



Office of Administrative Hearings
The Honorable Barbara J. Case
600 Robert Street North
St. Paul, MN 55164-0620

September 15, 2020

Re: Proposed Amendment to Rules Governing Adoption of the 2020 National Electrical Code, *Minnesota Rules*, Part 1315.0200; Revisor's ID Number R-4632

OAH Docket No. 82-9001-36673

Housing First Minnesota presents the following reply related to the Board of Electricity's response memorandum dated September 8, 2020. As noted by the Court, the purpose of this hearing is to determine if the Board has fulfilled its rulemaking obligations. While not at issue in this matter, the overall tone of the Board's letter is illustrative of the retaliatory behavior faced by those that speak against the Board's operations. In its use of this overly aggressive tone, the Board discourages participation in the process, particularly for individuals or organizations that may not be in alignment with the Board's decisions or actions.

Housing First Minnesota raised its concerns over the lack of a proper process because we believe that all regulatory agencies in Minnesota should hold themselves to the high standard required by state law.

Addressing The Board's Defense Of Its Process

As noted extensively in Housing First Minnesota's oral comments on Aug. 19, 2020, and in our filing dated Sept. 8, 2020, we do not believe that the Board followed the proper process.

The Board's response memorandum detailed all of the involvement at the national level through Mr. Dean Hunter and Mr. John Williamson. In defending its SONAR, the Board states that it "believes that its SONAR adequately put the Commenters on notice as to what the proposed rule is attempting to accomplish and allowed them sufficient time and notice to object to the proposed



rule **and fully prepare argument, testimony and evidence for the hearing.**”¹ At the hearing, the Board belatedly provided detail as to what actual changes the 2020 NEC would accomplish, discussed cost analysis studies that were conducted at the National level, and brought in several commenters to promote these changes. Housing First Minnesota was unable to respond to a single comment made by the Board or its supporters because there was *nothing* in the SONAR that related to the comments that were made.

While Housing First Minnesota appreciates the Board’s summary of the main purpose of a SONAR,² it overlooks the very first sentence of Minn. R. 1400.2070. “The statement of need and reasonableness **must summarize the evidence** and argument that the agency is relying on to justify both the need for and the reasonableness of the proposed rules, and must state how the evidence rationally relates to the choice of action taken.” The rule further reads “[a] general description of the statute being implemented or restating the proposed rule is not sufficient.”

The Board’s reliance on *Water in Motion, Inc. v. Minnesota Dep’t of Labor and Industry* is similarly misplaced. The Court concluded that while the SONAR should have included more detail, it found that the petitioners were not “surprised or prejudiced” by the board’s testimony at the hearing or that they were unable to fully prepare their own testimony.” *Water in Motion, Inc. v. Minn. Dep’t of Labor & Indus.*, A16-0335 at *12 (Minn. Ct. App. Dec. 5, 2016). By holding the final technical review and adoption hearing on the 2020 NEC on the same day, the Board limits the ability for interested parties to review the final version of the proposed code before its adoption, or to conduct any meaningful analysis. If an agency were to design a process to limit public feedback, they would look to the process used by the Board.

Far more applicable case law to the present case is found in *Builders Ass’n of the Twin Cities v. Minn. Dep’t of Labor & Indus.*, 872 N.W.2d 263 (Minn. Ct. App. 2015). Here, the court determined that because the Department of Labor and Industry did not conduct a reasoned determination as to why it decided that 4,500 square feet would be the threshold for sprinklers in new construction homes, the court struck down the rule. The court also stated that the supreme court found a decision to be arbitrary where an agency promulgated a rule but provided “no explanation of any assumptions made or suppositions underlying such assumptions, and no

¹ See Board’s Preliminary Response Memorandum dated September 8, 2020, p. 4 (emphasis added)

² *Id.*

articulation of the policy judgments.” *Id.* at 269 (citing *Manufactured Housing Inst. v. Pettersen*, 347 N.W.2d 238, 241 (Minn.1984)). The court also stated that:

Respondent was required to determine if the costs of complying with the rule would exceed \$25,000 for any small business or city, and did not perform a satisfactory assessment. The statute clearly requires that the agency, not the ALJ, must make the determination. Respondent did not make such an analysis. Therefore, we conclude that, because respondent failed to do this, it did indeed violate rulemaking procedures.

Id. at 273. The Board has attempted to provide its rationale, citing its rigorous involvement and participation at the national level *ex post facto* and in clear violation of its statutory requirement.

Housing First Minnesota’s participation in the 2020 NEC Adoption is a red herring. The issue at hand is the Board’s process used in the Minnesota adoption of the 2020 NEC and its insufficient SONAR. Housing First Minnesota is challenging this lack of procedure that the Board followed, not the other way around.

Addressing The NEC Model Code Development Process

As stated by a representative of the Board during the Aug. 19, 2020, hearing and in written comments from National Electrical Manufacturers Association, the National Fire Protection Association, the Electrical Inspector City of Bloomington, the National Electrical Contractors Association, there is a mistaken belief among interested parties and the Board that the model code development process administered by the National Fire Protection Association, and the participation of Minnesota in that process, should be considered as part of the rigorous technical review seen in the adoption of all other building codes in Minnesota. Any participation in the national model code hearings of any building code, or lack thereof, is not an applicable argument in this matter as a defense to the Board’s 44-day turnaround on the Electrical Code.

As thorough and open of a process as the NFPA’s NEC development may be, it is not a recognized part of administrative rulemaking by the State of Minnesota. The only process that can be considered in this matter is that taken by the Board and the only evidence that can be reviewed is that submitted by the Board through its SONAR. The use of this as a defense by the Board illustrates its failure to follow rulemaking requirements.

Addressing Critiques of Housing First Minnesota’s April Comments

During the Aug. 19, 2020, hearing and in its written comments, the Board has devoted considerable time to addressing Housing First Minnesota’s comments. Further, several other parties, including the Fire Marshals Association of Minnesota have followed the Board’s lead and also devoted much of their comments to the defense of the Board’s adoption of the provisions Housing First Minnesota raised as concerns in April of this year.

Housing First Minnesota does believe the Board erred in the adoption of the 2020 NEC without amendment, however, this is immaterial in the decision before the court, as is the Board’s defense of these decisions. The decision before the court is whether or not the Board has followed proper rulemaking procedure under Chapter 14.

Addressing Comments Dismissing the Practice of Regulatory Marketing

During the Aug. 19, 2020, hearing, a representative of the Board raised doubts that regulatory marketing exists. The topic of regulatory marketing is alluded to in the statutes governing the Minnesota Building Codes, Minn. State Statute, 326B.106, Subd. 1, which states:

“...To the extent possible, the code must be adopted in terms of desired results instead of the means of achieving those results, avoiding wherever possible the incorporation of specifications of particular methods or materials...”

Minn. State Statute, 326B.106, Subd. 1

Mark Mitchell, a building product sales expert who has written the definitive book on this matter, argues that involvement in the local code adoption process, such as this matter, is critical for product manufacturers to increase sales of unwanted or unnecessary upgrades otherwise not demanded by consumers:

“Building product manufacturers who make homes and buildings perform better should be more aggressive in pushing for code changes on a local basis if they want a more effective path to growth.”

(Mitchell, Mark. “How to Get Building Codes Adopted.” [See The Whizard Blog.](#))

According to their websites, Schneider Electric and EATON Corporation, organizations commenting on this matter, manufacture and distribute components governed by the code, including several components raised as concerns by Housings First Minnesota, notably surge protection devices and Arc Fault Interruption Circuit components. This is included for

illustrative purposes only and Housing First Minnesota is not alleging these firms engage in such behavior.

Conclusion

The Board of Electricity did not follow the required and proper procedures under Chapter 14 of Minnesota Statutes and Rules and cannot after-the-fact justify its SONAR and rulemaking process.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "David Siegel", written in a cursive style.

David Siegel
Executive Director