

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA BOARD OF ELECTRICITY**

In the Matter of the Proposed Repeal
Of Minnesota Rule 3800.3500,
Subpart 12, Defining Signaling Circuit

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck at 9:00 a.m. on December 9, 1998, at Room 135B, Earl Brown Center, University of Minnesota St. Paul Campus, 1800 Buford Street, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.13 to 14.20 (1996), to hear public comment, to determine whether the Minnesota Board of Electricity ("Board") has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of rules, whether the proposed rules are needed and reasonable, and whether or not modifications to the rules proposed by the Board after initial publication are impermissible, substantial changes.

Theresa Meinholtz-Gray, Assistant Attorney General, 525 Park Street, St. Paul, Minnesota 55103, appeared on behalf of the Board at the hearing. The Board's hearing panel consisted of John A. Schultz, Executive Secretary of the Board of Electricity, and John Williamson, Assistant Executive Secretary.

Approximately sixty-five (65) persons attended the hearing. Thirty-six (36) persons signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed amendments to these rules.

The record remained open for the submission of written comments for twenty (20) calendar days following the hearing to December 29, 1998, the period having been extended by the Administrative Law Judge ("ALJ"). During the initial comment period, the ALJ received ninety-four (94) written comments from interested persons and the Board. Pursuant to Minn. Stat. § 14.15, subd. 1, five working days were allowed for the filing of responsive comments. During the responsive comment period, the ALJ received six written responsive comments from interested persons and the Board. The ALJ received five written non-responsive comments after the close of the initial comment period which were not considered in this Report, but will be forwarded to the Board with the file. The record closed for all purposes on January 6, 1999.

NOTICE

The Board 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 Board of actions which will correct the defects and the Board 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 Board may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Board does not elect to adopt the suggested actions, they must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Board elects to adopt the actions suggested by 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 Board may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Board makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then they 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 Board files the rule with the Secretary of State, they 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 September 21, 1998, the Board requested the scheduling of a hearing.

2. On October 13, 1998, the Board requested prior approval of its Notice Plan¹ and filed the following documents with the Chief Administrative Law Judge:

- a. A copy of the rule to be repealed certified by the Revisor of Statutes.²
- b. A draft of Statement of Need and Reasonableness (SONAR).³
- c. The Board's Notice of Intent to Adopt Rules With a Public Hearing.⁴

3. On October 19, 1998, Administrative Law Judge Allen E. Giles approved the Notice Plan.⁵

4. On October 19, 1998, the Board mailed the Notice of Hearing to all persons and associates who had registered their names with the Board for the purpose of receiving such notice.⁶ Copies of the Notice were also mailed on that date to all persons and companies that are licensed by the Board.⁷ In addition, copies of the Notice and the SONAR were sent to all persons who were legislators during the seventy-fourth legislature and who are still legislators, the Chair of the Senate Governmental Operations and Veterans Committee, the Chair of the Senate Economic Development Budget Division, and the Chair of the House Governmental Operations Committee.⁸ The Board also posted the Notice and the SONAR on the Board's website at www.electricity.state.mn.us.⁹

5. On November 9, 1998, the Notice of Hearing and a copy of the proposed rule repeal were published at 23 State Register 1192.¹⁰

6. On the day of the hearing, the Board placed the following documents into the record:

- a. A copy of the request for comments as published in the State Register.¹¹
- b. The proposed repeal of the rule, including the Revisor of Statute's approval.¹²

¹ Board Ex. F.

² Board Ex. B.

³ Board Ex. C.

⁴ Board Ex. M.

⁵ Board Ex. G.

⁶ Board Ex. J.

⁷ Board Ex. I.

⁸ Board Ex. H.

⁹ Board Ex. K.

¹⁰ Board Ex. E.

¹¹ Board Ex. A.

¹² Board Ex. B.

- c. The Statement of Need and Reasonableness (SONAR).¹³
- d. A copy of the certificate showing that the agency sent a copy of the SONAR to the Legislative Reference Library.¹⁴
- e. A copy of the Notice of Hearing as mailed and published in the State Register.¹⁵
- f. A copy of the Board's October 13, 1998 letter to Judge Johnson requesting approval of its Notice Plan.¹⁶
- g. A copy of the October 19, 1998 letter from Judge Giles approving the Board's additional Notice Plan.¹⁷
- h. A copy of the certificate of Notice provided to appropriate legislators and other governmental officials, and a copy of the mailing list for those individuals.¹⁸
- i. A copy of the certificate of Notice provided to all persons and companies that are licensed by the Board.¹⁹
- j. A copy of the certificate of Notice provided to all persons on the Board's mailing list and a copy of the mailing list for those individuals.²⁰
- k. A copy of the certificate of giving Notice by posting the Notice of Hearing and SONAR on the Board's website and a copy of the Board's webpage.²¹
- l. A copy of the comments the Board received in response to the proposed repeal of Minn. R. 3800.3500, subp. 12.²²
- m. A copy of the certificate by the Board authorizing John Schultz to give Notice of the Board's Intent to Adopt Rules after holding a public hearing to repeal Minn. R. 3800.3500, subp. 12.²³

Standards of Review

7. In a rulemaking proceeding, an administrative law judge must determine whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts.²⁴ An agency need not always support a rule with adjudicative or trial-type facts. It may rely on what are called "legislative facts" which are general facts concerning questions of law, policy, and discretion. The agency may also rely on interpretations of statutes

¹³ Board Ex. C.

¹⁴ Board Ex. D.

¹⁵ Board Ex. E.

¹⁶ Board Ex. F.

¹⁷ Board Ex. G.

¹⁸ Board Ex. H.

¹⁹ Board Ex. I.

²⁰ Board Ex. J.

²¹ Board Ex. K.

²² Board Ex. L.

²³ Board Ex. M.

²⁴ Minn. Stat. § 14.14, subd. 2 (1996); Minn. R. 1400.2100 (1997).

and on stated policy preferences.²⁵ Here, the Board prepared a SONAR setting out a number of facts, statutory interpretations, and policy preferences to support the proposed rule repeal. It also supplemented information in the SONAR with information presented both at the hearing and in written comments and responses placed in the record after the hearing.

8. Inquiry into whether a rule is reasonable focuses on whether the rulemaking record establishes that it has a rational basis, as opposed to being arbitrary. Minnesota law equates an unreasonable rule with an arbitrary rule.²⁶ Agency action is arbitrary or unreasonable when it takes place without considering surrounding facts and circumstances or disregards them.²⁷ On the other hand, a rule is generally considered reasonable if it is rationally related to the end that the governing statute seeks to achieve.²⁸

9. The Minnesota Supreme Court has defined an agency's burden in adopting rules as having to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."²⁹ An agency is entitled to make choices between different approaches as long as its choice is rational. Generally, it is not proper for an administrative law judge to determine which policy alternative might present the "best" approach, since making such a judgment invades the policy-making discretion of the agency. Rather, the question for an administrative law judge is whether the agency's choice is one that a rational person could have made based upon the evidence in the record.³⁰

10. In addition to ascertaining whether proposed rules are necessary and reasonable, an administrative law judge must make other decisions – namely, whether the agency complied with the rule adoption procedure; whether the rule grants undue discretion to the agency; whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or illegal; whether the rule constitutes an undue delegation of authority to another; and whether the proposed language is not a rule.³¹

11. When an agency makes changes to proposed rules after it publishes them in the State Register, an administrative law judge must determine if the new language is substantially different from what the agency originally

²⁵ Manufactured Hous. Inst. v. Petterson, 347 N.W.2d 238, 244 (Minn. 1984); Mammenga v. Department of Human Servs., 442 N.W.2 786 (Minn. 1989).

²⁶ In re Hanson, 275 N.W.2d 790 (Minn. 1978); Hurley v. Chaffee, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).

²⁷ Greenhill v. Bailey, 519 F.2d 5, 10 (8th Cir. 1975).

²⁸ Mammenga v. Department of Human Servs., 442 N.W.2d at 789-90; Broen Mem'l Home v. Department of Human Servs., 364 N.W.2d 436,444 (Minn. Ct. App. 1985).

²⁹ Manufactured Hous. Instit. v. Petterson, 347 N.W.2d at 244.

³⁰ Federal Sec. Adm'r v. Quaker Oats Co., 318 U.S. 2, 233 (1943).

³¹ Minn. R. 1400.2100.

proposed.³² The legislature has established standards for determining if the new language is substantially different.³³

Nature of the Proposed Rule

12. This rulemaking proceeding involves repealing Minn. R. 3800.3500, subp. 12, which defines a “signaling circuit” as follows:

An electric circuit that is used exclusively for the supply of energy to a device that gives a recognizable signal, including but not limited to door bells, digital data displays, and signal lights, and that does not supply energy to any device that controls electrical equipment other than the signaling devices.

Minn. R. 3800.3500, subp. 12 was adopted in 1989 with the intention of clarifying the meaning of “signaling circuits” as it is used in the definition of “alarm and communication system” in Minn. Stat. § 326.01, subd. 6d. If repealed, a signaling circuit would be defined by the National Electrical Code, Article 100 (“NEC”). The NEC defines a signaling circuit as “[a]ny electric circuit that energizes signaling equipment.”³⁴

Statutory Authority

13. The Board cites Minn. Stat. § 326.241, subd. 2(6) as the source of its authority to adopt and modify these rules. This section states that “[t]he board . . . shall have the power to . . . [a]dopt reasonable rules to carry out its duties under section 326.241 to 326.248 and to provide for the amount and collection of fees for inspection and other services. All rules shall be adopted in accordance with chapter 14.”³⁵

14. Authority to promulgate rules is contained in Minn. Stat. § 14.06(a) which requires agencies to promulgate rules to the extent that:

Each agency shall adopt rules, in the form prescribed by the revisor of statutes, setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights of or procedures available to the public.

15. The Administrative Law Judge finds that the Board has the general statutory authority to adopt the proposed rule amendments.

³² Minn. Stat. § 14.15, subd. 3.

³³ Minn. Stat. § 14.05, subd. 2.

³⁴ This definition of signaling circuit is contained in the 1984 edition of the NEC.

³⁵ Minn. Stat. § 326.241, subd. 2(6).

Impact on Farming Operations

16. Minn. Stat. § 14.111 imposes an additional notice requirement when rules are proposed that affect farming operations. The Board made no mention of the statute or whether it applies in this rulemaking. The statute reads:

14.111 Farming operations.

Before an agency adopts or repeals rules that affect farming operations, the agency must provide a copy of the proposed rule change to the commissioner of agriculture, no later than 30 days prior to publication of the proposed rule in the State Register.

A rule may not be invalidated for failure to comply with this section if an agency has made a good faith effort to comply.³⁶

The proposed rules do not impose restrictions or have a direct impact on any aspects of farming operations. The Administrative Law Judge finds that the proposed rule change will not impact farming operations in Minnesota, and finds that no additional notice is required.

Background

17. In 1985, Minnesota Statutes Chapter 326 was amended by the legislature and several provisions were added dealing with low-voltage wiring.³⁷ The 1985 amendments created the alarm and communication contractor's license.³⁸ These amendments also added Minn. Stat. § 326.01, subd. 6d defining "alarm and communication system." That definition included the term "signaling circuit." The amendments referenced the NEC to provide definitions of certain terminology including the term "signaling circuit." The NEC defined "signaling circuit" as "[a]ny electric circuit that energizes signaling equipment."³⁹

18. In 1989, the Board amended sections of Minnesota Rules parts 3800.3500 through 3800.3810. This rulemaking proceeding included promulgating Minn. R. 3800.3500, subp. 12, defining a signaling circuit as follows:

³⁶ Minn. Stat. § 14.111.

³⁷ Minnesota Electrical Act, ch. 326, 1985 Minn. Laws 1st Spec. Sess., c6 s1, 2, 6 and 7.

³⁸ Minnesota Electrical Act, ch. 326, 1985 Minn. Laws 1st Spec. Sess., c6 s1.

³⁹ National Electric Code, art. 100 (1984).

an electric circuit that is used exclusively for the supply of energy to a device that gives a recognizable signal, including but not limited to door bells, digital data displays, and signal lights, and that does not supply energy to any device that controls electrical equipment other than the signaling devices.⁴⁰

19. The Board submitted a SONAR in support of its 1989 rulemaking proceeding. In the 1989 SONAR, the Board stated the following:

[t]he Board has learned from numerous electrical contractors that they have had difficulty competing with or are unable to bid competitively against other electrical contractors because they employ fewer licensed electricians and more unlicensed individuals. The Board is concerned and has a great deal of evidence that those unlicensed individuals are performing electrical work without the level of supervision contemplated by the Act or the Board's rules ... This raises concerns as to the quality of the electrical work being performed by unlicensed individuals and the safety hazards such work may present to the public.⁴¹

As its rationale for adding subpart 12, the Board stated that "[t]he definition of signaling circuit was added to clarify that circuits that control electrical equipment other than the signaling devices are not signaling circuits."⁴²

20. In 1995, Richard Luck, a licensed alarm and communications contractor and member of the Board of Electricity, was prosecuted and convicted for installing power limited wiring for building control purposes without using licensed installers and without applying for inspection as required by the Minnesota Electrical Act.⁴³

21. Judge Donovan Frank presided over Mr. Luck's prosecution. In Judge Frank's decision, dated August 8, 1995, he ordered the following:

[t]hat the Defendant cooperate and work with the state Board of Electricity and its employees and agents along with other Alarm and Communication Contractors to modify or otherwise amend the applicable rules and statutes that promote consistency of enforcement and treatment, and to establish rules and regulations consistent with present day technology and custom and practice

⁴⁰ See Minn. R. 3800.3500, subp. 12 (Supp. 1990).

⁴¹ Pub. Ex. 25B.

⁴² Id.

⁴³ Pub. Ex. 6 at 7.

across the State of Minnesota and similarly situated contractors in other states consistent with the National Electrical Code.⁴⁴

22. On January 5, 1996, Richard Luck and his company, Gartner Refrigeration, Inc., petitioned the Board of Electricity to repeal, or to alternatively amend, Minn. R. 3800.3500, subp. 12.⁴⁵ They argued, in part, that the rule should be repealed or amended because the definition imposed new limitations on the scope of work allowed by alarm and communication contractors.⁴⁶ For example, prior to the rule's adoption, they allege that alarm and communication contractors routinely installed power limited wiring for building control purposes. According to Mr. Luck, these contractors are no longer able to perform this work after Minn. R. 3800.3500, subp. 12 was adopted.⁴⁷

23. The Board established a nine-member Advisory Task Force during its October 10, 1996 meeting.⁴⁸ The Advisory Task Force ("ATF") was charged with the following:

to provide a forum for the occupation (industry) to discuss issues related to the definition of "signaling circuit" as found in Minnesota Rule 3800.3500, Subp. 12, the greater issue of licensing as it pertains to the installation of Class 2 and Class 3 Power-Limited circuits and equipment and provide recommendations to the board with regard to licensing and inspection.⁴⁹

The ATF presented the Board with its report dated April 8, 1997.⁵⁰ In its report, the task force stated, in part, that it "agrees that the Gartner petition raises the issue of the scope of work of the Alarm and Communication Contractors, but the ATF does not agree that in 1989 the [Board] enacted rules imposing a new limitation on the scope of wiring, but rather clarified the existing statute."⁵¹ The ATF also stated that it could not provide recommendations to the Board at that time, but suggested that the ATF continue meeting to discuss issues regarding low-voltage licensing in preparation for the 1998 legislative session.⁵²

24. On May 29, 1997, Richard Luck's company, Gartner Refrigeration, Inc., filed a Petition for Declaratory Judgment with the court of appeals against the Board of Electricity to determine the validity of Minn. R. 3800.3500, subp. 12.⁵³ In the Petition, Gartner Refrigeration alleged that the rule is invalid, in part,

⁴⁴ Id. at 8.

⁴⁵ Pub. Ex. 6.

⁴⁶ Id. at 4-5.

⁴⁷ Id.

⁴⁸ Pub. Ex. 102B.

⁴⁹ Id. at 3.

⁵⁰ Pub. Exs. 102A and 102C.

⁵¹ Pub. Ex. 102C.

⁵² Id. at 3.

⁵³ Pub. Ex. 8.

because it exceeds the Board's statutory authority by defining "signaling circuit" more narrowly than the NEC, "thereby excluding certain low-voltage wiring from the scope of an 'alarm and communication' contractor's license."⁵⁴ Gartner Refrigeration also argued that the rule was invalid because the rule excluded circuits that supplied energy to devices that control electrical equipment. It contended this exclusion violated equal protection of the law and due process.⁵⁵ Finally, it argued that the rule was not adopted in accordance with statutory requirements.⁵⁶

25. The Board held regular public meetings throughout June 1997 to May 1998. Transcribed excerpts from Board meetings were entered into the public record at the rule hearing.⁵⁷ During the June 10, 1997 meeting, the Board initiated discussion on the Gartner Refrigeration declaratory judgment petition.⁵⁸ Upon its attorney's advice, the Board moved to close the meeting to discuss litigation strategies.⁵⁹ When it reopened the meeting to the public, the Board announced that it had moved to abolish the Advisory Task Force and establish a full-Board committee to resolve pending problems.⁶⁰

26. At its July 8, 1997 meeting, the Board again moved to close to the public its discussions regarding response to the Gartner petition.⁶¹ During the closed session, the Board moved to authorize Board staff to begin procedures to repeal Minn. R. 3800.3500, subp. 12.⁶²

27. When the Board began the process of formally repealing Minn. R. 3800.3500, subp. 12, Mr. Luck withdrew his petition for declaratory judgment.⁶³

28. The Board held meetings on September 9, 1997,⁶⁴ March 10, 1998,⁶⁵ and May 12, 1998.⁶⁶ In all these meetings, the Board discussed licensing and supervision issues surrounding alarm and communication contractors, as well as the rule's definition of signaling circuit. In the May 12, 1998 meeting, Richard Luck stated the following with regard to the definition of Minn. R. 3800.3500, subp. 12:

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ See Pub. Exs. 9-15.

⁵⁸ Pub. Ex. 9.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Pub. Ex. 10.

⁶² Id.

⁶³ Pub. Ex. 5 at 3.

⁶⁴ Pub. Ex. 11.

⁶⁵ Pub. Ex. 12.

⁶⁶ Pub. Ex. 13.

[t]he existing rule has a term in it which requires, in order for a signaling circuit to be a signaling circuit, it has to be exclusively going to a signaling device or audible or some type of a piece of equipment within such a signaling nature. There is no exclusive condition in either NEC or the statutes and something that the Board initiated back in 1989 upon itself to add that exclusive condition.⁶⁷

29. In its July 14, 1998 meeting, the Board continued its discussion about repealing Minn. R. 3800.3500, subp. 12.⁶⁸ It also discussed the contents of the SONAR. At this meeting, Cort Holten, an attorney with Chestnut & Brooks who works with John Ryder, president of the Minnesota Burglar and Fire Alarm Association and a member of the Board of Electricity, stated the following with regard to the “turf war” between journeyman electricians and alarm and communication contractors, and the contents of the SONAR:

[w]e’re afraid that the, I will call it the turf battle discussion, I think you’re all familiar with what I’m referring to, would be better left out of the SONAR here and it would potentially if you’re a proponent of the proposed rule, this is kind of scary because we view it as a potential problem at the hearing ... The reason for repealing the rule could be simply stated as the statute defines this term that we’re talking about by incorporation, by reference to the National Electric Code ... If we get involved in what this all means, this discussion of which there are differences of opinion, you drag in issues that could be fatal to the hearing process.⁶⁹

30. Also at the July 14, 1998 Board meeting, Richard Luck shared his perspective about the need and reasonableness for the rule repeal as provided in the SONAR: “My thought is, I really don’t care what the SONAR says, as long as the rule gets repealed. As long as six months or a year from now somebody doesn’t come back to challenge this and say you repealed [Minn. R. 3800.3500, subp. 12] because you said that it was redundant.”⁷⁰

31. Mr. Luck also engaged in a discussion with Rosellen Condon, an Assistant Attorney General representing the Board, regarding the contents of the SONAR at the July 14, 1998 meeting. Their discussion, in part, is laid out below:

⁶⁷ Id. at 2.

⁶⁸ Pub. Ex. 14.

⁶⁹ Id. at 2-3.

⁷⁰ Id. at 4.

Luck: I think the fact that the pure fact that [Minn. R. 3800.3500, subp. 12] is repealed speaks volumes. The underlying reasons why it was repealed, I would see as secondary, so, you know, publish [the SONAR] because we say it's redundant and a challenge you can say people are arguing that it was inaccurate, you know what I mean, are you following me?

Condon: Yeah, I am following you. What you are saying here is let's repeal the rule and then we'll talk about it later about whether it changed who could do what. Is that right?

Luck: Yes.

Condon: OK, and what I'm saying is that when you go to this hearing, the Board has to take a position. We can't say we'll figure this out later because we are proposing to repeal a rule and why is that, what will the effect of that be. What I'm, what I am saying to you is you can't put it off. You gotta tell them, 'cause that's why they're in the hearing. They want to know where the Board stands because then either I will support the Board or I will not support the Board.⁷¹

Analysis of SONAR Contents

32. Minn. Stat. § 14.131 requires an agency adopting rules to include in its SONAR:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

⁷¹ Id. at 5.

- (5) the probable costs of complying with the proposed rule; and
- (6) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

In its SONAR, the Board listed the six factors from the statute and provided the agency's response. With regard to the first factor, the Board states that the result of the repeal will be that the NEC and the definitions contained therein will define the scope of work alarm and communication system installers are allowed to perform. Installers of class 2 and class 3 signaling circuits will be limited to installing circuitry prescribed by the NEC. It is the Board's position that the repeal of Minn. R. 3800.3500, subp. 12 will not change the scope of work of alarm and communication system installers and, therefore, will have no impact on such installers.

33. The Board contends that repealing the rule will not result in additional costs to it or any other agency. It states that the repeal will affirm the Board's interpretation and enforcement practices. The Board notes that class 2 and class 3 signaling circuit installers are not subject to mandatory inspections or associated fees. As a result, state revenues will not be effected due to the repeal of Minn. R. 3800.3500, subp. 12.

34. In regard to the third factor, the Board states that the purpose of the repeal is to eliminate redundancy and ambiguity created by having two definitions of signaling circuit. Also, the repeal will eliminate the potential for comparison between the two definitions. The Board contends that repealing the rule is the least costly method for eliminating the redundancy and ambiguity.

35. In regard to the fourth factor, the Board states that other statutes and rules dealing with the installation of alarm and communication systems are part of a larger issue requiring legislative attention. Although the Board has worked with the electrical industry in recent years on the issues of alternative licensing and inspection requirements for class 2 and 3 systems, it has not been able to effect changes in associated laws. The Board contends that it plans to continue pursuing change by legislative means.

36. The Board states that there will be no cost of complying with the rule change. This is because the term "signaling circuit," as it used in the statutory definition of "alarm and communication system," will be defined solely by the NEC.

37. The sixth factor is moot because there is no parallel federal regulation.

Analysis of the Proposed Rule Repeal

38. In a rulemaking proceeding, the SONAR should set forth the agency's position and its reasoning as to why the proposed rule adoption, amendment, or repeal is both necessary and reasonable. The six factors an agency must include in its SONAR are designed to incite a discussion about the effects and ramifications of the rule change. One primary issue that has emerged in the present case is the effect the rule repeal will have on the scope of work of alarm and communication contractors. The evidence reveals that this issue was presented and discussed by the Board prior to the time the SONAR was submitted. Mr. Luck's legal action against the Board sought repeal or amendment of the rule because Mr. Luck believes the scope of work of alarm and communication contractors is unnecessarily limited, and can and should be broadened by repealing or amending the rule. The record also includes notes from Board meetings wherein this issue was discussed. The SONAR, however, states only that the rule repeal will have no effect on the scope of work of alarm and communication contractors because signaling circuit is already defined in the NEC, and the two definitions are redundant. Notwithstanding the fact that the Board was aware at least some alarm and communication installers believed the rule repeal would increase their scope of work, the SONAR fails to adequately address this issue.

39. Those in support of the repeal are alarm and communication contractors. Many of the comments received by alarm and communication installers are duplicative. They state the following:

since [Minn. R. 3500.3800, subp. 12] was adopted it has changed the type of low voltage systems alarm and communication contractors can install. This is due to the way [sic] electrical inspectors think the rule means . . . We did not have this problem in 1985, when the law required us to be licensed. I would just like to earn a living and not be limited to one area of the work I was educated and trained to do.⁷²

40. Other comments in support of the repeal, such as the one submitted by Lauren Frankovich, state the following:

I don't feel the State Board of Electricity has the right to re-define the definition already found in the National Electrical Code Book.

⁷² See Pub. Exs. 33, 40, 43, 45, 46, 51, and 52B.

In 1985, I was allowed to do work (low voltage) that in 1989 I was not allowed to do because of some interpretation by people that are primary electricians and not electronic type people. This has [frustrated] me and many others in the alarm business. . . .⁷³

41. The evidence supports a conclusion that Minn. R. 3500.3800, subp. 12 is not redundant as it is used in the statutory definition of "alarm and communication system." In a memorandum to the Board, dated March 3, 1998, from Rosellen Condon, an Assistant Attorney General representing the Board, Ms. Condon responds to the Board's question regarding the effects of repealing Minn. R. 3500.3800, subp. 12.⁷⁴ Her comments include the following:

In general, no substantive change will result; status quo will remain with a possible loss of clarity with the attendant need for interpretation and explanation.

. . . .
. . . [Several commenters] argue that the repeal by itself would create the potential for questions and arguments regarding the scope of work that could be done by non-electricians, thereby, increasing regulatory costs.

. . . .
. . . The current rule definition of signaling circuit is consistent with the NEC definition, merely describing it in more detail The existing rule elaborates on the NEC definition of signaling circuit, providing an essential qualifier and examples in the definition; i.e., that the circuit supply power to signaling equipment.⁷⁵

In addition to the memorandum, a finding that the rule is not redundant is also supported by the numerous comments submitted by alarm and communication installers which provide that they believe the repeal would allow them to expand their scope of work. A common sense reading of the rule, as recognized by the Assistant Attorney General, is that the rule qualifies the NEC definition by excluding circuits that supply energy to a "device that controls electrical equipment other than signaling devices." The rule is a permissible interpretation of signaling circuit as it is used in the statute and how it is defined in the NEC. Minn. R. 3500.3800, subp. 12 provides clarification of the statute and the NEC definition. Consequently, if the rule is repealed the statute loses this clarification.⁷⁶ The Board's reasoning to repeal the rule because it is redundant is unsupported by the record in this case.

⁷³ See Pub. Exs. 37 and 48.

⁷⁴ Pub. Ex. 101D.

⁷⁵ Id.

⁷⁶ Many supporting the repeal submitted comments stating, in part, that the rule should be repealed because it is not serving its intended purpose, namely that it was meant to clarify the

42. The comments submitted by those in the alarm and communication industry make it clear that they consider the 1989 rule to be more restrictive than the NEC definition. This is supported by their testimony that the 1989 rule limited their scope of work, or was at least interpreted by some (inspectors) to limit their scope of work. The supporters' comments also make it clear that if the rule is repealed, they believe the scope of their work will increase. This is evidenced by their comments that they were able to perform a wider range of jobs prior to 1989 when the NEC definition of signaling circuit controlled the industry. It is also evidenced by the numerous comments submitted by electricians opposing the repeal alleging that the alarm and communication contractors will view the repeal as a license to expand their scope of work.⁷⁷

43. In his reply, dated January 6, 1999, John Schultz, Executive Secretary of the Board, addresses the scope of work issue and states as follows: "[a]lthough some supporters of the proposed repeal believe the rule should be repealed to expand the scope of work alarm and communication contractors can perform, this is not the board's reason for seeking repeal of the rule."⁷⁸ This response fails to adequately meet the Board's burden in this rulemaking proceeding. To reiterate, the Board must establish the need and reasonableness of the proposed rule repeal by an affirmative presentation of facts. The Board has an obligation to explain on what evidence it relies in support of the rule repeal. The Board's response to the scope of work issue fails to consider the merits of the positions of the groups on each side of this dispute.

44. The alarm and communication contractors believe the repeal will expand their scope of work at least to pre-1989 standards, when the NEC definition of signaling circuit controlled. The Board recognizes that alarm and communication installers believe the repeal will increase their scope of work.⁷⁹ It is the Board's duty in this rulemaking proceeding to deal with and discuss the ramifications of the rule repeal. It is, therefore, insufficient for the Board to simply state that its reasoning for the proposed repeal is different from the reasoning voiced by a large number of alarm and communication contractors.⁸⁰

definition of signaling circuit as used in the statute. See e.g., Pub. Exs. 1-5, 16, 17, 19 and 41. Supporters of the repeal provide that the rule has caused more confusion than clarification and should, therefore, be repealed. Id. The fact that the rule may be undesirable and has caused confusion, however, is not a sufficient basis on which to repeal the rule in this case because of the comments in the record. Repealing the rule will result in a loss of clarification of the statute, which many supporters believe will allow them to expand their scope of work. The Board must demonstrate why it is reasonable to repeal the rule by addressing the surrounding facts and circumstances of the case. Its contention that the rule is redundant and, if repealed, will have no effect on the industry, is insufficient when the evidence clearly suggests otherwise.

⁷⁷ See e.g., Pub. Exs. 5, 26, 29 – 32.

⁷⁸ Pub. Ex. 107 at 3.

⁷⁹ Id.

⁸⁰ Id.

45. The evidence suggests that the Board decided to take steps to repeal Minn. R. 3500.3800, subp. 12 as a legal strategy in response to Richard Luck's declaratory judgment petition. The Board meeting notes reveal that prior to the court petition, the Board had established a task force to discuss, in part, issues surrounding the rule's definition of signaling circuit. In April 1997, the task force was unable to make any recommendations to the Board, but suggested that it continue meeting to discuss the issues for the 1998 legislative session. It was not long after Mr. Luck filed his petition with the court in May 1997 that the Board abolished the task force and authorized staff to initiate steps to repeal Minn. R. 3500.3800, subp. 12. When this occurred, Mr. Luck withdrew his petition for declaratory judgment. If, as the evidence suggests, the Board initiated the rule repeal process as a legal strategy in response to Mr. Luck's petition, this alone does not invalidate the Board's decision to attempt to repeal Minn. R. 3500.3800, subp. 12. The problem lies in the fact that the Board is attempting to repeal the rule without establishing reasonable grounds for doing so. Namely, the Board fails to address major issues raised by both supporters and opposers of the repeal.

46. The Board's responses to the six factors listed in the SONAR are based on the underlying premise that the rule repeal will have no effect on alarm and communication contractors; specifically, that it will not expand their scope of work. The SONAR states that the repeal will not cause the Board (or any other agency) any additional costs, including compliance costs. The Board also claims that repealing the rule is the least costly method to achieve the purpose of the repeal. The evidence in this case, however, clearly demonstrates that alarm and communication contractors believe the repeal will expand their scope of work. The Board fails to address this central issue. As a result of this failure, the contents of the SONAR are rendered inaccurate.⁸¹ In other words, because the evidence presented reveals that the repeal will have an effect on the industry, and on alarm and communication contractors specifically, the Board's responses in the SONAR should be different than those provided. The practical effect of their testimony is that if the rule is repealed, alarm and communication contractors will begin performing work that they performed prior to the adoption of Minn. R. 3800.3500, subp. 12. If alarm and communication contractors expand their scope of work, however, it should be challenged by the Board because it alleges that the NEC definition and Minn. R. 3800.3500, subp. 12 are

⁸¹ For example, the practical effect of the testimony by alarm and communication contractors is that if the rule is repealed, they will begin performing work that they performed prior to the adoption of Minn. R. 3800.3500, subp. 12. If alarm and communication contractors expand their scope of work, however, it should be challenged by the board because the Board alleges that the NEC definition and Minn. R. 3800.3500, subp. 12 are redundant. This result suggests the Board's responses in its SONAR, particularly regarding associated costs due to the repeal, are inaccurate. The ALJ note that although the SONAR states the Board will not incur additional costs if the rule is repealed, Mr. Schultz did expand on this point in his response. Pub. Ex. 107 at 1. In his response, Mr. Schultz stated that "[a]lthough there may be a short-term increase in costs associated with interpretation and enforcement, board staff believes that costs over a longer term will not increase." Id.

redundant. The Board fails to address the scope of work of alarm and communication contractors and other central issues in this case this central issue of scope of work expansion

47. The Administrative Law Judge recognizes that the need to conclude rulemaking proceedings as efficiently as possible and to conserve limited agency resources. However, if an agency can avoid a discussion of the actual effect of a rule repeal by simply claiming it is redundant, when the record clearly indicates otherwise, then the rulemaking requirements of the Administrative Procedure Act are effectively circumvented. The APA requires an agency to demonstrate the need for and reasonableness of the repeal with an affirmative presentation of facts. The Board has not met this requirement because it chose to not address the underlying issues.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Board of Electricity gave proper notice in this matter.
2. The Board has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.
3. The Board has demonstrated its statutory authority to repeal the existing rule, 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) and (ii).
4. The Board has **not** demonstrated the need for and reasonableness of the proposed rule repeal by an affirmative showing of facts in the record within the meaning of Minn. Stat. §§ 14.15, subd. 4; and 14.50 (iii).
5. Any Findings that may properly be termed Conclusions, and any Conclusions that might properly be termed Findings, are hereby adopted as such.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rule repeal not be adopted.

Dated this _____ day of January, 1999.

GEORGE A. BECK
Administrative Law Judge

Reported: Taped, no transcript prepared.