

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>DELEGATION OF AUTHORITY TO ISSUE PROCEDURAL ORDERS (199 IAC 7.1)</p>	<p>DOCKET NO. RMU-06-5</p>
---	----------------------------

ORDER ADOPTING AMENDMENT

(Issued August 15, 2006)

Pursuant to the authority of Iowa Code §§ 17A.4, 474.3, and 474.5, the Utilities Board (Board) is adopting amendments to 199 IAC 7.1 to delegate authority to issue procedural orders in proceedings before the Board as described in the "Adopted and Filed" notice attached hereto and incorporated herein by reference. The amendments to rule 7.1 are being adopted as part of the Board's efforts to establish procedures as part of its Continuity of Operations Plan to issue procedural orders in dockets when a majority of the Board is not present due to emergencies. The amendments also provide for the issuance of procedural orders in other circumstances when a majority of the Board is not available.

A "Notice of Intended Action" with the proposed amendments was published in IAB Vol. XXVIII, No. 26 (6/21/06) p. 1866, as ARC 5172B. Comments concerning the proposed amendments were filed by the Consumer Advocate Division of the Department of Justice (Consumer Advocate) and the Iowa Telecommunications Association (ITA). No oral presentation was scheduled or requested.

ITA raised a question regarding the expansion from only emergency situations to "any other reason" for the absence of a majority of the Board. ITA suggests that the proposed amendments would provide blanket authority for delegation any time a majority of the Board was not available, regardless of the reason the Board members were absent. ITA suggests that the delegation should only apply when there is an emergency need for the procedural order and should not be based just on the availability of the Board members. ITA suggests the following revisions to the proposed amendments:

7.1(8) Authority to issue procedural orders in contested case proceedings, investigations, hearings, and all other dockets and matters before the board is granted to a single board member when a majority of the board is not available ~~due to emergency, or for any other reason, and there is an urgent need for the issuance of such procedural orders is granted to a single board member~~. If no member of the board is available to issue a procedural order ~~due to emergency, or for any other reason, it the procedural order~~ may be issued by an administrative law judge employed by the board in urgent circumstances. If an administrative law judge is not available ~~due to an emergency, or for any other reason, it a procedural order~~ may be issued by the executive secretary or general counsel of the board in urgent circumstances.

The procedural order under the subrule shall state that it is issued pursuant to the delegation authority established in 199 IAC 7.1(8) and identify the urgent need for the delegation. ~~Procedural orders under this subrule shall be issued only upon the showing of good cause and when the prejudice to a nonmoving party is not great. The procedural order under this subrule shall state that it is issued pursuant to the delegation authority established in 199 IAC 7.1(8) and that the~~ The procedural order so issued is subject to review by the board upon motion by any party or other interested person and the procedural order shall so state.

Consumer Advocate states that the proposed amendments may be broader than necessary and they provide little guidance on what types of orders would be considered procedural. Consumer Advocate points out that appellate rule 6.22(8) provides a nonexclusive list of motions to which it applies and provides some description of the types of orders that may be issued by delegation.

Consumer Advocate suggests that without similar references, the proposed amendments could allow issuance of orders that are not clearly procedural. Consumer Advocates suggests that a stay might be considered a procedural order that could be issued by delegation under the amendments and it is Consumer Advocate's opinion that stays are substantive and not procedural. Consumer Advocate suggests the following line be added to the second paragraph of the proposed amendment to subrule 7.1(3): "Procedural orders may not involve substantive subject matters, such as the issuance of stays or similar actions."

Consumer Advocate recommends the proposed amendments limit delegation to circumstances when there is some extraordinary reason why the order must be issued during the period of unavailability. As proposed, the amendments would allow delegation any time a majority of Board members is absent and Consumer Advocate suggests this leaves open the possibility of the delegation of authority being used routinely. Consumer Advocate suggests the language "due to emergency, or for any other reason" be deleted.

Consumer Advocate also suggests that the term "unavailable" should be described or defined. With no definition, the delegation could be used when Board

members are merely difficult to locate. The proposed amendments do not address whether the unavailable Board members must be unavailable by telephone and electronic messaging. Consumer Advocate recommends the following revisions to the proposed amendments to meet the problems describe above:

Authority to issue procedural orders in contested case proceedings, investigations, hearings, and all other dockets and matters before the Board when a majority of the board is not available ~~due to emergency, or for any other reason~~ is granted to a single board member. If no board member is available to issue a procedural order ~~due to emergency, or for any other reason~~, the procedural order may be issued by an administrative law judge employed by the board. If an administrative law judge is not available ~~due to an emergency, or for any other reason~~, a procedural order may be issued by the executive secretary or general counsel of the board.

Procedural orders under this subrule shall be issued only upon the showing of good cause, and when the prejudice to the nonmoving party is not great, and when the subject matter of the request requires action during the period of unavailability. A person is unavailable when not present in the board offices and not reasonably reachable by telephone or other means of communication. Procedural orders may not involve substantive subject matters such as the issuance of stays or similar actions. The procedural order under this rule shall state that it is issued pursuant to the delegation authority established in 199 IAC 7.1(8) and that the procedural order so issued is subject to review by the board upon motion by any party or other interested person.

The Board stated in the June 1, 2006, order commencing this rule making that the amendments would ensure proceedings before the Board are not unduly interrupted by the unavailability of a majority of Board members and the proposed amendments limited the authority to issue procedural orders to specific personnel and for procedural orders that do not affect the ultimate outcome of a proceeding or

when the prejudice to a nonmoving party is not great. The proposed amendments also provide for Board review of any orders issued pursuant to the amended rule, upon motion by the Board or any party or other interested person. Thus, the proposed amendments balance the occasional need to issue orders on short notice, when a majority of the Board may be unavailable, with procedures to protect the rights of all interested persons.

The proposed amendments are initiated for two purposes. First, it is an attempt by the Board to be prepared in case of an emergency in which a majority of the Board cannot be present in a timely manner to issue procedural orders. For example, if all three Board members were stranded at a meeting by a general grounding of civil aviation, the rule could be used to postpone or reschedule hearings that would be affected by the delay in Board member travel. In a severe case involving a 90-day "rocket-docket," it might even be necessary to use this procedure to assign a matter to a presiding officer in order to conduct the hearing and assemble a record that would let the Board issue a decision on the merits within the permitted time frame.

Second, the amendments were proposed to address more common situations where a docket is under time constraints. Examples include requests for short extensions of time to make a necessary filing or requests for emergency adjudicative action pursuant to Iowa Code § 17A.18A. In these and other situations, two or more Board members may be available by telephone or electronic mail, but not physically available to sign an order in the appropriate time frame. The Board considers the

proposed procedure a reasonable method of addressing these situations. The Board explained in the order that the proposed amendments establish a procedure similar to the procedure adopted by the Iowa Supreme Court in Iowa Rules of Appellate Procedure [Iowa R. App. P. 6.22(8)]. Similar to the Iowa Supreme Court procedure, the proposed amendments would only allow specified officials to issue a procedural order and only upon a showing of good cause and when the issuance would not greatly prejudice a nonmoving party.

The Board recognizes that ITA is correct that use of the phrase "or any other reason" would allow for the delegation authority to be used in circumstances that might not be seen as an emergency. However, the Board considers the limitation of the use of the delegation authority to only "urgent" situations, as suggested by ITA, to be too limiting and it would defeat a primary purpose of the amendments. The need for the issuance of an order amending a procedural schedule may not be "urgent," but it may be necessary for the efficient and reasonable conduct of a proceeding.

Another example of when the delegation authority might be appropriate, but not urgent, is when there is a need for the issuance of a procedural order in a timely manner in a docket to give the parties adequate time to prepare and make a filing. The parties to the docket could be greatly inconvenienced if the order could not be issued until a majority of the Board was available. Under these circumstances, the delegation authority could be used to ensure the parties had the most time available to prepare and make a filing. Use of the delegation authority in this type of situation would be reasonable and within the intent of the proposed rule.

Procedural orders cannot be issued by delegation unless the party requesting the order had shown good cause and the person issuing the order had determined that any prejudice to the nonmoving party would not be great. Although these safeguards are not specific as to the types of orders that could be issued by delegation, the standards expressed are widely recognized in the law and require a level of support beyond the mere filing of the request. Since the Supreme Court has used these standards in its delegation procedure, the Board considers them appropriate for use by the Board. In addition, any order may be appealed to the Board, so any party that considers itself prejudiced by the order issued by delegation has the opportunity to have the matter considered by the Board.

Generally speaking, a majority of the Board would be considered unavailable when the Board members are not present in the office or able to return to the office in a reasonable amount of time to sign and issue the order. For a regular Board order to be effective, without the delegation, two Board members must sign the order. Access to Board members by telephone or electronic communications is not always sufficient. Delegation as adopted in the amendments allows for the order to be issued whenever a majority of the Board is not physically able to sign and issue an order in a timely manner.

The Board understands the concerns expressed by ITA and Consumer Advocate. The Board has addressed those concerns by proposing a procedure similar to the procedure adopted by the Iowa Supreme Court and the Board has adopted safeguards similar to those established by the Supreme Court. However,

recognizing that the proposed language may be overly broad when it allows the issuance of a procedural order by delegation "for any other reason," the Board will replace that phrase with the phrase "for the efficient and reasonable conduct of proceedings." This revision should remove some of the concern over the unlimited application of the delegation authority and will tie the need for delegation more closely to the efficient operation of the agency.

IT IS THEREFORE ORDERED:

1. A rule making identified as Docket No. RMU-06-5 is adopted.
2. The Executive Secretary is directed to submit for publication in the Iowa Administrative Bulletin an "Adopted and Filed" notice in the form attached to and incorporated by reference in this order.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Curtis W. Stamp

Dated at Des Moines, Iowa, this 15th day of August, 2006.

UTILITIES DIVISION [199]

Adopted and Filed

Pursuant to Iowa Code sections 17A.4, 474.3, and 474.5, the Utilities Board (Board) gives notice that on August 15, 2006, the Board issued an order in Docket No. RMU-06-5, In re: Delegation of Authority to Issue Procedural Orders (199 IAC 7.1), "Order Adopting Amendments." The amendments establish procedures for issuing procedural orders when a majority of the Board is not present due to emergencies or for other reasons. Notice of Intended Action was published in IAB Vol. XXVIII, No. 26 (6/21/06) p. 1866, as ARC 5172B. Comments concerning the proposed amendments were filed by the Consumer Advocate Division of the Department of Justice and the Iowa Telecommunications Association. No oral presentation was scheduled or requested.

The comments expressed concerns regarding the scope of the proposed amendments and that they could be used to issue orders dealing with substantive matters. The Board considered the comments and has revised the proposed amendments by replacing the phrase "for any other reason" with the phrase "efficient and reasonable conduct of proceedings" to indicate that procedural orders may be issued to allow for the efficient operation of the Board. The amendment has also been revised to more clearly state that orders issued pursuant to this delegated authority may be reviewed by the Board on its own motion. The Board determined that the amendments provide the flexibility needed by the Board and offer sufficient

safeguards. The order issued in Docket No. RMU-06-5 containing a discussion of the comments and support for this rule making can be found on the Board's Web site, www.state.ia.us/iub.

These amendments are intended to implement Iowa Code sections 17A.4, 474.3, and 474.5.

These amendments shall become effective October 18, 2006.

The following amendments are adopted.

Item 1. Amend rule **199—7.1(17A,476)** by adding "474" to the parenthetical implementation statutes.

Item 2. Adopt **new** subrule 7.1(8) as follows:

7.1(8) Authority to issue procedural orders in contested case proceedings, investigations, hearings, and all other dockets and matters before the board when a majority of the board is not available due to emergency, or for the efficient and reasonable conduct of proceedings, is granted to a single board member. If no member of the board is available to issue a procedural order due to emergency, or for any other reason, the procedural order may be issued by an administrative law judge employed by the board. If an administrative law judge is not available to issue a procedural order due to an emergency, or for the efficient and reasonable conduct of proceedings, a procedural order may be issued by the executive secretary or general counsel of the board.

Procedural orders under this subrule shall be issued only upon the showing of good cause and when the prejudice to a nonmoving party is not great. The procedural order under this subrule shall state that it is issued pursuant to the

delegation authority established in 199 IAC 7.1(8) and that the procedural order so issued is subject to review by the board upon its own motion or upon motion by any party or other interested person.

August 15, 2006

/s/ John R. Norris

John R. Norris

Chairman