines, criteria, bulletins, manuals, etc.) that appear to meet the definition of a rule but have not been adopted under the Administrative Procedure Act (APA) in Chapter 14. Section 14.02, subdivision 4 defines rule as

> "every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by it or to govern its organization or procedure."

During a review the Commission attempts to determine if the policy (etc.) meets this definition and is being used as if it has the force and effect of law, as it would have were it adopted under the APA.

During the 1987-1988 biennium, the LCRAR formally reviewed the following two sets of policies that seemed to be rules.

A. DEPARTMENT OF HUMAN SERVICES, INSTRUCTIONAL BULLETIN #88-50A, CRIMINAL BACKGROUND CHECKS FOR LICENSE APPLICANTS

This issue came to the Commission at the request of Representatives Rodosovich, Riveness, B. Johnson, Quist, and Tjornhom on behalf of various social service providers, including representatives of the Minnesota Association of Voluntary Social Service Agencies, the Association of Residential Resources in Minnesota, and Care Providers of Minnesota. The issue involved the Department of Human Services (DHS) Instructional Bulletin #88-50A issued May 9, 1988. The subject of the Bulletin was Criminal Background Checks for License Applicants.

The Bulletin was based on the Human Services Licensing Act (Chapter 245A) passed in 1987. The background check procedures that applicants need to follow for themselves and their employees is contained in Section 245A.09. In addition, Section 245A.05 requires the department to adopt rules governing the operation, maintenance, and licensure of programs subject to licensure under the Human Services Licensing Act.

The basic complaint concerned both the substance of the Instructional Bulletin and the process by which it came to be. The social service providers believed the Department of Human Services should have engaged in rulemaking to adopt the policies and procedures in the bulletin that go beyond the plain meaning of the law. DHS believed they were not required to proceed through rulemaking because the bulletin merely explained a self-executing statute.

On September 15, 1988 the Commission conducted a preliminary assessment of the issue. Testimony was taken from representatives of the Minnesota Association of Voluntary Social Service Agencies, the Association of Residential Resources in Minnesota, Care Providers of Minnesota, two social service providers, an independent lobbyist, and the Department of Human Services.

The Commission voted and approved the staff recommendation to hold a public hearing on the issue of whether all or part of the bulletin constituted a rule and therefore must be adopted under the Administrative Procedure Act.

In October, 1988 the Department of Human Services officially suspended the Instructional Bulletin and stated in November, 1988 that it planned to seek amendments, during the 1989 session, to the Human Services

Licensing Act to clarify the substantive questions the bulletin raised. After new legislation is sought and passed, if rules are necessary or required, the department has agreed to adopt them at that time.

The Commission did not hold a public hearing, and at this time awaits introduction of a bill in the 1989 session to address the original complaint. No further action of the Commission has been necessary.

B. MINNESOTA BOARD ON AGING, POLICIES AND PROCEDURES MANUAL FOR AREA PLANNING AND COMMUNITY SERVICES

This issue came to the Commission at the request of Representatives Ogren, Pappas, Blatz, and Senator Belanger on behalf of nine regional development commissions (RDCs) and the Metropolitan Council, all of which serve as Area Agencies on Aging (AAAs). These AAAs are designated by the Minnesota Board on Aging (MBA) to implement the federal Older Americans Act of 1965.

The issue involved the Board on Aging's Policies and Procedures Manual for Area Planning and Community Services as proposed in May, 1988. The Board used this manual to carry out its duty of administering and making policy relating to all aspects of the federal Older Americans Act of 1965.

The basic complaint raised by some of the area agencies on aging was that the manual included state requirements for implementing the federal Older Americans Act, and that these requirements were rules but did not go through the Administrative Procedure Act rulemaking process.

The original complaint from the regional development commissions was also about a section of the manual relating to the designation of area agencies on aging. The RDCs feared that the Board on Aging was about to dedesignate them as AAAs because as RDCs they did not function only as the AAA, but also had many other programs within their commission. Prior to the LCRAR's conducting a preliminary assessment of the issue on September 15, 1988 however, the AAAs and the MBA met with a mediator to discuss concerns about dedesignation. As a result, the MBA modified the proposed policy.

On September 15, 1988 the Commission conducted a preliminary assessment of the issue and received testimony from Representative Ogren, and representatives of the Arrowhead RDC, the Northwest RDC, and the MBA.

At the LCRAR meeting of September 15th, 1988 the Commission came to understand that the MBA had entered into mediation discussions with the AAAs and the RDCs concerning the manual's proposed policy issues, the working relationship of the involved parties, and the Board's policy making procedures.

Staff was directed by the chair to continue to monitor the issue.

PART V LCRAR SUBCOMMITTEE ON RULEMAKING EXEMPTIONS TO THE APA

Throughout the 1987-88 biennium Commission staff compiled a list of about 150 rulemaking exemptions to the Administrative Procedure Act (APA) that are found throughout Minnesota Statutes. These exemptions allow agencies to avoid some or all of the uniform rulemaking procedures required by the APA.

In early 1988 the LCRAR formed a Subcommittee to examine the exemptions issue after the LCRAR chair wrote to all heads of agencies that have rulemaking exemptions, asking for their assistance by verifying staff's list of exemptions and by providing the rationale for each one. The subcommittee members included Senator Belanger as chair, Senator Schmitz, and Representatives Gruenes and Pappas.

On May 24, 1988 the Subcommittee held its first organizational meeting and accepted the staff recommendation to proceed in its examination by holding public hearings and inviting specific agencies to discuss their exemptions.

At an August 10, 1988 public hearing the Subcommittee heard testimony from the Minnesota Amateur Sports Commission, the World Trade Center Corporation, and the Department of Natural Resources. At a subsequent public hearing on September 15, 1988, the Subcommittee continued to hear testimony from the Department of Corrections, the Minnesota State High School League, the Pollution Control Agency, and the Department of Transportation.

A final public hearing was held on November 15, 1988 to hear testimony from the Department of Human Services and the Office of Adult Release within the Department of Corrections. The second half of this meeting was open for general comments from parties interested in the APA and the issue of rulemaking exemptions.

Based on staff research, state agencies' responses, testimony of agency staff and others presented to the Subcommittee during the public hearings, on December 20, 1988 the Subcommittee approved a staff report which included recommending the following to the full Commission:

1. To reduce the absolute number of rulemaking exemptions, the LCRAR should sponsor a housekeeping bill to repeal exemptions considered by agencies to be unnecessary.

2. To provide some measure of legislative control over the examination of an exemption before it becomes law, the LCRAR should sponsor an amendment to the Senate Rules, similar to House Rule 5.8, to provide that bills which exempt a department or agency from rulemaking shall be referred to the Committee on Governmental Operations, which shall be responsible for considering the need and rationale for the exemption.

3. To ensure periodic review by the Legislature of the rulemaking exemptions that it grants to state agencies, the LCRAR should sponsor a bill to amend Section 14.40 to add to the duties of the LCRAR that of periodic review of state agency exemptions.

4. To improve public access to exempt rules, the LCRAR should sponsor a bill amending Chapter 14 to provide that no exempt rule (except for rules concerning only the internal management of a state agency) has the force and effect of law unless the agency publishes a notice in the State Register that summarizes the rule and indicates that the agency shall

furnish a copy of the rule upon request. In addition, the Secretary of State shall maintain a log of the notices of these exempt rules, similar to the log kept for Executive Orders.

5. The LCRAR should refer the final report to all policy committees, along with the relevant letters to and from state agencies, and the minutes of the Subcommittee's meetings. The LCRAR should request that policy committees review the exemptions of agencies under their control, and give consideration to specific enumerated issues.

At its January 10, 1989 meeting the full Commission approved the Subcommittee's recommendations. The final Subcommittee report is provided in Appendix C of this report.

PART VI ADVICE AND COMMENT ON PROPOSED RULES

When a proposed rule is subject to a public hearing, an agency must establish the need for and reasonableness of the proposed rule. The presiding administrative law judge at the public hearing makes a determination of the need for and reasonableness of the rule and suggests actions to correct any defects found concerning the need for or reasonableness of the rule. Section 14.15, subdivision 4 states that if the chief administrative law judge determines that the need for or reasonableness of the rule has not been properly established, the agency is not required to follow the suggested actions to correct the defect. The agency, if it elects to not follow the suggested actions, must submit the proposed rule to the LCRAR for its advice and comment. The Commission's comments are advisory and not binding on the agency. The agency may not adopt the rule until it has received and considered the LCRAR's advice, with the LCRAR having a thirty day time limit within which to provide its advice and comment.

PUBLIC UTILITIES COMMISSION RULES RELATING TO EXTENDED AREA TELEPHONE SERVICE

The Commission held two meetings during June 1988 upon request by the Public Utilities Commission (PUC). Pursuant to Section 14.15, subdivision 4, the PUC requested the Commission's advice and comment on the reasonableness of amendments to their proposed rule, Part 7815.0900, subpart 2, governing the basis of rates for extended area service.

Extended area service (EAS) is the ability to call between two telephone exchanges for a flat monthly charge, thereby avoiding payment of toll rates based on usage. The PUC was proposing an amendment to its basis of rates rule. An administrative law judge (ALJ) had found the basis of rates subpart to be unreasonable because the rulemaking record did not demonstrate the reasonableness of excluding lost toll contribution from the EAS rate. He suggested the PUC adopt language which would include lost toll contribution in EAS rates. The PUC elected to not follow the ALJ's suggestion, and came to the LCRAR requesting advice and comment on the reasonableness of their proposed EAS rate basis.

The Commission followed the procedure it used twice before when asked to provide its advice and comment on a proposed rule. On June 15, 1988 the Commission held a public hearing on the issue. Testimony was provided by representatives from the Public Utilities Commission, the Department of Public Service, the Office of the Attorney General, and various telephone companies.

At a public hearing on June 23, 1988, staff recommended the Commission:

1. advise the PUC that the proposed EAS rate rule was reasonable, i.e. that the rule excluding lost toll contribution in an EAS rate was reasonable;

2. direct the PUC to seek legislative direction on several matters;

3. advise the PUC to add clarifying language to the rule should the PUC choose to adopt the rule;

4. advise the PUC to consider the appropriateness of immediately adopting the proposed rule in view of the pending Metro EAS case, which involves the determination of whether the public interest requires the establishment of EAS between 16 petitioning communities and the Minneapolis - St. Paul metropolitan calling area, and, if so, the appropriate rates to be charged for such service; and

5. advise the PUC to utilize a rule advisory task force when proposing future rules.

The Commission approved staff recommendations #2, #4, and #5 and added another, which stated that the Commission had found nothing to conclude that the administrative law judge was in error by declaring the rule part that excluded lost toll contribution unreasonable. Staff's recommendation #1 failed to pass on a four to three vote; recommendation #3 was withdrawn by the chair.

The Commission met its statutory responsibility to the PUC by giving its advice within 30 days of the request. Although the advice was not binding, the PUC followed it to the extent that it withdrew the proposed rule.

PART VII SECTION 14.12 MONITORING PROJECT

Minnesota Statutes, Section 14.12 provides that agencies that are required by law to adopt rules must publish proposed rules within 180 days of the effective date of the law requiring the rules to be adopted. If an agency cannot meet this deadline, there is no specific sanction against them; however, the agency is obliged to notify the LCRAR, the Governor, and appropriate policy committees of its failure to meet this 180-day deadline, and the reasons for that failure. The purpose of Section 14.12 is to encourage agencies to promptly exercise their delegated rulemaking authority.

LCRAR staff has monitored agency compliance with Section 14.12 for the mandatory grants of rulemaking authority given during the 1986 and 1987 session, and currently is monitoring compliance for the rulemaking grants given during 1988.

FINDINGS

For the three years the LCRAR has been monitoring agency compliance with the rule publication or notification requirements of Section 14.12, the compliance rate has been as follows:

1986	57%
1987	18%
1988	88%

The dip in 1987 was likely due to the fact that the LCRAR staff did not send a letter to specifically inform agencies of their responsibilities under Section 14.12. To promote compliance, staff will consistently send these letters in the future.

PART VIII LCRAR TRAVELS

A. THE COMMISSION VISITS THE ILLINOIS JOINT COMMITTEE ON ADMINISTRATIVE RULES

On December 16th and 17th, 1987 the Commission visited its counterpart, the Joint Committee on Administrative Rules (JCAR) in Springfield, Illinois. The trip included Representative Rodosovich, Senators Waldorf and Belanger, Commission staff members, and executive agency representatives, Commissioner Lani Kawamura from the State Planning Agency and Assistant Attorney General Jocelyn Olson.

In recent years there has been some legislative interest in increasing legislative oversight of state agency rules. The purpose of the trip was to give us a glimpse of a legislative committee that engages in far more extensive rule review than that of the LCRAR.

The Illinois legislature commits about $800,000 a year to maintain a JCAR staff of about 25, consisting of rule analysts, attorneys and support staff. (By contrast, in 1988 the LCRAR had a budget of $117,000 a year and a staff of 2.5, with legal counsel as needed.)

The JCAR consists of 12 legislators, 6 from each house, who are evenly divided by political party. The members elect co-chairs when the Committee renews itself every two years. Meetings are held monthly, either in Springfield or in Chicago.

Our business itinerary included an informal roundtable discussion at the JCAR offices with staff and members, a meeting with two agency representatives who often deal with the Joint Committee, and attendance at the JCAR's monthly meeting on December 17th.

In Illinois the JCAR is the primary reviewer of all agency rules, proposed and adopted. No executive agency review of executive agency rules exists, i.e. no rule review is conducted by an office similar to Minnesota's Office of Administrative Hearings or the Office of the Attorney General.

The JCAR exercises its review power by formally approving or objecting to proposed rules. The JCAR may also delay the official filing of a specific rule.

Even though the statutory purposes of the JCAR and the LCRAR are identical, "to promote adequate and proper rules and an understanding on the part of the public respecting them", Illinois and Minnesota conduct its review of agency rules in significantly different ways.

B. NATIONAL CONFERENCE OF STATE LEGISLATURES 1988, RENO, NEVADA: LEGISLATIVE RULE REVIEW IN FOUR STATES

The 1988 National Conference of State Legislatures was held from July 25th to July 29th, 1988 in Reno, Nevada. Thanks to the Minnesota Revisor of Statutes, Steve Cross (current chair of NCSL's Legal Staff Services Section), the issue of legislative review of administrative rules received program time at the convention.

Maryanne Hruby, Executive Director of the LCRAR, acted as moderator of a panel of speakers from four states, each of which represented a different rule review structure.

The panel members consisted of Caroll Webb, Executive Director and General Counsel of the Florida Joint Administrative Procedures Committee and Jeannette Scully, Legislative Analyst with the Florida Legislature;

Lorne Malkiewich, Legislative Counsel of the Nevada Legislature; Frank Ertz, Executive Director of the Pennsylvania Independent Regulatory Review Commission; and Senator Harold Halverson, Chair of the South Dakota Interim Rules Review Committee.

Because legislative review commissions do not have their own section at NCSL, this program time provided a rare and valuable opportunity for staff and legislators from various states to discuss the different legislative rule review processes and their results.

APPENDIX A

LEGISLATIVE REVIEW OF RULES

14.39 LEGISLATIVE COMMISSION TO REVIEW ADMINISTRATIVE RULES; COMPOSITION; MEETINGS.

A legislative commission for review of administrative rules, consisting of five senators appointed by the committee on committees of the senate and five representatives appointed by the speaker of the house of representatives shall be appointed. The commission shall meet at the call of its chair or upon a call signed by two of its members or signed by five members of the legislature. The office of chair of the legislative commission shall alternate between the two houses of the legislature every two years.

History: *1974 c 355 s 69; 1975 c 271 s 6; 1980 c 615 s 1; 1980 c 618 s 26; 1981 c 112 s 1,2; 1981 c 253 s 1; 1981 c 342 art 2 s 1; 1982 c 424 s 130; 1986 c 444*

14.40 REVIEW OF RULES BY COMMISSION.

The commission shall promote adequate and proper rules by agencies and an understanding upon the part of the public respecting them. The jurisdiction of the commission includes all rules as defined in section 14.02, subdivision 4. The commission also has jurisdiction of rules which are filed with the secretary of state in accordance with section 14.38, subdivisions 5, 6, 7, 8, 9, and 11 or were filed with the secretary of state in accordance with the provisions of section 14.38, subdivisions 5 to 9, which were in effect on the date the rules were filed. It may hold public hearings to investigate complaints with respect to rules if it considers the complaints meritorious and worthy of attention. If the rules that are the subject of the public hearing were adopted without a rulemaking hearing, it may request the office of administrative hearings to hold the public hearing and prepare a report summarizing the testimony received at the hearing. The office of administrative hearings shall assess the costs of the public hearing to the agency whose rules are the subject of the hearing. The commission may, on the basis of the testimony received at the public hearings, suspend any rule complained of by the affirmative vote of at least six members provided the provisions of section 14.42 have been met. If any rule is suspended, the commission shall as soon as possible place before the legislature, at the next year's session, a bill to repeal the suspended rule. If the bill is not enacted in that year's session, the rule is effective upon adjournment of the session unless the agency has repealed it. If the bill is enacted, the rule is repealed. The commission shall make a biennial report to the legislature and governor of its activities and include its recommendations to promote adequate and proper rules and public understanding of the rules.

History: *1974 c 355 s 69; 1975 c 271 s 6; 1980 c 615 s 1; 1980 c 618 s 26; 1981 c 112 s 1,2; 1981 c 253 s 1; 1981 c 342 art 2 s 1; 1982 c 424 s 130; 1984 c 655 art 1 s 4; 1Sp1985 c 13 s 84*

14.41 PUBLIC HEARINGS BY STATE AGENCIES.

By a vote of a majority of its members, the commission may request any agency issuing rules to hold a public hearing in respect to recommendations made pursuant to section 14.40, including recommendations made by the commission to promote adequate and proper rules by that agency and recommendations contained in the commission's biennial report. The agency shall give notice as provided in section 14.14, subdivision 1 of a hearing thereon, to be conducted in accordance with sections 14.05 to 14.36. The hearing shall be held not more than 60 days after receipt of the request or within any other longer time period specified by the commission in the request.

History: *1974 c 355 s 69; 1975 c 271 s 6; 1980 c 615 s 1; 1980 c 618 s 26; 1981 c 112 s 1,2; 1981 c 253 s 1; 1981 c 342 art 2 s 1; 1982 c 424 s 130*

14.42 REVIEW BY STANDING COMMITTEES.

Before the commission suspends any rule, it shall request the speaker of the house and the president of the senate to refer the question of suspension of the given rule or rules to the appropriate committee or committees of the respective houses for the committees' recommendations. No suspension shall take effect until the committees' recommendations are received, or 60 days after referral of the question of suspension to the speaker of the house and the president of the senate. However, the recommendations shall be advisory only.

History: *1974 c 355 s 69; 1975 c 271 s 6; 1980 c 615 s 1; 1980 c 618 s 26; 1981 c 112 s 1,2; 1981 c 253 s 1; 1981 c 342 art 2 s 1; 1982 c 424 s 130*

14.43 NOTICE OF SUSPENSION.

In addition to the other requirements of this section, no suspension shall take effect until notice has been published in compliance with section 14.38, subdivision 4. The commission shall send the notice to the State Register.

History: *1974 c 355 s 69; 1975 c 271 s 6; 1980 c 615 s 1; 1980 c 618 s 26; 1981 c 112 s 1,2; 1981 c 253 s 1; 1981 c 342 art 2 s 1; 1982 c 424 s 130*

14.15 ADMINISTRATIVE LAW JUDGE'S REPORT.

Subd. 4. **Need or reasonableness not established.** If the chief administrative law judge determines that the need for or reasonableness of the rule has not been established pursuant to section 14.14, subdivision 2, and if the agency does not elect to follow the suggested actions of the chief administrative law judge to correct that defect, then the agency shall submit the proposed rule to the legislative commission to review administrative rules for the commission's advice and comment. The agency shall not adopt the rule until it has received and considered the advice of the commission. However, the agency is not required to delay adoption longer than 30 days after the commission has received the agency's submission. Advice of the commission shall not be binding on the agency.

History: *1957 c 806 s 2; 1974 c 344 s 1-3; 1975 c 380 s 2; 1975 c 413 s 1; 1976 c 138 s 1; 1977 c 443 s 2; 1980 c 615 s 3-7,9-11,39-50; 1981 c 253 s 5-19; 1981 c 357 s 25; 1Sp1981 c 4 art 2 s 1; 1982 c 424 s 130; 1983 c 210 s 5-7; 1984 c 640 s 10,32; 1987 c 384 art 2 s 1*

adopted 9/16/87

APPENDIX B

RULES OF PROCEDURE

OF THE

LEGISLATIVE COMMISSION TO REVIEW ADMINISTRATIVE RULES

1. RULES OF OPERATION

1.1 [Controlling Authority.] The commission is governed by the Minnesota Constitution, its enabling legislation, Minnesota Statutes, sections 14.39 to 14.43, and by these rules.

1.2 [Mason's Manual.] Except as otherwise provided by these rules or established custom and usage, the rules of parliamentary procedure contained in "Mason's Manual of Legislative Procedure" govern the commission.

1.3 [Suspension of rules.] The concurrence of six members of the commission is required to suspend, alter, or amend these rules.

2. MEMBERSHIP

2.1 [Appointment.] The commission consists of five senators appointed by the committee on committees of the senate and five representatives appointed by the speaker of the house of representatives.

2.2 [Resignation.] A member of the commission may resign by providing notice to the chair. Upon receiving notice of the resignation, the chair shall promptly inform the appointing authority of the house in which the resigning member serves, and request the appointment of a replacement.

3. OFFICERS

3.1 [Election and term.] The commission shall elect its own officers including a chair and a vice-chair by majority vote of the members present. Officers serve for a term of two years.

3.2 [Chair and vice-chair.] The office of chair of the commission shall alternate between a member of the senate and a member of the house. The office of vice-chair of the commission shall alternate between a member of the senate and a member of the house. The vice-chair shall not be a member of the house in which the chair serves.

3.3 [Subcommittees.] The commission may conduct business through subcommittees. The chair of the commission shall appoint the chair and members of any subcommittee. The senate and the house shall be represented on all subcommittees. The majority and minority caucuses of each house shall be represented on all subcommittees. The chair of the commission shall be an ex officio member of all subcommittees.

4. MEETINGS

4.1 [Call.] The commission shall meet at the call of the chair or upon a call signed by two members of the commission or signed by five members of the legislature.

4.2 [Open to public.] All meetings of the commission, and of any subcommittee, are open to the public.

4.3 [Notice.] The chair of the commission and any subcommittee shall, as far as practicable, give three days' notice of any meeting. The notice must include the date, time, place and agenda for the meeting.

4.4 [Quorum.] A majority of commission members constitutes a quorum. The commission may take testimony without a quorum present, but no question may be decided and no action may be taken in the absence of a quorum.

4.5 [Roll-call vote.] Any member may demand a roll-call vote on any motion before the commission or a subcommittee. Only upon a demand being made shall the roll be called and the vote of each member on the motion be recorded, together with the name of the members demanding the roll call.

4.6 [Reconsideration.] The commission may reconsider any action taken. A commission member need not have voted with the prevailing side in order to move reconsideration.

4.7 [Minutes.] The chair of the commission and any subcommittee shall cause minutes to be kept. The minutes must include:

(a) The time and place of each hearing or meeting;

(b) Commission members present;

(c) The name of each person appearing, together with the name of the person, agency, or employee organization represented;

(d) The language of each motion, the name of the members making the motion, and the result of any vote upon the motion, including the ayes and nays when a roll call is demanded; and

(e) Other important matters related to the work of the commission or subcommittee.

Minutes shall be approved at the next regular meeting of the commission or subcommittee.

4.8 [Excused absences.] The chair may excuse any commission member from attending a commission meeting.

5. REPORTS

5.1 [Acceptance or rejection.] The substantive provisions or recommendations of any report to the commission from a subcommittee shall be accepted or rejected, in whole or in part, by a majority of commission members present.

5.2 **[Minority report.]** Any minority report shall be made separately from the majority report. A minority report to the commission from a subcommittee shall be considered before the majority report. If the minority report is adopted, the majority report shall not be considered. If the minority report is not adopted, the majority report shall then be considered.

6. PRELIMINARY ASSESSMENT

6.1 **[Purpose.]** The initial meeting to investigate a complaint with respect to a rule shall be known as a preliminary assessment. The purpose of this meeting is to determine whether the complaint is meritorious and worthy of attention.

6.2 **[Conduct.]** The preliminary assessment shall be conducted by the commission.

7. PUBLIC HEARING

7.1 **[Commission action.]** If the commission determines after a preliminary assessment that the complaint is meritorious and worthy of attention, the commission may hold a public hearing on the complaint. At the conclusion of the public hearing, the commission may take the following action:

(a) If the rules that are the subject of the hearing were adopted without a rulemaking hearing, request the office of administrative hearings to hold a public hearing and prepare a report summarizing the testimony received at the hearing.

(b) Direct the staff to continue to monitor the issues raised by the complaint.

(c) Refer the complaint to the appropriate policy committees.

(d) Request the agency issuing the rules to hold a public hearing on any recommendations made by the commission. The agency must give notice of the hearing as provided in Minnesota Statutes, section 14.14, subdivision 1. The hearing must be held not more than 60 days after receipt of the request or within any longer time period specified by the commission in the request.

(e) Request the speaker of the house and the president of the senate to refer the question of whether or not the given rule or rules shall be suspended to the appropriate committee or committees of the respective houses for the committees' recommendations. The recommendations are advisory only.

(f) Sponsor legislation to implement recommendations made by the commission.

(g) Any other action the commission considers appropriate.

7.2 **[Majority vote required.]** All actions taken by the commission pursuant to rule 7.1, paragraphs (a) to (g) shall be by majority vote of the commission members present.

7.3 **[Suspension of rules.]** The commission may, at a subsequent public hearing, suspend any rule complained of by an affirmative vote of at least six members. The commission shall direct the executive director to publish notice of the suspension in the State Register. The suspension takes effect five working days after the notice is published, but in no event may the suspension take effect until the committees' recommendations referred to in rule 7.1, paragraph (e) are received by the commission, or 60 days after referral of the question of suspension under rule 7.1, paragraph (e).

If a rule is suspended, the commission shall as soon as possible place before the legislature, at the next year's session, a bill to repeal the suspended rule. During the meeting at which the vote to suspend was taken, the chair shall appoint a commission member who voted to suspend the rule to introduce the bill on the commission's behalf. If the bill is not enacted in that year's session, the rule is effective upon adjournment of the session unless the agency has repealed it. If the bill is enacted, the rule is repealed.

8. ADVICE AND COMMENT

8.1 [Public hearing and subsequent meeting.] The commission or a subcommittee may hold an initial public hearing to take testimony on a proposed rule submitted to it under rule 8.2. At the close of the public hearing, the commission or a subcommittee shall direct staff to prepare a staff report with recommendations for the commission's consideration at a subsequent meeting. The initial public hearing and the meeting to consider the staff report must be held within 30 days of receipt of the agency's submission.

8.2 [Agency submission.] If the chief administrative law judge determines that the need for or reasonableness of a proposed rule has not been established, and if the agency does not correct this defect in the manner suggested by the chief administrative law judge, the agency shall submit the rule to the commission for its advice and comment.

8.3 [Effect of submission.] The agency shall not adopt the rule until it has received and considered the commission's advice. However, the agency is not required to delay adoption longer than 30 days after the commission receives the agency's submission. Advice of the commission is not binding on the agency.

9. ORDER OF BUSINESS

9.1 [Generally.] The order of business at a duly called meeting of the commission is as follows:

1. Call to order.
2. Roll call.
3. Approval of the minutes of the last meeting.
4. Reports of subcommittees.
5. Unfinished business.
6. New business.
7. Announcements.
8. Adjournment.

APPENDIX C

FINAL REPORT OF THE LCRAR SUBCOMMITTEE ON RULEMAKING EXEMPTIONS

January 1989

BACKGROUND

The purpose of this Subcommittee was to examine the numerous statutory rulemaking exemptions that the Legislature has granted over the years to state agencies. These exemptions allow agencies to avoid some or all of the uniform rulemaking procedures provided in the Minnesota Administrative Procedure Act (APA) (Minnesota Statutes, chapter 14).

The Subcommittee was formed in early 1988 after staff research identified the existence of a significant number of rulemaking exemptions, and after the LCRAR Chair wrote to all heads of agencies that have rulemaking exemptions, asking for their assistance by verifying our list of exemptions and by providing the rationale for each one.

Under its authority in section 14.40 to "promote adequate and proper rules and an understanding on the part of the public respecting them", the Subcommittee held a series of three public hearings from August through November 1988 and invited eight state agencies to explain the rationales for their exemptions to the Subcommittee. The Subcommittee allowed the executive director to choose which state agencies to invite.

The Amateur Sports Commission was invited because it is a new small agency (created in 1987) that asked for an exemption for its procedural rules in 1988.

The World Trade Center was invited because it is a relatively new (1984) and somewhat controversial agency that has a blanket rulemaking exemption.

The Department of Natural Resources was invited because it is a large agency with a long-standing exemption for all the rules of the Division of Fish & Game and because the Subcommittee was aware of some Senate interest in this exemption.

The Department of Corrections was invited because Subcommittee member Representative Sandy Pappas was interested in the department's interpretation of their general exemption in section 14.02 as it relates to inmates under Supervised Release, and because the LCRAR previously examined the department's exemption.

The Pollution Control Agency was invited because it is a relatively large agency that adopts many long, complex, and controversial rules but has only three minor exemptions.

The Department of Transportation was invited because it is a large agency with six exemptions and a Subcommittee member was interested in their responses.

And the Minnesota State High School League was invited because during the 1988 Session it was somewhat controversial, and because it is totally exempt from rulemaking under chapter 14.

The Subcommittee hoped to be able to compare and contrast rationales of various kinds of state agencies, and, due to time limitations, chose this sample of agencies to interview in person.

At the last Subcommittee hearing on November 15th, 1988, the second half of the agenda was open for comments from parties interested in the APA and the issue of rulemaking exemptions. Persons who testified

included William Brown, Chief Administrative Law Judge, Office of Administrative Hearings; Professor Mel Goldberg, William Mitchell College of Law; Richard Wexler, Chair of the Minnesota State Bar Association, Administrative Law Section; Julie Brunner, Assistant Commissioner, Department of Human Services; and Jocelyn Olson, Assistant Attorney General, Pollution Control Agency.

FINDINGS

Based on staff research, state agencies' responses, testimony of agency staff and others presented to the Subcommittee during the public hearings, the Subcommittee makes the following findings:

1. **(NUMBER OF EXEMPTIONS)**

   There are currently 167 rulemaking exemptions that have been granted by the Legislature to state agencies. These exemptions are found in sections 14.02, 14.03, and in various other individual sections of law. (See Appendix A for a complete list of statutory exemptions.)

2. **(TYPES OF EXEMPTIONS)**

   For purposes of this examination, there are two kinds of exemptions: program-specific and agency-wide or blanket exemptions. Of the total of 167, 17 are agency-wide. The remainder are program-specific.

3. **(NUMBER OF AGENCIES WITH AND WITHOUT EXEMPTIONS)**

   There are approximately 80 state entities that have some characteristics of a state agency. More than one-half or 48 of them have some rulemaking exemptions. And 20% have a blanket exemption. The remaining agencies apparently conduct their business without them.

4. **(PROCESS FOR EXEMPT RULES)**

   To have an exemption means that an agency can adopt certain rules and enforce them without affording the public an opportunity to participate in their development. This is because an exempt rule is not published when first proposed in the State Register.

   It is not explained and justified in a Statement of Need and Reasonableness.

   It is not reviewed by the Attorney General.

   It is not subject to scrutiny at a public hearing.

   And it is not published when final in Minnesota Rules for ready access by the public.

   The result is that the vast majority of exempt rules are currently not published. There is no way to know how many exempt rules exist because by their very nature they are not subject to the normal procedural protections afforded the public by the APA. There is no comprehensive and uniform publication requirement for exempt rules.

(There are a few statutory rulemaking exemptions which by their own terms require an alternative form of publication, e.g. posting weight limits on highways (section 14.02, subdivision 4, clause (d)), and publication in newspapers of DNR fish and game rules (section 97A.051). And in 1985 section 14.385 was enacted to require certain exempt rules to be submitted to the Revisor of Statutes for publication. This elicited only 11 sets of exempt rules. In sum, these efforts have resulted in the publication of only a very few exempt rules.)

5. (NO STATUTORY LIMITS ON EXEMPTIONS)

Exempt rules are not second class rules; they are not unlawful. Once granted, there are no general limitations imposed on them. The APA does not require a stated rationale for an exemption. There are no general statutory time limits imposed. There are no formal statutory mechanisms for their legislative or executive review. And there is no Minnesota case law interpreting the implementation of a statutory rulemaking exemption.

6. (LEGISLATIVE CONTROL OF EXEMPTIONS)

The only formal legislative mechanism to control rulemaking exemptions is in House Rule 5.8 which requires that any bill with a rulemaking exemption shall be referred to the Governmental Operations Committee.

There is no Senate counterpart to this rule.

At this time legislative review of rulemaking exemptions occurs primarily during the normal committee hearing process or during floor sessions.

7. (RATIONALES FOR EXEMPTIONS)

Agencies were asked to give the rationale for each of their exemptions. The most common reasons provided were:

-the general need for flexibility

-the need to adopt effective rules quickly to protect the public or to implement a program in a timely manner

-rulemaking is costly

-their rules are really only internal management rules (as generally exempted by section 14.02, subdivision 4, clause (a))

-the program is only a pilot project i.e. experimental

-the rules do not apply to the "public"

-the federal government requires a quick response

-the "rule" is not in fact a rule i.e. it is only a "guideline"

-the "agency" is not a state agency

-there are other procedural safeguards in lieu of the APA

-rulemaking makes the agency duties difficult to perform

-rulemaking is inconvenient

-rules are not controversial, therefore no APA rulemaking is necessary

-unknown

-comfort language e.g. statute really suffices but drafter was being cautious

Clearly it is up to the Legislature as a whole to decide whether any of these particular rationales is justifiable. However, unlike other state APAs and the Model Act, the Minnesota APA does not offer much assistance to the Legislature in assessing whether the rationale justifies removing rulemaking requirements for adopting rules. Each of our statutory exemptions apparently stands on its own. There are hardly any statutory criteria, general or specific, to consider when granting an exemption. The APA provides only one exemption for an entire category of rules for any agency. It is section 14.02, subdivision 4, clause (a) - for internal management rules.

In contrast, other APAs contain categories of rules that are exempt. These categories reflect, at a minimum, a decision that for certain kinds of rules the need for efficient, economical and effective government outweighs the public's right to participate in policy making. (See Appendix B for Model State APA, section 3-116 which uses a categorical approach to rulemaking exemptions.)

In addition, in the interest of fairness, all agencies should be apprised of the kinds of exempt rules and rationales that are available to them. If efficient, economical, and effective government is good for one agency, it may be good for others. If a category of exempt rules is justifiable for one agency, it may be justifiable for many. Likewise, rules that are not justifiably exempt for one agency, may not be justifiable for any.

RECOMMENDATIONS

To respond effectively to these findings, the Subcommittee recommends to the LCRAR the following:

1. To reduce the absolute number of rulemaking exemptions, the LCRAR should sponsor a housekeeping bill to repeal exemptions considered by agencies to be unnecessary.
2. To provide some measure of legislative control over the examination of an exemption before it becomes law, the LCRAR should sponsor an amendment to the Senate Rules, similar to House Rule 5.8, to provide that bills which exempt a department or agency from rulemaking shall be referred to the Committee on Governmental Operations, which shall be responsible for considering the need and rationale for the exemption. (See Appendix C.)
3. To ensure periodic review by the Legislature of the rulemaking exemptions that it grants to state agencies, the LCRAR should sponsor a bill to amend section 14.40 to add to the duties of the LCRAR that of periodic review of state agency exemptions.
4. To improve public access to exempt rules, the LCRAR should sponsor a bill amending chapter 14 to provide that no exempt rule (except for rules concerning only the internal management of a state agency) has the force and effect of law unless the agency publishes a notice in the

State Register that summarizes the rule and indicates that the agency shall furnish a copy of the rule upon request. In addition, the Secretary of State shall maintain a log of the notices of these exempt rules, similar to the log kept for Executive Orders.

5. The LCRAR should refer this report to all policy committees, along with the relevant letters to and from state agencies, and the minutes of the Subcommittee's meetings. The LCRAR should request that policy committees review the exemptions of agencies under their control, and give consideration to the following issues:

   a. Should the current rulemaking exemptions expire or be sunsetted unless they are reviewed and re-approved by the Legislature by June 30, 1990 or another appropriate date?

   b. Should the Legislature adopt a general "good cause" exemption, similar to that found in the Model State APA, section 3-108? Basically, this exemption would allow an agency that believes it is "unnecessary, impracticable, or contrary to the public interest" to adopt a rule under the APA rulemaking process, to avoid those requirements by publishing a statement to that effect. Currently, agencies seek or are granted emergency rulemaking authority or a rulemaking exemption by the Legislature. With a "good cause" exemption, an agency would bear the burden of finding and publishing the reasons for the exemption. (See Appendix D Model State APA section 3-108 for a sample "good cause" exemption.)

   c. How are the current exemptions being interpreted, broadly or narrowly? Is more specific language needed to limit the exemption?

   d. If the rationale for a specific exemption is that the rules concern only the agency's internal management, then is the specific exemption needed since section 14.02, subdivision 4, clause (a) provides this categorical exemption?

   e. Should the Legislature amend the APA to adopt a provision similar to section 3-116 of the Model State APA? (See Appendix B.) This provision would establish categories of rules that are exempt.

   f. Absent other criteria for determining whether an exemption is justified, the committee should weigh the need for efficient, economical and effective government against the public's right to fully participate in state policy-making.

SUMMARY

The Subcommittee believes that these recommendations support the general principles of the APA, while allowing agencies to seek justifiable exemptions. These recommendations are designed to enhance legislative control over the delegation of policy making authority to the executive branch. They reflect the Subcommittee's view that the policy committees are in the best position to review specific exemptions and to assess their justification. The LCRAR has viewed its role as a broad one--of "promoting proper agency rules and an understanding on the part of the public respecting them." It does not wish to usurp the control over the subject matter of rules, which it believes is more properly exercised by appropriate policy committees.