

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF PUBLIC SERVICE

Proposed Rules Governing Specifications,
Tolerances and Other Technical
Requirements for Commercial Weighing
and Measuring Equipment, Governing
Packaged Commodities, and Governing
Voluntary Registration in the Placing-In-
Service Program.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for a public hearing before Administrative Law Judge Bruce D. Campbell, commencing at 9:00 a.m. on April 26, 1995, at the Minnesota Department of Public Service, 200 Metro Square, 121 Seventh Place E., St. Paul, Minnesota, and continued until all interested persons present had an opportunity to participate by asking questions and presenting oral and written comment.

This report is part of a rule hearing procedure required by Minn. Stat. §§ 14.01 - 14.28 (1994), to determine whether the proposed rules relating to commercial weighing and measuring equipment should be adopted by the Commissioner. Julia E. Anderson, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Minnesota Department of Public Service. Also present at the hearing, comprising the agency panel, were the following persons: Michael F. Blacik, Director of the Division of Weights and Measures, Department of Public Service (Division); Mark V. Vuccelli, Weights and Measures Division Regional Supervisor; Sherrill A. Mullenmaster, Weights and Measures Division Regional Supervisor; Richard E. Johnson, Weights and Measures Division Regional Supervisor; and David Koets, Weights and Measures Division Regional Supervisor. No witness was solicited to appear on behalf of the Weights and Measures Division of the Department at the hearing.

Fifteen members of the public signed the hearing register and eleven members of the public provided oral comment at the hearing. The Department introduced DPS Exhibits 1-22, inclusive. The Department also submitted for the record during the comment period DPS Ex. 23, the 1995 edition of NIST Handbook 44. At the hearing, the Administrative Law Judge also received Public Exhibits 1-3, inclusive. The record of this proceeding closed for all purposes on May 23, 1995, the date set by the Administrative Law Judge for the receipt of reply comments, as authorized by the Minnesota Administrative Procedure Act.

The Commissioner must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all

interested persons upon request. Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of actions which will correct the defects and the Commissioner may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commissioner does not elect to adopt the suggested actions, she must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment. If the Commissioner elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Commissioner may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Commissioner makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then she shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes. When the Commissioner files the rule with the Secretary of State, she shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On February 10, 1995, the Department of Public Service filed the following documents with the Chief Administrative Law Judge:
 - a) A copy of the proposed rules certified by the Revisor of Statutes.
 - b) The Order for Hearing.
 - c) The Notice of Hearing proposed to be issued.
 - d) A Statement of the number of persons expected to attend the hearing and estimated length of the Department's presentation.
 - e) The Statement of Need and Reasonableness.
2. On March 6, 1995, a Notice of Hearing and a copy of the proposed rules were published at 19 State Register pages 1841-1854.
3. On February 22, 1995, the Department mailed the Notice of Hearing to all persons and associates who had registered their names with the Department for the purpose of receiving such notice.
4. On April 3, 1995, the Department filed the following documents with the Administrative Law Judge:
 - a) The Notice of Hearing as mailed.

- b) The Department's certification that its mailing list was accurate and complete.
- c) The Affidavit of Mailing the Notice to all persons on the Department's list.
- d) The names of the Department personnel who would represent the Department the hearing together with the names of any other witnesses solicited by the Department to appear on its behalf.
- e) A copy of the State Register containing a copy of the Notice of Hearing and the proposed rules.
- f) The written requests for a contested hearing.

5. The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

6. The Department mailed a copy of the Statement of Need and Reasonableness to the Legislative Commission to Review Administrative Rules in a timely manner, as required by Minn. Stat. § 14.131 (1994).

7. The period for submission of initial written comment and statements remained open through May 16, 1995, the period having been extended by order of the Administrative Law Judge to 20 calendar days following the hearing. The record closed on May 23, 1995, the fifth business day following the close of the initial comment period.

8. The time for the issuance of this Report has been extended in writing by the Chief Administrative Law Judge due to the physical incapacity of the Administrative Law Judge following the close of the hearing record. This report was issued within the period of extension granted by the Chief Administrative Law Judge.

Statutory Authority

9. The authority to adopt and amend rules pertaining to weights and measures is contained in Minn. Stat. § 239.06 (1994), which reads as follows:

The Department shall prescribe and adopt such rules as it may deem necessary to carry out the provisions of this chapter, and it may change, modify, or amend any or all rules when deemed necessary and the rules so made shall have the force and effect of law.

Under the statute, the Department has the general authority to adopt rules relating to weights and measures, the subject matter of Minn. Stat. c. 239 (1994).

Impact on Small Businesses

10. The proposed rules will have an impact on small businesses, as that term is defined in Minn. Stat. § 14.115, subd. 1 (1994). The Department specifically considered the factors listed in Minn. Stat. § 14.115, subd. 2(a)-(e) (1994), for reducing the impact of the proposed rules on small businesses. The Department's consideration of the statutory factors for reducing the impact on small businesses is contained in the Statement of Need and Reasonableness (SONAR), at pp. 41-42. The Department concluded that no accommodation was possible. No member of the public, in oral or written submissions, stated that it was possible for the Department to modify its proposed rules to accommodate the interests of small businesses.

11. Minn. Stat. § 14.115, subd. 4 (1994), requires that in addition to considering methods of lessening the impact of proposed rules on small businesses, the agency must provide an opportunity for small businesses to participate in the rulemaking process, using one of four stated methods. Minn. Stat. § 14,115, subd. 4(a) (1994), provides that such an opportunity for small businesses to participate in the rulemaking process may be afforded by:

The inclusion in any advance notice of proposed rulemaking of a statement that the rule will have an impact on small businesses which shall include a description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons . . .

In its Notice of Hearing, the Department included a specific statement that the proposed rules would have an impact on small businesses. The Notice referred the reader to the full discussion of the impact of the proposed rules on small businesses contained in the SONAR.

12. As a consequence of Findings 10-11, supra, the Administrative Law Judge finds that the Department has appropriately considered the interests of small businesses in its proposed rules, as required by Minn. Stat. § 14.115, subd. 2 and subd. 4 (1994).

Cost to Local Public Bodies

13. Minn. Stat. § 14.11, subd. 1 (1994), requires an inclusion of a fiscal note in the Notice of Intent to Adopt a Rule relating to the rule's impact on public expenditures if the rule would have a total cost of over \$100,000.00 to all local public bodies in the state in either year of the two years immediately following adoption of the rule. The Commissioner of the Department of Public Service has determined that the proposed rules will not require the expenditure of public funds by local public bodies. SONAR, p. 42.

Impact on Agricultural Lands

14. Minn. Stat. § 14.11, subd. 2 (1994), requires the agency to comply with the requirements of Minn. Stat. §§ 17.80 - 17.84 (1994), if the proposed rules may have a direct and substantial adverse impact on Minnesota agricultural land. The Commissioner of the Department of Public Service has determined that the proposed rules will not have a direct substantial impact on Minnesota agricultural land. SONAR, p. 43.

Nature of the Proposed Rules

15. Pursuant to Minn. Stat. § 239.06 (1994), the Minnesota Department of Public Service is directed to adopt and modify appropriate rules related to weights and measures, limited only by the jurisdiction given to the Division of the Department by Minn. Stat. c. 239 (1994). The existing weights and measures rules of the Department, contained in Minn. Rules chapter 7600, are largely obsolete. Clients of the Department also find that the existing rules are difficult to use and understand. The Department proposes to repeal Minn. Rules chapter 7600 and replace the existing rules with a totally revised chapter. The new rules retain those portions of Chapter 7600 that remain effective tools for weights and measures enforcement. Where the existing rules are not fully carried forward, the new rules simplify, modernize and update them.

Discussion of the Proposed Rules

16. Some of the proposed rule provisions received no negative public comment and were adequately supported by the Statement of Need and Reasonableness. The Judge will not address those provisions in the following discussion and specifically finds that the need for and reasonableness of the proposed rules not receiving public comment have been demonstrated.¹ The remainder of this Report will concern only those portions of the proposed rules that were contested.

Part 7601.0100 - Definitions

17. Part 7601.0100, in 21 subparts, contains the definitions that are used in the proposed rules. The only two subparts that received any public comment were subpart 3, defining "Commercial," "commercial use," and "commercial purpose," and subpart 21, defining "Weighing and measuring equipment". Several public commentators argued that the definitions contained in subpart 3 and subpart 21 expanded the application of the proposed rules beyond the statutory jurisdiction of the

¹ In order for an agency to meet the burden of reasonableness, it must only demonstrate by a presentation of fact that the rule is rationally related to the end sought to be achieved. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn. App. 1985). Those facts may either be adjudicative facts or legislative facts. Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). The agency must show that a reasoned determination has been made. Manufactured Housing Institute at 246.

Director of the Division under Minn. Stat. § 239.011, subd. 10 (1994), and Minn. Stat. § 239.09 (1994). The definitions contained in Part 7601.0100, subp. 3 and Part 7601.0100, subp. 21, for example, are used in Part 7601.1000 and Part 7601.1010 to require commercial weighing and measuring equipment to comply with NIST Handbook No. 44, which contains detailed specifications and technical requirements for construction and installation of such equipment. Part 7601.1010 authorizes the Division to test and inspect commercial weighing equipment for compliance with NIST Handbook No. 44.

18. Part 7601.0100, subp. 3 of the proposed rule provides:

‘Commercial,’ ‘commercial use’ and ‘commercial purpose’ refer to weights and measures used or located on premises where they could be used to:

- A) determine the weight, measure, or count of commodities or things sold, offered, or exposed for sale, on the basis of weight, measure, or count; and
- B) compute the basic charge or payment for services rendered on the basis of weight, measure, or count.

In written comments dated May 10, 1995, Cleveland-Cliffs, Inc., states that the portion of the definition which includes the statement “located on premises where they could be used to” is an impermissible expansion of the statutory jurisdiction of the Division. Cleveland-Cliffs argues that only such equipment actually used as described in Paragraphs A and B is properly within the definition. The former rules, Minn. Rules chapter 7600, contained no definition of the words “commercial”, “commercial use” or “commercial purpose”, even though they were used throughout the rules. Nor, does Minn. Stat. § 239.05 (1994), the definitional section in Minn. Stat. c. 239 (1994), define those or similar terms. Minn. Stat. § 239.011, subd. 2(10) (1994), in describing the statutory authority of the Director of the Division of Weights and Measures, states:

shall inspect and test, to ascertain if they are correct, weights and measures commercially used to:

- i) determine the weight, measure, or count of commodities or things sold, offered, or exposed for sale, on the basis of weight, measure, or count; and
- ii) compute the basic charge or payment for services rendered on the basis of weight, measure, or count. . . .

There is agreement that the appropriate definition of “commercial” in the context of weighing equipment subject to the jurisdiction of the Division must be derived from Minn. Stat. § 239.011, subd. 10 (1994).

19. The Department, in its comments of May 22, 1995, does not respond to the statement that the Department impermissibly extends its jurisdiction by incorporating in subpart 3 the phrase “or located on premises where they could be used to”. In the SONAR, at p. 5, the Department states only that subpart 3 is functionally equivalent to statutory terminology that delineates the extent of the Department’s enforcement

authority. The Department notes that it is authorized by Minn. Stat. § 239.011, subd. 2 (10) (1994), to test and inspect only commercial weighing and measuring equipment. Finally, at the same location in the SONAR, the Department states that commercial weighing and measuring equipment is any equipment that is used to determine the weight, measure or count of commodities offered for sale, or to determine a basic charge for services rendered on the basis of weight, measure or count. The SONAR does not discuss the basis for including in subpart 3 the phrase “or located on premises where they could be used to”.

20. An agency may not by rule extend its jurisdiction beyond that authorized by statute. McGuire v. Viking Tool & Die Co., 104 N.W.2d 519, 528 (Minn. 1960); Sellner Manufacturing Co. v. Commissioner of Taxation, 202 N.W.2d 886 (Minn. 1972). If Minn. Stat. § 239.011, subd. 2(10) (1994), requires actual past use for the described purposes, subpart 3, which includes the concept of potential or possible future use, is in excess of statutory authority.

The Administrative Law Judge concludes that the inclusion in subpart 3 of the phrase “or located on premises where they could be used to” is not an impermissible expansion of Minn. Stat. § 239.011, subd. 2(10) (1994). The word “used”, as contained in Minn. Stat. § 239.011, subd. 2(10) (1994), includes the concept of potential or possible future use; it does not require actual, past use for the described purposes. In Commonwealth v. McHugh, 400 Pa. 566, 178 A.2d 556, 559 (1962), the court well stated the applicable considerations:

Without auxiliary verbs, or other words, indicating past, present or future tense, the word “used” is a participial adjective which has no fixed meaning in terms of time. See Webster’s New International Dictionary 1782 (2d Ed. 1959). Standing alone, “used” can sound in the past, present or future tense. Hence, it was error for the court below to employ the word exclusively in the present tense. As stated, at p. 10, in the brief for the Bell Telephone Company of Pennsylvania, amicus curiae, “Furthermore * * * the words ‘used in such [public utility] service’, as applied in Section 2(n)(3)(iii), are merely descriptive of the character and type of facilities which the Legislature intended to exclude, and were never intended to refer only to facilities in actual current use by the utility engaged in furnishing such service. The word ‘used’ is frequently resorted to for such descriptive purposes even though the article being described is not at the moment in actual use in any respect. Thus, a hardware store operator may say to a customer that a power tool is ‘used’ for shaping or planing wood even though it is sitting in a corner of his store and is obviously not in actual use for any purposes. Similarly, a salesman who is urging the purchase of a desk by a customer may properly describe the desk as ‘something used for studying, reading and writing’. In so doing, his description of the functions which the desk is designed to perform in no way alters the fact that the desk is

presently a facility for studying, reading and writing, even though it is not at that time being used for such purposes. The salesman's employment of the phrase 'used for studying, reading and writing' is helpful in identifying and describing the activities for which the desk is a facility; it does not, in any sense, indicate that the desk is presently being used in such activities."

See, West Penn Power Company v. Springdale Township, 542 A.2d 1041, 1046 (Pa. Cmnr. 1988) (utility plant in extended "cold reserve status" is being used to furnish utility services within the meaning of state tax statute). This construction of the word "used" in Minn. Stat. § 239.011, subd. 2(10) (1994), is also reasonable in light of the legislative purpose. The provision was adopted to protect commercial sales involving weights by giving the Division of Weights and Measures regulatory oversight over the equipment likely to be used. That purpose is advanced by the use of the phrase "located on premises where they could be used" in subpart 3. Where the premises are such that actual commercial sales involving the use of weighing equipment are occurring, it is appropriate, for consumer protection, to give the Division oversight over any weighing equipment located on such premises that could be employed in making such sales.

21. To meet the definition of "commercial," "commercial use" or "commercial purpose" contained in Part 7601.0100, subpart 3, the weights and measures used must perform both functions specified in Paragraphs A and B of that subpart. Subpart 3 joins Paragraphs A and B with the word "and". Paragraphs A and B are quoted directly from Minn. Stat. § 239.011, subd. 2(10) (1994). As stated in Finding 24, infra, requiring both paragraphs is not in accordance with commercial practice. Since subparts 3 and 21 are combined in the rules and used in a common descriptive term, it is necessary that they not be in conflict. See, e.g., Part 7601.1010, subp. 1. As discussed in Finding 25, infra, Minn. Stat. § 239.011, subd. 2(10) (1994), is properly read to require Paragraph A or B and not Paragraph A and B in defining weights and measures subject to the jurisdiction of the Division of Weights and Measures. The Administrative Law Judge finds that use of the conjunctive "and" between Paragraphs A and B in subpart 3 of Part 7601.0100 conflicts with subpart 21 of Part 7601.0100, making application of portions of the rules impossible. See, e.g., Part 7601.1000; Part 7601.1010.

22. To correct the defect, the Department must strike the word "and" at page 1, line 20, of the proposed rules and insert the word "or". This change, necessary to harmonize subparts 3 and 21 of Part 7601.0100, is not a prohibited substantial change.

23. Subpart 21 defines “weighing and measuring equipment” as follows:

all weights and measures of every kind, all instruments and devices for weighing and measuring, and any appliances and accessories associated with those instruments and devices, which are used to:

- A. determine the weight, measure, or count of commodities or things sold, offered, or exposed for sale on the basis of weight, measure, or count; or
- B. compute the basic service charge or payment for services rendered on the basis of weight, measure, or count.

This definition is used in the rules, in conjunction with the term “commercial” contained in subpart 3, to describe the weighing and measuring equipment that is subject to the jurisdiction of the Division of Weights and Measures. The jurisdiction of the Division of Weights and Measures is limited to weighing and measuring equipment that is used commercially. Comments of the Department of Public Service, May 22, 1995, p. 2; Minn. Stat. § 239.011, subd. 2(10) (1994). The source of the definition is Minn. Stat. § 239.011, subd. 2(10) (1994), quoted at Finding 18, supra. That statute, however, joins the equivalent of Paragraphs A and B of the proposed rules with the word “and”.

24. At the hearing, a representative of Cleveland-Cliffs, Inc., relying on Minn. Stat. § 239.011, subd. 2 (10) (1994), concluded that the use of the word “or” in subpart 21 illegally expanded the authority of the Department. The same argument is made in the written submission of Cleveland-Cliffs, Inc., dated May 10, 1995. In its comments dated May 22, 1995, the Department argues that the word “and”, contained in Minn. Stat. § 239.011, subd. 2 (10) (1994), should be read as meaning “or” so that the Department has jurisdiction to inspect and test commercial weights which are used to “determine the weight, measure, or count of commodities or things sold, offered, or exposed for sale, on the basis of weight, measure, or count” or “compute the basic charge or payment for services rendered on the basis of weight, measure, or count”. The Department states that this result is necessary because the two functions referred to by the statutory clauses of Minn. Stat. § 239.011, subd. 2 (10) (1994), are separate and distinct. Some commercial scales measure a weight or quantity to be sold, while others are used to determine a service charge based on a given weight or quantity. Most, if not all, heavy capacity commercial scales perform one but not both functions. Comments of the Department of Public Service, May 22, 1995, p. 3. Moreover, no commercial weighing and measuring equipment is used to determine both a quantity offered for sale and a quantity-based service charge. Comments of the Department of Public Service, May 22, 1995, p. 3. The result of the statutory argument made by Cleveland-Cliffs, Inc., would be to virtually oust the Department from its authority to regulate and inspect commercial weighing and measuring equipment.

25. Although the terms in a statute are normally interpreted according to their commonly accepted usage, the word “and” may be interpreted in the disjunctive when doing so is necessary to effect legislative intent and avoid an absurd result. Maytag Co.

v. Commissioner of Taxation, 218 Minn. 460, 17 N.W.2d 37, 39 (1954); Ahrweiler v. Board of Supervisors, 226 Iowa 229, 283 N.W. 889 (1939). See also, Queen v. Minneapolis Public Schools, Special School District #1, 481 N.W.2d 66, 67 (Minn. App. 1992). Since no commercial weighing equipment is used to perform both functions, to avoid an unreasonable result, the word “and” in Minn. Stat. § 239.011, subd. 2(10) (1994), should be interpreted in the disjunctive. The Administrative Law Judge concludes, therefore, that the portion of Part 7601.0100, subp. 21, which states Paragraphs A and B and joins the paragraphs with the word “or”, is needed and reasonable and does not conflict with Minn. Stat. § 239.011, subd. 2 (10) (1994).

26. Subpart 21, at line 22, page 3 of the proposed rules, employs the word “used”, referring to actual past use for the purposes stated in Paragraph A or B of the subpart. Employing the word “used” without including language pertaining to potential or future use creates an irreconcilable conflict with the portion of subpart 3 which provides “or located on premises where they could be used to”. As discussed at Finding 21, supra, the definitions must not be in conflict.

27. To correct the defect, the Department must harmonize the two provisions. It must either strike the phrase “or located on premises where they could be used to” in subpart 3, or add that phrase after the word “used” in subpart 21, line 22, page 3 of the proposed rules. Either result would be in accordance with Minn. Stat. § 239.011, subd. 2(10) (1994). Correction of the defect would not result in a prohibited substantial change.

28. Several representatives of the taconite industry stated at the hearing that the proposed rules might extend the jurisdiction of the Department to certain weighing and measuring devices that are used internally by the industry in its production processes. Belt scales may carry raw ore into a taconite plant. Belt scales also weigh finished pellets before stockpiling. The weights are used for determining royalties and a production tax based on tonnage. There is, however, no sale of the product at the plant. Comments of Cleveland-Cliffs, Inc., May 10, 1995, p. 2. The taconite industry takes the position that the authority of the Department to regulate scales at taconite plant locations that are not used to determine the weight, measure or count of commodities or things sold, offered, or exposed for sale may be impermissibly extended by the definitions contained in subpart 3 and subpart 21 of Part 7601.0100. Minn. Stat. § 239.011, subd. 2 (10) (1994), defines the applicable jurisdiction of the Department to regulate commercial weighing and measuring equipment. The applicability of the rules to internal measuring devices used by the taconite industry is not affected by the definitions contained in Part 7601.0100, which are taken directly from the governing statute. The concerns expressed by the taconite industry relate to the statutory authority of the Department, which must be judicially determined, and not to any provision of the proposed rules. Comments of the Department of Public Service, May 22, 1995, p. 3.

Part 7601.0200 - Variances

29. Part 7601.0200 relates to the authority of the Director of the Division of Weights and Measures to grant variances from the requirements of the rules. The need for and reasonableness of this part is described at page 8 of the SONAR. Only one

public comment was made on this part. James M. Hamilton of the Burlington Northern Railroad stated that subpart 3B(1) which uses the phrase “economically unfeasible” is too imprecise for fair application. Mr. Hamilton suggested that the Department define in the rules the circumstances under which an action would be economically unfeasible. The Department did not respond to Mr. Hamilton’s comment. The Statement of Need and Reasonableness does not discuss the individual criteria for determining undue hardship and, specifically, the phrase “economically unfeasible”. SONAR, p. 8. The Administrative Law Judge finds that the use of the term “economically unfeasible” in subpart 3B(1) of Part 7601.0200 provides sufficient direction to the Director and the person requesting a variance so that the rule is not impermissibly vague. Given the myriad of differing factual situations that the Director must consider in determining undue hardship and economic unfeasibility, it is unlikely that the rule could be significantly more precise. Can Manufacturers Institute, Inc. v. State, 289 N.W.2d 416, 423 (Minn. 1979). The Administrative Law Judge finds that Part 7601.0200, subp. 3, as proposed, is needed and reasonable. Given the nature of the subject matter involved, the subpart is sufficiently specific to provide appropriate criteria for evaluating a variance request.

Part 7601.1000 - NIST Handbook 44 Incorporated by Reference

30. Part 7601.1000 incorporates by reference NIST Handbook 44 (1994), with the exceptions specified in Items A, B, and C of subpart 1. The existing rule, Minn. Rule 7600.6800 had incorporated by reference the then current handbook for specifications, tolerances and other technical requirements for weighing and measuring devices of the National Conference on Weights and Measures. That publication was NIST Handbook 44 (1985). It is both necessary and reasonable to incorporate into the proposed rule the most current edition of the national handbook. Incorporating the current edition of the NIST Handbook will allow Minnesota to maintain weights and measures code uniformity with the rest of the Nation. Incorporating the most recent edition of the Handbook ensures that the owners and users of weighing and measuring equipment will have access to the most modern equipment without being restricted by out of date national code requirements. SONAR, p. 9.

31. Subpart 1 of Part 7601.1000 currently incorporates the 1994 edition of NIST Handbook 44. At the hearing, several commentators suggested that Part 7601.1000 be amended, appropriately, to incorporate by reference the 1995 edition of NIST Handbook 44, since it is the most current edition. The Department explained, at the hearing, that the 1995 edition of NIST Handbook 44 was not available when the proposed rules were drafted. No member of the public opposed amending the rule to incorporate the 1995 edition of NIST Handbook 44. In its comments of May 12, 1995, the Department proposed to amend Part 7601.1000, subp. 1 to incorporate by reference the 1995 edition of NIST Handbook 44. With its comments, the Department provided DPS Ex. 23, the 1995 edition of NIST Handbook 44. The Department reviewed the 1995 edition of NIST Handbook 44 and has determined that it does not differ materially from the 1994 edition. The substitution could have no prejudicial effect on any member of the public. The Administrative Law Judge accepts the amendment proposed by the Department to this subpart as needed and reasonable. The amendment to incorporate NIST Handbook 44 (1995), does not constitute a prohibited substantial change.

32. Paragraphs A, B and C. of subpart 1 of this Part state the exceptions to the application of NIST Handbook 44. No member of the public opposed excluding from the application of NIST Handbook 44 Paragraphs A, B and C. The need for and reasonableness of these exceptions to the application of NIST Handbook 44 are discussed at pages 9 and 10 of the SONAR.

33. At the hearing, the Department proposed an amendment to subpart 1 of Part 7601.1000, which would add a fourth paragraph, D, as an additional exception to the application of NIST Handbook 44. That amendment was offered in response to public comment received by the Department prior to the hearing. It was the intention of the Department to include the additional exemption in the proposed rule but, through oversight, it did not do so. Comments of the Department of Public Service, May 12, 1995, p. 2. The final statement of the amendment proposed by the Department is as follows:

D. The user requirement UR.2.2, in section 3.31 of NIST Handbook 44 (1995) shall not apply so as to require a ticket printer on vehicle tank meters.

Comments of the Department of Public Service, May 12, 1995, p. 1. The addition of Paragraph D to subpart 1 is needed and reasonable because ticket printers do not work well in the extreme Minnesota climate. Comments of the Department of Public Service, May 12, 1995, p. 2. The amendment does not constitute a prohibited substantial change.

34. At the hearing, several representatives of the taconite industry stated that additional exceptions to the application of NIST Handbook 44 should be incorporated into subpart 1 of Part 7601.1000. In its written comments of May 10, 1995, Cleveland-Cliffs, Inc., proposes six additional exceptions to or modifications of NIST Handbook 44, which it believes would be appropriate for its taconite operations. The Department, in its comments of May 22 1995, opposes the inclusion of additional exemptions to NIST Handbook 44 specific to the taconite industry. The Department states that it has successfully applied the belt conveyor scale code in the 1985 edition of the NIST Handbook 44, which is incorporated in the existing rule, to belt conveyor scales that are in regular commercial service in Minnesota. Since the 1985 edition of NIST Handbook 44 is substantially the same as the 1995 edition, the Department concludes that additional exemptions are inappropriate. Moreover, the taconite industry has taken the position that its belt conveyor scales are not subject to the jurisdiction of the Division of Weights and Measures and, therefore, would not be subject to the proposed rules or Handbook 44. Until the commercial status of the belt conveyor scales used by the taconite industry in Minnesota is authoritatively determined, it would be inappropriate to include in subpart 1 of Part 7601.1000 exceptions designed specifically for the taconite industry. The Division has agreed to cooperate with the taconite industry in revising the rules, if necessary, if taconite conveyor belt scales are determined to be commercial, and subject to the rules. Finally, Part 7601.0200 includes a variance rule under which specialized weighing applications may be exempted from portions of NIST Handbook 44 on an individual basis. The variance procedure could be used, if necessary, until specialized rules relating to taconite scales could be developed, if such scales are determined to be within the jurisdiction of the Department.

35. As a consequence of Findings 30-34, supra, Part 7601.1000, as amended, is found to be needed and reasonable. The two amendments proposed by the Department and discussed in the previous Findings do not constitute prohibited substantial changes.

Part 7601.1010 - NIST Handbook 44; Compliance Required

36. Part 7601.1010, subp. 1, requires that a person who owns or operates weighing or measuring equipment for commercial purposes in Minnesota use equipment that meets the requirements of NIST Handbook 44. Subpart 2 of Part 7601.1010 requires that a person who sells, installs, owns, or operates commercial weighing or measuring equipment manufactured after July 1, 1996, only sell, install or use equipment for which a "Certificate of Conformance" has been issued by the United States Department of Commerce, National Institute of Standards and Technology, Office of Weights and Measures. The need for and reasonableness of Part 7601.1010 is discussed at pages 10 and 11 of the SONAR. No public commentator questioned the need for or reasonableness of Part 7601.1010. Mr. Gregory VanderVorste, representing Howe Scale Company, asked whether subpart 2 of Part 7601.1010 applied to repairs. A similar comment was made by Bruce Reieron, representing Mettler-Toledo, Inc. In its comments of May 12, 1995, the Department answered Mr. VanderVorste and Mr. Reieron. The inquiries of the two public commentators did not, however, question the need for or reasonableness of Part 7601.1010, as discussed in the SONAR. The Administrative Law Judge, therefore, finds that Part 7601.1010 is both needed and reasonable.

Part 7601.2000 - Protection from Environment

37. Subpart 1 of Part 7601.2000 authorizes the Director of the Division of Weights and Measures to require special environmental protection for an outdoor scale, if the scale is adversely affected by weather or other environmental factors. Items A-F list the types of environmental protection that might be required. The need for and reasonableness of subpart 1 of Part 7601.2000 is discussed at page 12 of the SONAR. A number of public commentators stated that Item E of subpart 1, the erection of a complete building to protect the scale from the weather, should be clarified, so that such construction is only ordered as a last resort. The Department considers the construction of a building to protect a scale from the weather to be an extreme measure, only to be ordered in unusual circumstances. SONAR, p. 12. In its comments of May 12, 1995, the Department declines to amend Item E of subpart 1 on the grounds of simplicity. The Department believes it appropriate to have a general rule so that it can be applied to all types of commercial scales used in Minnesota. The Department believes it would be impractical and unwise to write a detailed rule specifying the circumstances under which any particular enforcement action might be taken when the rule would apply to hundreds of different types of weighing and measuring devices. Comments of the Department of Public Service, May 12, 1995, p. 5. Further, the Department believes that an uncomplicated rule is necessary for comprehension by its regulated businesses, many of whom are extremely small and unsophisticated. The Administrative Law Judge notes that Part 7601.2000, subp. 1 is identical to the existing rule, Part 7600.7750. When no change is made in an existing rule, need and

reasonableness need not be re-established. Moreover, there is no evidence in the record that the Department has used the existing rule to require the construction of buildings to protect outdoor scales in a capricious or inappropriate manner. The Administrative Law Judge finds that the Department has demonstrated the need for and reasonableness of subpart 1 of Part 7601.2000 by an affirmative presentation of fact.

38. At the hearing, Mr. James M. Hamilton, representing the Burlington Northern Railroad, proposed adding an additional item to subpart 1 of Part 7601.2000:

G. or other measure which satisfactorily mitigates environmental conditions.

The Department, in its comments of May 12, 1995, opposed Mr. Hamilton's suggested amendment. The Department concluded that the general language suggested by Mr. Hamilton would serve no useful purpose. In its experience under the former rule, Part 7600.7750, a listing of the specific types of environmental protections contained in Paragraphs A-F, was sufficient to safeguard outdoor scales from weather or other environmental factors. Moreover, the language suggested by Mr. Hamilton is unduly vague. The Administrative Law Judge finds that there is no need for an additional general requirement in Part 7601.2000, subp. 1.

Part 7601.3000 - Railroad Track Scale; Plans

39. Part 7601.3000 requires, in subpart 1, that a scale manufacturer of a railroad track scale furnish complete design, assembly, and construction plans to the purchaser before installation. In subpart 2, a railroad track scale purchaser is required to furnish installation plans to the Director the Division of Weights and Measures. The need for and reasonableness of Part 7601.3000 is discussed at page 13 of the SONAR. At the hearing, a number of public commentators suggested that subpart 1 and subpart 2 be amended so that the scale manufacturer and the scale purchaser must also provide design, assembly, construction, and installation plans to the railroad using the track scale. John Holleman, representing Systems Associates, Inc., a manufacturer of railroad track scales, stated that his company is not opposed to providing railroad track scale design and installation plans to serving railroads. In response to the public comments, the Department, in its comments of May 12, 1995, offered to commence a separate rule-making proceeding to deal with the concerns expressed by the railroads. The Department appears to agree, generally, that the suggestions of the public commentators about providing plans to the serving railroads are appropriate. It would like, however, to explore the subject with the railroad industry generally. The Administrative Law Judge finds that Part 7601.3000 is needed and reasonable as proposed. The Department is not legally required to propose the most reasonable rule. It is entirely within the discretion of the Department to address the concerns expressed by the railroad representatives at the hearing in a separate rule-making proceeding.

Part 7601.3015 - Application

40. At the hearing, in response to comments from the railroad industry, the Department proposed the addition of a new Part 7601.3015. DPS Ex. 21. In its comments of May 12, 1995, the Department restated the proposed amendment as follows:

7601.3015 APPLICATION

The requirements in parts 7601.3020 and 7601.3030 shall apply only to railroad track scales that will be used to weigh individual, stationary rail cars, and shall not apply to railroad track scales that will be used to weigh rail cars in motion.

All of the railroad representatives present at the hearing, as well as representatives of scale companies, supported the proposed amendment. The Administrative Law Judge finds that the Department has supported the need for and reasonableness of the amendment contained in Part 7601.3015 by an affirmative presentation of fact. The addition of Part 7601.3015 does not constitute a prohibited substantial change within the meaning of Minn. Stat. § 14.05, subd. 2 (1994), and Minn. Rule 1400.1100, subp. 2. The amendment does not raise a new subject matter different from that noticed in the Notice of Hearing or result in a rule that is fundamentally different. Moreover, the amendment does not affect classes of persons who reasonably could not have been expected to comment on the proposed rule at the hearing.

Part 7601.3020 - Railroad Track Scale Foundation

41. Subpart 1 of Part 7601.3020 relates to soil bearings and soil bearing tests that must be conducted before the scale foundation for a railroad track scale is installed. The need for and reasonableness of subpart 1 of Part 7601.3020 are discussed at pages 13 and 14 of the SONAR. The only public comment received on this subpart is contained in Pub. Ex. 2, a comment from Kenneth H. Jennison of the Burlington Northern Railroad. In his written comment, Mr. Jennison states a general objection to the format and content of subpart 1, without detailing specific inadequacies. Mr. Jennison proposes that subpart 1 be totally reworded as stated in Pub. Ex. 2. The Department did not respond to Mr. Jennison's comment. The prime difference between the proposal of Mr. Jennison, contained in Pub. Ex. 2, and subpart 1 of Part 7601.3020 as proposed is that Mr. Jennison would require a minimum soil bearing capacity of at least 4,000 pounds per square foot. Subpart 1 does not require a stated minimum bearing capacity in pounds per square foot. It only requires that a registered engineer certify that the soil bearing is suitable for the scale to be installed. There is no evidence in the record that a minimum bearing capacity of 4,000 pounds per square foot is necessary. The Department characterizes that same requirement currently contained in Part 7600.2100, subp. 1 as unreasonable. SONAR, pp. 13-14. The Administrative Law Judge finds that the Department has established the need for and reasonableness of subpart 1 of Part 7601.3020, as proposed. As long as competent professional engineering opinion concludes that the load-bearing capacity of the soil is sufficient for the railroad track scale foundation, there is no need to include in the subpart a stated minimum soil bearing capacity.

42. Subpart 2 of Part 7601.3020 relates to the method of constructing foundation walls, floors, footings, and weighing element support piers. The need for and reasonableness of subpart 2 of Part 7601.3020 are discussed at page 14 of the Statement of Need and Reasonableness. The only public comment on subpart 2 of Part 7601.3020, submitted by Weigh-Tronix, Inc., objects to subpart 2 because it believes that new types of railroad track scales are being developed in Minnesota that

may not need concrete foundations. Weigh-Tronix, Inc. believes that the primary concern should not be the materials used in construction but that adequate foundations be provided for the particular scale involved. The Department did not respond directly to the comment of Weigh-Tronix, Inc. The Administrative Law Judge finds that subpart 2 of Part 7601.3020 is needed and reasonable as proposed. Subpart 2 sets very general requirements that will insure long-term performance without specifying scale design. Moreover, subpart 2 reflects modern scale foundation construction practices. SONAR, p. 14.

43. Subpart 3 of Part 7601.3020 specifies that the foundation for the railroad track scale must be "deep enough to provide a finished pit seven feet deep, measured from the top of the finished foundation wall to the top surface of the finished pit floor". The need for and reasonableness of subpart 3 are discussed at SONAR, p. 14. At the hearing, a number of public commentators representing railroad interests opposed subpart 3 as being unduly restrictive. Weigh-Tronix, Inc., in its written comment of April 28, 1995, states that the requirement for a seven-foot deep pit would preclude most modern static track scale designs. Weigh-Tronix, Inc. also concludes that a seven-foot deep pit is not necessary to ensure the integrity of the scale even under Minnesota frost conditions. In its comments of May 12, 1995, the Department states that its extensive experience in regulating pit-type railroad track scales leads it to conclude that a scale pit at least 6'8" in depth is needed to accommodate the loadcells and weighbridge of many pit-type railroad track scales. The additional four inches or less required by the proposed rule does not result in a significant additional cost to the railroad. The Administrative Law Judge finds that subpart 3 of Part 7601.3020 is needed and reasonable as proposed.

Part 7601.3030 - Approach Rails and Piers

44. Subpart 1 of Part 7601.3030 did not receive adverse public comment. The need for and reasonableness of subpart 1 is discussed at page 15 of the SONAR. Subpart 2 of Part 7601.3030 relates to approach panels installed at each end of a railroad track scale. The need for and reasonableness of subpart 2 of this Part is discussed at page 15 of the SONAR. At the hearing, the Department proposed to delete Item C from this subpart and to renumber the remaining item. DPS Ex. 21; Comments of the Department of Public Service, May 12, 1995, p. 2. Item C of subpart 2 was deleted because the railroad industry and the Department believe that provision is no longer necessary. Moreover, members of the railroad industry have concluded that the specification contained in Item C is an inappropriate construction detail, since the end wall will be adversely affected by any dynamic breaking action of a train. Pub. Ex. 3.

45. Subpart 2 of Part 7601.3030 was the subject of two adverse comments. Weigh-Tronix, Inc. in its written submission of April 28, 1995, states that the need for, form and length of approach panels is application-dependent. Weigh-Tronix, Inc. concludes that Item D of subpart 2, as proposed, would itself be a sufficient description of the requisite approach panels. The Company believes that it is not necessary for approaches to be level. In Pub. Ex. 3, received at the public hearing, the Burlington Northern Railroad objects to the format and content of subpart 2. It states, generally,

that the subpart is inadequate and not comprehensive as stated. Burlington Northern Railroad would prefer to substitute for subpart 2, section 2.22.6 of the current AAR Scale Handbook. The Department did not respond to the statements of the Burlington Northern Railroad contained in Pub. Ex. 3 or the statement of Weigh-Tronix, Inc., contained in its letter of April 28, 1995.

46. The Administrative Law Judge finds that subpart 2 of Part 7601.3030, as amended, is needed and reasonable. The subpart reflects the scale installation requirements of the American Railroad Engineers Association. As stated in Finding 44, supra, former item C was unnecessary and, perhaps, dangerous. The deletion of Item C does not constitute a prohibited substantial change within the meaning of Minn. Stat. § 14.05, subd. 2 (1994). The amendment was made in response to public comment and does not result in a rule that is fundamentally different from that noticed prior to the hearing.

Part 7601.4010 - Vehicle and Livestock Scale Foundations

47. The need for and reasonableness of Part 7601.4010 is discussed at pages 16 - 17 of the SONAR. The only public comment received on this Part related to Item H of subpart 3. At the hearing, Mr. VanderVorst, representing Howe Scale Company, stated that Item H of subpart 3 should be eliminated as not being practical in Minnesota climatic conditions. The Department, in its comments of May 12, 1995, stated that the suggestion of Mr. VanderVorst has merit. However, the Department desires to conduct additional investigation of the issue within the Division of Weights and Measures. The Department anticipates addressing Mr. VanderVorst's suggestion in a future rule-making proceeding. The Administrative Law Judge believes it appropriate to defer any elimination of Item H until the division has had an opportunity to verify Mr. VanderVorst's opinion. For the reasons stated at pages 16 and 17 of the SONAR, the Administrative Law Judge finds that subpart 3 of Part 7601.4010, as proposed, is needed and reasonable.

Part 7601.4020 - Vehicle and Livestock Scale Approaches

48. Part 7601.4020 relates to approaches for vehicle and livestock scales. The need for and reasonableness of Part 7601.4020 is stated at pages 17 and 18 of the SONAR. The only public comment related to this Part concerned Item C of subpart 2. At the hearing, Mr. Reiersen, representing Mettler-Toledo, Inc., stated that Item C of subpart 2 varies from a requirement contained in NIST Handbook 44. The Department did not respond to Mr. Reiersen's statement in either of its post-hearing comments. Subpart 2 of Part 7601.4020 is identical to subpart 2 of the existing rule on the same subject matter, Part 7600.7500. Although subpart 2, Item C is less stringent than the approach requirement contained in NIST Handbook 44, it has been used successfully in Minnesota since approximately 1966 under the existing rule, Part 7600.7500. SONAR, p. 17. The Administrative Law Judge finds that subpart 2 of Part 7601.4020 is needed and reasonable as proposed.

Part 7601.7000 - Placing in Service Program - Purpose and Policy

49. Part 7601.7000 relates to a voluntary registration program for persons who install, adjust, repair, service, or test commercial weighing and measuring equipment. The need for and reasonableness of Part 7601.7000 is discussed at page 21 of the SONAR. At the hearing, a representative of the taconite industry stated that it requires a separate, specialized program. Since internal personnel spend the major portion of their time on a specific kind of a scale peculiar to an individual taconite plant, that commentator concluded that any sort of generalized test on multiple types of commercial weighing and measuring equipment for purposes of registration would be unfair to persons within the taconite industry who only repair special types of scales. It should be noted, however, that Part 7601.7000 relates only to persons who install, adjust, repair, service, or test commercial weighing and measuring equipment. The terms “commercial” and “weighing and measuring equipment” are defined in subparts 3 and 21 of Part 7601.0100. It has not been determined that the internal scales used by the taconite industry for purposes unrelated to the sale of their product are, in fact, commercial weighing and measuring equipment. To the extent that it is judicially determined that such scales are commercial weighing and measuring equipment, the Department has already created several levels of registration for persons who repair commercial weighing and measuring equipment. Comments of the Department of Public Service, May 22 1995, p. 4. It is the stated intention of the Department to refine the registration process so that individual registrants are not required to pass any examination that does not apply to the types of commercial weighing and measuring equipment they will service. Comments of the Department of Public Service, May 22, 1995, p. 4. The Administrative Law Judge finds that Part 7601.7000, as proposed, is needed and reasonable.

Part 7601.7020 - Certificate of Registration

50. Part 7601.7020 relates to a registration certificate issued by the Director of the Division of Weights and Measures to persons who meet the requirements stated in this Part. The need for and reasonableness of Part 7601.7020 is stated at page 22 of the SONAR. In its written comments of May 10, 1995, Cleveland-Cliffs, Inc., suggested that two levels of registration be created. The existing level of registration would be as provided for in the rules. The proposed second level of registration would be for technicians who repair and calibrate taconite scales on a part-time basis. Such a second level of registrant would be qualified only to repair and calibrate the types and brands of commercial weighing and measuring equipment present at their place of employment. Cleveland-Cliffs proposes that that the second-level registrants be tested and licensed for a four-year period. In its comments of May 22, 1995, the Department responds that it has already created several levels of registration for persons who repair commercial weighing and measuring equipment. The Department limits the examination to the applicant’s area of specialty. Comments of the Department of Public Service, May 22, 1995, p. 4. The variance rule contained in Part 7601.0200, is also available to avoid any unreasonable application of Part 7601.7020 to a particular applicant. The comments made concerning the taconite industry scales in Finding 49, supra, are also applicable to the comment of Cleveland-Cliffs. The Administrative Law Judge finds that the Department has demonstrated the need for and reasonableness of Part 7601.7020, as proposed.

CONCLUSIONS

1. The Department gave proper notice of the hearing in this matter.
2. The Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subs. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.
3. The Department has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i)(ii), except as noted at Findings 21 and 26.
4. The Department has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).
5. The amendments and additions to the proposed rules which were suggested by the Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.
6. The Administrative Law Judge has suggested action to correct the defect cited in Conclusion 3, as noted at Findings 22 and 27.
7. Due to Conclusion 3, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.
8. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.
9. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the proposed rules be adopted except where specifically otherwise noted above.

Dated this 14th day of July, 1995.

BRUCE D.. CAMPBELL

Administrative Law Judge

Reported: Taped.