

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF TRANSPORTATION

In the Matter of the Proposed Rules  
Governing Distribution of Financial  
Assistance Under the Public Transit  
Assistance Program.

REPORT OF THE  
CHIEF HEARING EXAMINER

The above-entitled matter came on for review by the Chief Bearing  
Examiner

pursuant to the provisions of Minn. Stat. 14.15, subds. 3 and 4 (1982), as  
amended by Minn. Laws 1983, Ch. 210, 6 and 7, which provide:

Subd. 3. Finding of substantial change. If the [hearing  
examiner's] report contains a finding that a rule has been  
modified in a way which makes it substantially different from  
that which was originally proposed, or that the agency has not  
met the requirements of sections 14.13 to 14.18 it shall be  
submitted to the chief hearing examiner for approval. If the  
chief hearing examiner approves the finding of the hearing  
examiner, the chief hearing examiner shall advise the agency and  
the revisor of statutes of actions which will correct the  
defects. The agency shall not adopt the rule until the chief  
hearing examiner determines that the defects have been  
corrected.

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

Based upon a review of the record in this proceeding, the Chief Hearing  
Examiner hereby approves the Report of the Bearing Examiner in all respects.

In order to correct the defects enumerated by the Hearing Examiner, the  
agency shall either take the action recommended by the Bearing Examiner or  
reconvene the rule hearing if appropriate. If the agency chooses to  
reconvene

the rule hearing, it shall do so as if it is initiating a new rule hearing, complying with all substantive and procedural requirements imposed on the agency by law or rule.

If the agency chooses to take the action recommended by the Bearing Examiner, it shall, prior to submitting the rules to the Attorney General for review, submit to the Chief Bearing Examiner a copy of the rules as initially published in the State Register, a copy of the rules as proposed for final adoption in the form required by the State Register for final publication, and a copy of the agency's Findings of Fact and Order Adopting Rules. The Chief Bearing Examiner will then make a determination as to whether the defects have been corrected and whether the modifications in the rules are substantial changes.

Should the agency make changes in the rules other than those recommended by the Hearing Examiner, it shall also, prior to submitting the rule to the Attorney General, submit the complete record to the Chief Bearing Examiner for a review in regard to substantial changes.

Dated: December 1983.

DUANE R. HARVES  
Chief Bearing Examiner

MEMORANDUM

Besides the reasons stated in the Examiner's Findings of Fact 32 and 49, Minn. Stat. 14.05, subd. 4, specifically requires an agency to adopt standards and criteria for the granting of variances from rules before or at the same time the variance rule is adopted. Therefore, the violation of this specific statutory mandate is a further reason for the illegality of the rules in questions.

D.R.H.

STATE OF MINNESOTA  
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In the Matter of the Proposed Rules  
Governing Distribution of Financial  
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EXAMINER  
Assistance Program.

REPORT OF THE HEARING

The above-entitled matter came on for hearing before State Hearing Examiner Bruce D. Campbell on Wednesday, October 26, 1983, at 9:30 a.m., in Room 81 of the Minnesota State Office Building, St. Paul, Minnesota.

This Report is a part of the rule hearing procedure required I,, Minn. Stat. 14.05 through 14.28 (1982), to determine whether the proposed rules should be adopted by the Commissioner of Transportation.

Members of the Department panel appearing at the hearing included Nancy Moore, Special projects Coordinator of the Minnesota Department of Transportation, Robert Works, Director, Transit Program Section, Minnesota Department of Transportation, and Jean Stepan, Special Assistant Attorney General assigned to the Minnesota Department of Transportation.

Four people signed the hearing register and one public witness appeared and spoke at the hearing. The Department submitted 12 written exhibits and two timely written comments were received from members of the public. The Commissioner of Transportation 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 (1982), as amended by Minn. Laws 1983, Ch. 210, 6, this Report has been submitted to the Chief Hearing Examiner for his approval. If the Chief Hearing Examiner approves the findings of this Report, he will advise the Commissioner of Transportation of actions which will correct the defects and the Commissioner of Transportation may not adopt the rule until the Chief Hearing Examiner

determines that the defects have been corrected. However, in those instances where the Chief Hearing Examiner identifies defects which relate to the issues of need or reasonableness, the Commissioner of Transportation may either adopt the Bearing Examiner's recommendations to cure the defects or, in the alternative, if the Commissioner of Transportation does not elect to adopt the recommendations, he may submit the proposed rule to the Legislative Commission to Review Administrative Rules for the commission's advice and comment. Provisions relating to this submission to the commission may be found in Minn. Stat. 14.15, subd. 4 (1982), as amended by Minn. Laws 1983, Ch. 210, 7.

If the Commissioner of Transportation elects to adopt the recommendations of the Bearing Examiner and makes no other change; and the Chief Hearing Examiner determines that the defects have been corrected, then the Commissioner of Transportation shall submit the rule to the Attorney General for review of form and legality. If the Commissioner of Transportation makes changes in the rule other than those recommended by the Hearing Examiner, then he shall

submit the rule, with the complete record, to the Chief Bearing Examiner for a review of the changes before adopting it and submitting it to the Attorney General. Procedures relating to this subsequent review by the Chief Hearing Examiner are set forth in Minn. Stat. 14.16 (1982).

When the Commissioner of Transportation submits the rule to the Attorney General, he shall give notice on the day of submission to all persons who requested that they be informed of the submission to the Attorney General.

Based upon all the testimony, exhibits and written comments, the Hearing Examiner makes the following:

#### FINDINGS OF FACT

##### Procedural Requirements

1. (A) August 18, 1983, the Department of Transportation filed the following documents with the Chief Bearing Examiner:
  - (a) A copy of the proposed rules.
  - (b) The Order for Hearing.
  - (c) The Notice of Bearing proposed to be issued.
  - (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
2. On September 12, 1983, a Notice of Bearing and a copy of the proposed rules were published in VIII State Register, page 451.
3. (X) September 12, 1983, the Department of Transportation mailed the Notice of Bearing to all persons and associations who had registered their names with the Department of Transportation for the purpose of receiving such notice.
4. On September 14, 1983, the Department of Transportation filed the following documents with the Bearing Examiner:
  - (a) The Notice of Bearing 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 Statement of Need and Reasonableness.
  - (e) The names of Department of Transportation personnel who will represent the Department at the hearing together with the names of any other witnesses solicited by the Department to appear on its behalf.
  - (f) A copy of the State Register containing the proposed rules.
  - (g) An Affidavit of Additional Notice.
  - (h) All materials received following a Notice of Intent to Solicit Outside Opinion published at VII State Register, page 1441, April 4, 1983 .
  - (i) The Petition requesting a rule hearing.

The documents were available for inspection at the Office of Administrative

Bearings from the date of filing to the date of the hearing.

5. The record remained open through November 2, 1983, for the receipt of

written comments and statements. On November 7, 1983, the

Department of

Transportation filed with the Hearing Examiner a Statement of

Acceptance or

Rejection of Public Comments as authorized by law, whereupon the record

finally closed.

#### Nature of the Proposed Rules

6. This rule proceeding presents totally new rules and substitutional revisions of existing rules concerning the distribution of financial assistance under the Public Transit Financial Assistance Program, established pursuant to Minn. Stat. 174.21-174.27 (1982). The governing legislation mandates that rules be developed in the following four areas which are addressed in the rules: procedures for the review and approval of applications for operating financial assistance; a definition of a term "total operating cost"; the establishment of uniform performance standards for private operators of regular route transit in the Twin Cities transit taxing district; and the establishment of procedures for the review and approval of applications for financial assistance. The Department of Transportation, to aid in proposing rules acceptable to the diverse interest groups concerned, formed an external advisory committee made up of current recipients of transit financial assistance. Consultation with interested groups in the development of the rules was statutorily mandated. Minn. Stat. 174.23, subd. 7 (1982). The seven members of the Committee represented all service area classifications defined in Minn. Stat. 174.24, subd. 3 (1982). The Committee met on a number of occasions and assisted in the development of and approved the content of the proposed rules. The minutes of the Advisory Committee are contained in the official record as DOT Exhibit E.

#### Statutory Authority

7. The Department of Transportation advances the following authority for promulgating rules governing the distribution of financial assistance under the Public Transit Financial Assistance Program: Minn. Stat. 174.23, subs. 2 and 7 (1982); Minn. Stat. 174.24, subd. 3 (1982); and Minn. Stat. 174.245, subd. 2 (1982). The statutory authority relied upon by the Depart-

ment of Transportation generally authorizes the adoption of rules relative to the subject matter of the proposed rules. To the extent that a specific provision of any proposed rule exceeds the scope of statutory authority granted, a discussion of such specific lack of authority will be included herein in the consideration of that individual rule provision. Except as specifically noted, it is found that the Department does have authority to adopt the proposed rules.

14 MCAR 1.4031. Definitions

8. This section of the proposed rules contains 19 separate definitions which are proposed to clarify the meaning of words used throughout the rules. none of the definitions proposed were challenged in public comments, and the definitions comport either with dictionary or statutory definitions, or generally accepted accounting practices and principles. It is concluded that the need and reasonableness of such definitions 'have been established by an affirmative presentation of facts in the record- and that the definitions are necessary to make the law enforced and administered specific for purposes of

Minn. Stat. 14.02, subd. 4 (1982). Certain of the definitions incorporate  
ty, reference statutory definitions. Incorporations by  
reference are  
authorized. Minn. Stat. 14.07, subd. 4 (1982). 'The form of  
the rule, in-  
cluding the incorporations by, reference, were approved by the  
Revisor of  
Statutes.

14 MCAR 1.4032. Authority, Purpose and Scope  
9. 1.4032, in three subsections, states the statutory  
authority for the  
adoption of tie rules, the purpose of the rules and the scope of  
their ap-  
plication. Minn. Stat. 14.02, subd. 4 (1982), defines a rule  
as a "agency  
statement of general applicability and future effect...". Both the  
complexity  
of the proposed rules and the recent vintage of the subject  
matter make the  
inclusion of an authority, scope and purpose section  
appropriate. It is  
reasonable to state the statutory authority to adopt rules and to  
state the  
scope and purpose of the rules to inform, in a clear and concise  
manner, the  
public of the legislative directive to the Commissioner of  
Transportation and  
the general intent of both the enabling legislation and the proposed  
rules.

10. Although not affecting the need and reasonableness of the  
proposed  
rule, it would be more appropriate to begin the rules with the  
authority, pur-  
pose and scope section, 14 MCAR 1.4032, rather than follow the  
definitional  
section. If the reason for the authority, purpose and scope  
section is to  
orient the reader, the placement of this section prior to the  
definitional  
section would more properly implement that purpose.

14 MCAR sec. 1.4033. Eligible Recipient  
11. Section 1. 4033 is a definition of the term "eligible  
recipient",  
and, as such, is a verbatim restatement of the definition contained  
in Minn.  
Stat. 174.24, subd. 2 (1982). It is necessary and reasonable  
to duplicate  
the statutory definition because eligibility is a primary issue that  
needs to  
be readily understood ty the public. Such duplication of  
statutory language  
is also necessary in order to avoid confusion with the  
Assistance Program,  
described in 14 MCAR 1.4065, which has different eligibility  
requirements.

Since the definition is taken from statutory language, the definition is reasonable.

12. Although not affecting the need and reasonableness of the proposed rule, the definition of "eligible recipient" should be contained in the definitional section if it has general application. If its placement in the rules is designed to avoid confusion with use of the same term in later provisions of the rules, making a placement in the general definitional section inappropriate, however, the definition should be qualified by a citation to those provisions of the rules to which this definition of the term applies.

14 MCAR sec. 1.4035. Application for Financial Assistance Through Public Transit Participation Program

13. Section 1.4035 describes the process for submitting an Application for Financial Assistance under the statutory program. An application is necessary to initiate consideration of the request for assistance by the Department of Transportation. The provision, requiring a submission to the Department

ment, allows the Department to prescribe the format of the application. It appears, from the language of the proposed rule, that the Department may be free to request any information it chooses from the applicant. At least, the rule does not specifically limit or define the information that might be sought through the later adoption of a format. If such is the appropriate construction of the proposed rule, the Department has failed to establish its legality- since it allows the Department absolute discretion to require any information desired from the applicant. The purpose of adopting rules is to limit such unfettered agency discretion. The Hearing Examiner assumes that it was the intention of the Department that the provisions of the following proposed rule, 14 NEAR 1.4037, by implication, prescribe the information to be provided in an application. If such was the intention of the Department, however, the rule, as drafted, does not reflect that intent. The Department, on the face of the rule, has an impermissibly unlimited discretion. See Finding 32, infra.

14. If the application of the first sentence of 14 MCAR 1.4035 was not intended to be limited to the matters specified in 14 NEAR 1.4037, the Department has also failed to demonstrate the legality of the proposed rule. If the Department of Transportation may request and obtain from any applicant whatever information it chooses to seek, the rule contains no reasonable standard or limitation on Department action. As such, the rule, in giving unfettered discretion to the Department without criteria or standards, is illegal. See Finding 32, infra.

15. It is not entirely clear from the context of the rule which construction was intended by the Department. To correct the defect, it should include, after the first sentence of 14 MCAR 1.4035, a provision limiting the contents of the application to those matters specified in 1.4037, if such is the intent of the rule. If the contents of the application are not limited by 1.4037, reasonable categories of information which the Department

may request from an applicant must be specified. If it is ST; intention of the Department to request from applicants information other than that specified in 14 MCAR 1.4037, any criteria limiting the discretion of the Agency with respect to the contents of an application must be based on evidence within the record and must not constitute a substantial change.

Minn. Stat. 0&\$5 2.111.

16. Although not affecting need and reasonableness, the Hearing Examiner notes that 14 MCAR 1.4035 follows immediately after 14 MCAR 1.4033, the definition of "eligible recipient". Since the rules are replacement rules, rather than amendments, there appears to be no reason not to renumber the rules consecutively without leaving a gap for 1.4034. Much the same observation could be made about the numbering of the remaining rules. There is no statement in the record regarding the failure of the Department to use a consecutive numbering system.

17. The remaining portion of 14 MCAR 1.4035, requiring the submission of an application to other appropriate governmental bodies, is necessary and reasonable since it reflects a statutory requirement. Minn. Stat. 174.23, subd. 2 (1982).

14 MCAR 1.4037. Application Format

18. 1.4037 A of the Rules describes the information that must be contained in the Management Plan. The information requested under Items 1-6 pertains to specific cost and revenue items in the budget and is information the Department needs to evaluate properly the applicant's request for financial assistance prior to entering into budget negotiations. The information requested under Items 7-12 pertains to specific operational plans of the applicant and is information the Department needs to evaluate properly the applicant's qualifications for providing the most efficient and effective transit service. Since the information requested in the Management Plan is necessary for the Department to make an informed judgment with respect to the application for funds, it is needed for the Department to make an intelligent decision with respect to funding applications prior to committing state funds. The required content of the Management Plan is reasonable since it contains the categories of information that the Department needs to properly evaluate the application.

19. 1.4037 B requires applicants to submit an Operations Report specifying actual and anticipated statistics on operating expenses and operating revenues and actual and anticipated statistics on miles and hours of service and passengers carried. It is necessary to request both actual and anticipated statistics in each category because it makes possible comparisons that facilitate and improve the Department's evaluation of applications for assistance. Statistics on operating expenses and revenues are necessary because these budget figures provide the basis for negotiations towards a final financial assistance contract. Statistics on miles and hours of service and passengers carried are important to budget evaluation because they largely determine the scope of other budgetary cost items. Mae Bearing Examiners finds that, for the reasons stated, the provision defining the contents of the Operations Plan is both necessary and reasonable.

20. 1.4037 C7 requires applicants to provide, with the application, a

resolution by, the governing body authorizing the submission of an application, designating a person to represent the applicant in negotiations with the Department and attesting to the availability of local funds. It is both necessary and reasonable to require the submission of such a resolution so that the Department may be assured that its efforts to establish a financial assistance arrangement with the applicant will be fruitful.

14 MCAR 1.4040. Determination of Financial Assistance; Expense Categories

21. 1.4040 A describes the scope of the definition of "total operating costs" and is needed to make clear that all of the expense items defined in this section, as well as all the unallowable expenses defined in 1.4042 apply in the determination of total operating costs.

22. 1.4040 13 defines the categories of costs contained in the term "personnel services" expense. A definition of this component of cost is needed because personnel services are a major component of the total operating costs of the transit system. The definition is reasonable because it includes all the charges applicable to transit personnel, including indirect labor charges and fringe benefits.

23. 1.4040 C defines the "administrative charges" category as a separate expense category. This section is necessary because administrative charges are a natural component of the total operating costs of a transit system. With the exception hereinafter discussed, the section is reasonable because it provides for all of the charges applicable to the administration of a transit system. The Bearing Examiner, however, for the reasons stated in Finding 32, infra, finds that the inclusion of the term "etc.", as an open-ended component of an attempted definition in two provisions of subsection C, renders the provision illegal.

24. To correct the defect, the Department must either eliminate the term "etc." without addition, or add additional components to the definitions which find support in the record and do not constitute a substantial change within the meaning of Minn. Stat. 14.24 (1982) and 9 MCAR 2.111.

25. 1.4040 D defines the expense category of "vehicle charges". The section is necessary because vehicle charges are an integral part of the total operating cost of a transit system. It is reasonable because it provides for all charges applicable to the operation of vehicles.

26. 1.4040 E defines the expense category of "operations charges". A definition is necessary because operations charges are an essential element in the total operating cost of a transit system. With the exception hereinafter discussed, the definition is reasonable because it provides for all the types of operations charges that might be present in a transit operation, both direct and indirect. For the reasons stated in Finding 23, supra, the inclusion of the term "etc." in subsection E 5 of the proposed rule renders it illegal.

27. To correct the defect, the Department must either remove the term "etc." from the proposed rule without addition or add additional components to the definition which find support in the record and do not constitute a substantial change. Minn. Stat. 14.24 (1982) and 9 MCAR 2.111.

28. 1.4040 F describes specific items of expense within the "insurance charges" general expense category. The definition is needed because insurance

expenses are a necessary and unavoidable element in the total operating cost of a transit system. The definition is reasonable because it allows for the two essential types of insurance present in a transit operation: public liability insurance and property damage insurance.

29. 1.4040 (G defines the expense category of "taxes and fees". The definition is necessary and reasonable because such taxes are applicable to a transit operation and those taxes and fees enumerated are exhaustive of the category.

14 MCAR 1.4042. Determination of Financial Assistance; Disallowed Expenses

30. 1.4042 A defines the scope of total operating costs and is needed to make clear that all of the disallowed expenses defined in 1.4042, as well as expense items defined in 14 MCAR "1.4040, apply in the determination of total operating costs.

31. 1.4042 B provides that expenditures for general purpose equipment are unallowable as operating costs, except with the prior approval of the Department. The section then defines general purpose equipment. It is

necessary to disallow such costs because general purpose equipment can too easily be transferred to activities other than transit. Moreover, such items have useful lives that are not only difficult to determine but also longer than the life of a transit project. It is reasonable to exclude general purpose equipment from compensable expenditures because general purpose equipment, by its nature, has applications and uses for activities other than transit. Moreover, given the fact that transit substantially benefits the local community, local organizations should use local funds to purchase general purpose equipment which both maintains the local transit operation and gives the locality flexibility in adapting their equipment to changing local needs. It is necessary and reasonable to define general purpose equipment without reference to a capital purchase price or expected useful life because there is no universal standard by which to define general purpose equipment in terms of price and useful life maximums.

32. Although the exclusion of general purpose equipment from compensable expenditures, is necessary and reasonable, the unfettered discretion of the Department to vary the rule by, allowing expenditures for general purpose equipment renders this provision of the rule illegal. The rule is not sufficiently specific so as to avoid, or at least discourage, arbitrary behavior on the part of the Department. Generally, a lack of standards governing the exercise of discretion by, an administrative body which permits or encourages arbitrary enforcement may be illegally vague. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). Constitutional due process may also require that decisions -be made in accordance with ascertainable standards. *Holmes v. New York City Housing Authority*, 398 F.2d 262, 265 (2nd Cir. 1968). Moreover, both the Office of Administrative Hearings and the office of the Attorney General have unifomally rejected rules which lodge unlimited discretion in an agency without defined or ascertainable standards. Sidi a result is inherent in the definition (of a rule, contained in Minn. Stat.

14.02, subd. .4 (1982), as an agency statement of general applicability to implement or make specific the law enforced of administered by that agency.

The absence of standards and unfettered discretion on the part of the agency, however well-intentioned, avoids the purpose of adopting a rule, which is to both inform the public of the standards to be applied in administrative operation and protect them from arbitrary agency action. See Minn. Stat. 14.05, subd. 4 (1982).

33. To correct the defect the Department must either delete from 1.4042 B the ability of the Department to include general purpose equipment in cost calculations (Dr establish reasonable standards governing the exercise of that discretion. If the Agency chooses to adopt criteria restricting the exercise of agency discretion, the criteria must find support in the record and not constitute a substantial change. Minn. Stat. 0&\$5 2.111.

34. 1.4042 C-G describe the following unallowable cost items: interest and other financial costs; fines and penalties; contingencies; bad debts; contributions; donations; and entertainment expenses. It is necessary and reasonable to disallow such costs because they do not contribute to the day-to-day operation of the transit system and because allowing them would encourage undesirable business practices. It is also reasonable to disallow

such costs because they are considered unallowable costs by the Federal

Government. Federal Management Circular 74-4.

14 MCAR 1.4043. Determination of Financial Assistance; Fee for Service

35. 1.4043 provides that operators for profit of public transit service

are eligible for a fee for service. The fee for service, over and above the

cost of operation, must be arrived at through non-competitive negotiations and

represent a fair and reasonable profit. The rules enumerate factors to be

considered in determining the fee. The provision is needed in order to pro-

vide incentives for private operators to provide public transportation

service. Moreover, the consideration of a profit incentive is mandated by

statute. The guidelines established for paying a fee for service are reason-

able in that they are in conformance with Federal procurement regulations.

36. One public commentator suggested that the limitation on fee reim-

bursement available to for-profit public transit services be altered to pro-

vide that a private non-profit operator could also qualify for such an incen-

tive reimbursement. See, Pub. Ex. I, Comments of Suburban Paratransit, Inc.,

p. 2. The purpose of allowing an incentive payment is to encourage those

operators who normally engage in an operation for profit to provide services.

A similar incentive is not necessary for non-profit organizations. Moreover,

the State has a limited amount of funding and, as such, it is reasonable to

restrict incentive reimbursements to accomplish the evident statutory pur-

pose; necessary encouragement of the provision of transit services. Hence,

the Hearing Examiner concludes that the Department has demonstrated that

limiting for profit incentive reimbursement to "for-profit" transit providers

is both necessary and reasonable.

14 MCAR f 1.4044. Distribution of Financial Assistance; Revenue Categories

37. 1.4044 A describes the scope of the definitions of revenue cate-

gories and is necessary and reasonable in order to demonstrate that all of the

revenues defined in 14 MCAR 1.40.44 apply in determining the fixed local

share of total operating costs to be paid by a recipient in accordance with

statutory requirements.

38. 1.4044 B-G describe the various sources of revenue that may comprise the fixed local percentage of total operating costs to be paid by a recipient. It is necessary to define these revenues in order to fairly and consistently implement Minn. Stat. 174.24, subd. 3 (1982), which requires the commissioner of Transportation to distribute State funds in such a way that a fixed percentage of costs is paid from local sources of revenue. The definitions established are reasonable in that they describe sources of revenue connected with the provision of transit service, are local sources as required by statute and comport with current operational practice. Two public commentators suggested that investment income and general donations be excluded from the definition of other financial assistance contained in sec. 1.4044, subd. (G Pub. El. 5 Comments of Suburban Paratransit, Inc., pp. 2-4; Pub. Ex. II, Comments of Darts. Both commentators suggested that investment income be eliminated and a limitation on donations be keyed directly to a specific transit use or a receipt in lieu of transit fares. The Hearing

Examiner does not accept the changes suggested by the public witnesses on much the same reasoning that a similar conclusion was reached with respect to a fee incentive for non-profit private operators. Since the State makes a significant financial contribution to transit projects throughout the State, it must reduce its burden in all proper circumstances. The definition advanced by the Department of Transportation minimizes the expense to the State without having a deleterious impact on transit programs. The Hearing Examiner notes that the concern raised by Darts and Suburban Paratransit, Inc., have little practical application for the majority of transit projects that the Minnesota Department of Transportation funds, the operation of the "fixed local share" funding procedure obviates the unfairness suggested by the public commentators. Under this funding mechanism, the local share is "fixed" based upon a statutory percentage of project costs for various population categories. The local transit project must meet its fixed share and can use essentially the revenues available to it to do so. Once the fixed share requirement is met, the recipient is free to use any additional revenues as it chooses.

14 MCAR 1.4045. Distribution Classifications

39. 1.4045 references the statutes concerning the distribution of funds under the classifications established by the Legislature and states exceptions allowed by the statutes. It is necessary to include this section to provide continuity in the text of the rules. Incorporation of statutory definitions by reference is authorized. Minn. Stat. 14.07, subd. 4 (1982).

14 MCAR 1.4050. Financial Assistance Contract

40. 1.4050 A. describes the content of a financial assistance contract. Because this contract is a legal result of the application and negotiations process, it is necessary and reasonable to provide the public with pertinent information about the contract. Because the governing statute allows payment to most recipients to be made at 50% of the total contract amount in the first month of operation, it is necessary to restrict such contracts to no more than one year in order to avoid the excessive individual drain on the general fund

that would result from multi-year contracts. It is necessary and reasonable to include a resolution by the governing body because it is legally required and assigns responsibility for the proper execution of the contract.

41. 1.4050 B references the statutes concerning the allowable disbursements schedule for state transit funds. Its inclusion is necessary and reasonable to provide continuity in the text of the rules. Incorporation of statutory definitions and terms by reference is statutorily authorized. Minn.

Stat. 14.07, suba. 4 (1982).

42. 1.4050 c provides that the Minnesota Department of Transportation will terminate the financial assistance contract if a recipient fails to comply with the terms and conditions of the contract. The provision is both necessary and reasonable in order to promote contract compliance and, when violations occur, to prevent further misappropriation of state funds.

14 MCAR 1.4055. Use of Financial Assistance

43. 1.4055 A provides for record keeping by recipients and their sub-

contractors. The requirement of adherence to generally accepted accounting principles and the verification of transit cost allocation are necessary to insure a proper accounting for the use of a state financial assistance. It is necessary to require statistics on miles annual hours of service and passengers carried so the Department of Transportation can monitor the efficiency and effectiveness of the transit service funded. The retention of records three years from the date of final payment is necessary and reasonable to comply with the procedures of the Minnesota Department of Administration Contract Management Division and the subsequent Minnesota Department of Transportation Uniform Procedures Manual.

44. 1.4055 B requires recipients to submit to the Department, at the end of each month, a report summarizing cost allocations and operating statistics for the period. The provision of this information is both necessary and reasonable to facilitate the regular monitoring and evaluation of projects funded by the Department of Transportation. It is appropriate to require information on a monthly basis to insure that recipients keep records current and maintain an accurate accounting.

45. Suburban Paratransit, Inc., Pub. Ex. I, p. 5, has suggested that the requirement that the information be provided on forms emanating from the Department be altered to include forms approved by the Department. Tie Department of Transportation in its submission to the Hearing Examiner after the close of the public comment, as authorized by statute, has accepted this comment. Hence, it would be reasonable for the Department to amend 1.4055 B as follows:

Reports must be completed on forms provided or approved by the Department . . . .

Such an amendment does not constitute a substantial change within the meaning of Minn. Stat. 14.24 (1982) or 9 MCAR 2.111. See, *United Steel Workers of America v. Marshall*, 647 F.2d 1189 (D.C.Cir. 1980); *American Iron & Steel Institute v. EPA*, 568 F.2d 284, 293 (3rd Cir. 1977); *South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974).

46. 1.4055 C provides for audits of the financial records of recipients and their subcontractors. Audits are necessary to establish that State financial assistance has been properly expended and has been used only for grant purposes. It is reasonable to require audits because the Department of Transportation must safeguard the integrity of public funds and insure their program application. The flexibility provided for this section as respects departmental audits and independent audits is necessary and reasonable because it may reduce the cost of audits and comport with the legislative directive contained in Minn. Stat. sec. 174.23, subd. 7 (1982), to develop "necessary and reasonable changes . . . in financial examination procedures where possible". The requirement for pre-award audits of new recipients is both necessary and reasonable since it provides the Department of Transportation with an opportunity to resolve, prior to the expenditure of public funds, any deficiencies in the financial accounting procedures of a new recipient.

47. It could be suggested that the discretion of the Department to either accept an independent audit or institute a departmental audit, uncontrolled by

criteria contained in the rule, has the same vice of vagueness previously discussed with respect to the inclusion of reimbursement for general purpose vehicles, discussed at Findings 31-33, supra. The Hearing Examiner, however, does not conclude that the discretion with respect to audits is impermissibly vague. The vice previously noted when an agency decision is made without standards is really a denial of administrative due process; the person governed by the rule may be subject to a loss, or forfeiture at the whim of the agency. Under the instant rule, however, the recipient is placed at no disadvantage by the discretionary decision of the Department to conduct their own audit rather than accept an independent audit. Any expense would be borne by the Department and, in the final analysis, it is the Department's duty to insure the proper application of State public funds. A decision whether to subject a recipient to a departmental audit is a decision to be made on an individual basis as a result of agency experience and the information presented to it in the individual case. Under such circumstances, the Department is performing a function which would be difficult to circumscribe by a more particular rule. *Can Manufacturers Institute, Inc. v. State*, 289 N.W.2d 416, 423 (Minn. 1979). See also, *City of New Brighton v. Metropolitan Council*, 237 N.W.2d 620, 625 (Minn. 1975). Hence, the Hearing Examiner concludes that 1.4055 C, as proposed, is both necessary and reasonable.

48. 1.4055 D provides for project monitoring by the Department. This provision is necessary if the Department is to fulfill its public responsibility to protect State funds from misuse and to insure that public funds are used as efficiently and effectively as possible. It is necessary to require that recipients receive prior approval from the Department before changing the Project Management Plan because such changes affect the Project budget and can impact the amount of State financial resources expended. It is necessary to provide for a penalty in the event changes are made without prior approval in order to foster compliance with this provision.

49. For the reasons stated in Finding 32, supra, 1.4055 D, which authorizes the Department of Transportation to approve deviations from the Management Plan required under 1.4037 A, is illegal in that no criteria are enunciated for the exercise of that discretion. See Minn. Stat. 14.05, subd. 4 (1982). Moreover, severe financial implication might result from the failure to obtain approval.

50. To correct the defect, the Department must enunciate in Subsection D criteria that it will employ in determining whether to sanction a departure from the Management Plan. Such criteria must -End support in the record and must not constitute a substantial change within the meaning of Minn. Stat.

A 14.24 (1982), or 9 MCAR 2.111.

14 MCAR 1. 4060. Uniform Performance Standards for Private Operators in Metropolitan Transit Taxing District

5-1. 1. 4060 A requires that performance standards the developed II, the private operators of regular route transit service and that these standards be specified in the Management Plan. Such standards are necessary because they are mandated by statute. The criteria for establishing standards are reasonable since they conform with current effective practice and realistically place appropriate burdens and requirements on the private operators.

52. 1.4060 B establishes funding procedures for private operators. It is necessary to establish funding procedures for private operators so that they may obtain appropriate funding. The provisions are reasonable in that they place upon the private operators the same application, contract and monitoring requirements that apply to other applicants. The rule provision allowing up to 100% of the operating deficit as reimbursement is needed and reasonable to comport with the statutory requirement. It is reasonable to make private operators eligible for a fee for service under the total operating cost definition to provide an incentive for continuing public transit service, an incentive that would be absent in the absence of a fee for service concept. Moreover, the governing statute specifically authorizes a fee for service. Mae cash flow requirements of private business make both necessary and reasonable the provision for payment to private operators on a monthly basis and the optional ability to receive an advance of funds in the first month of the contract. The provision for the deduction of the advance from the last two monthly payments is necessary and reasonable to avoid over-payments of State funds should an advance be obtained by the private operator.

53. Suburban Paratransit, Inc., Pub. Ex. I, p. 5, suggests that 1.4060 B add the word "program" after the word "minus" and before the words "revenue received" in 1.4060 B. Such an amendment, however, is unnecessary since the term "revenue received" is clearly defined in the rule. 14 MCAR 1.4065. Public Transit Grant Assistance Program

54. 1.4065 A. states eligibility requirements for the receipt of grant assistance and restates the statutory definition contained in Minn. Stat. 174.245, subd.2 (1982). It is necessary and reasonable to duplicate statutory language because eligibility is a primary issue requiring ready comprehension by the public. It is also necessary to duplicate statutory language to make a clear distinction between this program and the Transit Assistance Program, described in 1.4033, each of which has different eligibility

requirements. The Hearing Examiner finds that the duplication of statutory language is both necessary and reasonable to allow affected persons to understand the proposed rules. Minn. Stat. 14.07, subd. 5 (1982).

55. 1.4065 B states the criteria to be used in the evaluation of requests for assistance. The formulation of criteria is legislatively mandated. Minn. Stat. 174.245, subd. 2 (1982). The criteria are reasonable because they emphasize three central concepts in transit purchasing: need as impacting on service provision; accessibility for the handicapped; and local financial capability to provide matching funds.

56. 1.4065 C states the standards for capital assistance requests for the purchase of new transit vehicles or the refurbishing of existing vehicles. The rule also contains the definition of refurbishing expenses. The provision of the rule is necessary as a consequence of Minn. Stat.

174.245, subd. 1- (1982). A public commentator suggests that the rule, as drafted, is unreasonable in that it does not accurately state the applicable scope of the transit: Grant Assistance Program established pursuant to Minn. Stat. 174.245 (1982). The rule as drafted states that the requests must be considered for the purchase of new transit vehicles or for the refurbishing of

existing vehicles. The unspoken assumption is that such requests may also be considered for other purposes. Minn. Stat. 174.245 (1982), limits Public Transit Grant Assistance to the purchase or refurbishing of transit vehicles; it may not be considered for another purpose. While such may not be the intent of the Department in formulating the rule, it is the natural interpretation of the provision as drafted. The Department seeks to defend the rule by arguing its correspondence to the statute. Minn. Stat. 174.245, subd. 1 (1982), clearly limits the Public Transit Grant Assistance Program to only the purchasing or refurbishing of transit vehicles. Hence, the Hearing Examiner finds that 1.4065 C is in excess of statutory authority in that, as a consequence of vagueness, it may be possible for the Department to exceed the scope of Minn. Stat. 174.245, subd. 1 (1982).

57. To correct the defect the Department should adopt the suggestion of Suburban Paratransit, Inc., contained in Pub. Ex. I, pp. 5-6, as follows:

Only Assistance requests for the purchase of new transit vehicles or for the refurbishing of existing vehicles may be considered.

58. The remaining provision of 1.4065 C, defining refurbishing expenses, is necessary and reasonable as a result of Minn. Stat. 174.245, subd. 1- (1982). It is also reasonable in that it comports with the normal dictionary definition of the term and accepted accounting practice.

59. 1.4065 D establishes procedures for the review of Grant Assistance requests. Establishing such procedures is mandated by Minn. Stat. 174.245, subd. 2 (1982). Establishing review procedures is also necessary as a consequence of the limited availability of State funds and the competition for such funds. A survey of the capital needs of financial assistance grant recipients is a reasonable component of the procedure because it gives all such recipients an equal opportunity to submit a request and to make a factual presentation to support assistance. The use of an internal committee of departmental representatives to evaluate requests is reasonable because such

individuals have the necessary background and information to evaluate the requests properly.

60. 1.4065 D, however, does not comport with the requirement contained in Minn. Stat. 174.245, subd. 2 (1982). The statute requires the commissioner to "establish to, rule the procedures and standards for review and approval of applications for financial assistance and the criteria to be used in determining priorities in making the grants". Although the rule does establish an internal mechanism for establishing priority rankings, there is no provision regarding the relative priority to be assigned each criterion. Moreover, there is no consideration of how awards are to be made once rankings are assigned. There is no requirement, for example, that the Department must fund, up to its available resources, those projects with the highest priorities. To complete 1.4065 D there must be some logical transition between the ranking by the internal committee and the execution of an Assistance Contract as discussed in 1.4065 E. In the absence of such a logical relationship between ranking and funding, the same vice of unfettered discretion discussed in Finding 32, supra, applies to 1.4065 IL. Hence, the Bearing Examiner finds that the rule, as drafted, does not comport with the

statutory duty contained in 174.245 (1982), to establish by rule the standards for approval of applications for financial assistance.

61. 'I) correct the defect, the Department must include in 1.4065 D a provisions relative to the relationship between priority rankings, as provided for in 1.4065 D, and the execution of the Assistance Contract discussed in

1.4065 E. Any such logical transition or relationship between the separate events must find support in the record and must not constitute a substantial change within the meaning of Minn. Stat. 14.24 (1982) and 9 MCAR 2.111.

62. 1.4065 E describes the Assistance Contract. It is necessary and reasonable to include this provision in the rule to inform the public of the requirements to which recipients are subject. The limits of assistance stated in the rule are reasonable since they are statutorily mandated. Minn. Stat.

174.245, subd. 2 (1982). The requirement of a resolution by the recipient's governing body is a necessary legal requirement imposed by municipal law and practice.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

#### CONCLUSIONS

1. That the Department of Transportation gave proper notice of the hearing in this matter.

2. That the Department of Transportation has fulfilled the procedural requirements of Minn. Stat. 14.14, subs. 1, 1a and 2 (1982), as amended by Minn. Laws On 210, 4 and On 301, 64, and all other procedural requirements of law or rule.

3. That the Commissioner of Transportation has demonstrated his 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, as amended by Minn. laws 1983, Ch. 210, 6, and 14.50 (i) and (ii) (1982), except as noted at Findings 13, 14, 23, 26, 32, 49, 56 and 60, supra.

4. That the Department of transportation 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) (1982).

5. That the Hearing Examiner has suggested action to correct the defects cited in Conclusion 3, supra! as noted at Findings 15, 24, 27, 33, 50, 57 and 61, supra.

6. That due to Conclusions 3 and 5, supra, this report has been submitted to the Chief Hearing Examiner for his approval pursuant to Minn. Stat.

14.15, subd. 3 (1982), as amended by Minn. Laws 1983, Ch. 210, 6.

7. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

B. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department of Transportation 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 Hearing Examiner makes the following:

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted except where specifically otherwise noted above.

Bated this 7th day of December, 1983.

BRUCE D. CAMPBELL  
Bearing Examiner

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