

00-187



WISCONSIN STATE SENATE

**RODNEY C. MOEN**

SENATOR - 31ST DISTRICT

State Capitol, P.O. Box 7882, Madison, Wisconsin 53707-7882 Phone: (608) 266-8546 Toll-free: 1-877-ROD-MOEN

August 17, 2000

Chairperson Ave M. Bie  
Commissioner Joseph P. Mettner  
Commissioner Robert M. Garvin  
Public Service Commission of Wisconsin  
610 North Whitney Way  
P. O. Box 7854  
Madison, WI 53707-7854

Re: Clearinghouse Rule CR00-187

Dear Commissioners Bie, Mettner and Garvin:

On August 16, the Senate Committee on Health, Utilities and Veterans and Military Affairs took executive action and voted to request that the Public Service Commission make modifications to Clearinghouse Rule CR00-187. These modifications are detailed below.

The Committee's jurisdiction over Clearinghouse Rule CR00-187 expires on August 17, 2001. Please let me know in writing by August 14, 2001 if the Commission agrees to consider modifications to the rule. If the Commission does not agree to consider modifications, the Committee objects to the rule.

**1. Definition of "party."** Proposed PSC § 2.02(10) defines "party" as a "person or agency named or admitted as a party in a proceeding." In other words, a person is not a party until the Commission acts to name or admit the person as a party. The Committee is concerned that this definition may be applied to limit the rights of persons seeking to appear before the PSC, and that the definition is too narrow for the types of dockets which the Commission may open. For instance, a recent PSC staff memorandum has been brought to our attention in which staff indicated that the Commission had unilaterally engaged in settlement discussions with Ameritech on a service quality matter. Staff stated that the Commission did not need to include persons who had sought intervention in those settlement discussions.

As part of any stipulated settlement, Ameritech Wisconsin would need to waive hearing and consent to Commission entry of the agreed order. While some persons have sought intervention, no action has been taken to make them parties to the case and, in turn, entitled to notice.

Memorandum to the Public Service Commission, David Albino, April 17, 2001 at 5. In our view, such a conclusion is unacceptable because it shuts out the public.

To be sure, the proposed rule's definition of "party" is drawn directly from the statutes governing contested cases. Wis. Stat. § 227.01(8). We see no reason, however, to limit the definition of "party" to contested cases, the most formal of the many types of Commission proceedings. The Commission also has many types of other dockets, such as investigations and informal complaints. The definition of party should be broad enough to encompass all such dockets in a way that will not exclude interested persons from participating as a party. The following is a more appropriate definition:

"Party" means a person or agency whose interests may be affected by commission action or inaction in the docket other than a rule-making proceeding.

**2. Intervention.** The Committee is likewise concerned that the effect of proposed PSC §§ 2.20 and 2.21 is to make interveners second-class citizens. Under the proposed rule, initiating parties like applicants and respondents are automatically parties but interveners are not unless they are "admitted as a party" by the Commission. In addition, the proposed rule sets a deadline (30 days) for intervention. The current rule provides no such limitation. No compelling reason exists to adopt deadlines for intervention, especially since deadlines will have the effect of limiting public participation in Commission proceedings. Citizens who learn later about a Commission proceeding that affects them will not always be able to meet such deadlines.

Proposed PSC § 2.20(1)(e) should be revised as follows:

(e) A person intervening in a docket is an intervener.

Proposed PSC §§ 2.21(1) and (2) should be revised as follows:

(1) **Intervention by Right.** A person whose interest may be affected by the commission's action or inaction in a docket shall be admitted as an intervener.

(2) **Permissive Intervention.** A person not satisfying the standard in (1) may nevertheless intervene in a docket if the person's participation likely will promote the proper disposition of the issues to be determined in the proceeding.

Proposed PSC §§ 2.21(3) and (4) should be deleted.

**3. Confidentiality.** Proposed PSC § 2.11(5) establishes, for the first time, a lower standard for keeping information filed with the Commission secret from the public and interested parties. The rule lists the proper grounds for confidentiality, but then goes on to establish a new procedure for confidential "handling" of information after the initial screening. This would be information that only the Commission and its staff would see for some undefined period, and which could be the basis for Commission decision-making.

This is contrary to the state's Open Record Law ("ORL"). The rule establishes a way to keep documents secret after the initial screening if they are "possibly exempt," but not in fact exempt from the ORL. Therefore, proposed PSC § 2.11(5)(c) should be deleted and proposed PSC § 2.11(5)(b) should be changed as follows:

(b) The commission shall grant a request if the commission determines that the record, or portion of a record, is exempt from disclosure under one of the grounds listed in sub. (3)(a).

Also, it is the Committee's understanding that, for many years, parties in Commission dockets have had access to documents which are properly designated as confidential under one of the statutory exemptions, if they sign a standard confidentiality agreement. Such an approach is consistent with Wis. Stat. § 227.46(8) which contemplates the use of confidentiality agreements when it states that hearing examiners "may order protective measures" to protect confidential documents (but still allow parties access to them). Without such arrangements, the Commission would be basing its decisions on secret documents that no other party has ever seen. Parties would also be deprived of their procedural due process rights to participate fully in Commission proceedings.

Proposed PSC § 2.11 should therefore be amended to include another subsection as follows:

(8) If the commission or an administrative law judge determines that a record is exempt from disclosure as set forth above, the commission or the administrative law judge shall order such protective measures as are necessary, including but not limited to confidentiality agreements, to protect such records and allow other parties such access to the records as they are entitled to by law.

Proposed PSC § 2.11(6) also should require the Commission to permit parties access to a record so that they can argue that the record should not be confidential. This can be accomplished by a confidentiality agreement, if appropriate. Also, this subsection would establish a two-week "grace period" of confidentiality for non-confidential records. If the record is not confidential, either the party should withdraw it (if it has the right to withdraw it) or the Commission should disclose it. No waiting period should be permitted. Proposed PSC § 2.11(6) should be revised to read as follows:

A record submitted with a request for confidential treatment will be confidentially handled during the 30-day period the commission is considering the request, provided that other parties are permitted access to the record after signing a confidentiality agreement.

Finally, in order to guide practitioners, proposed PSC 2 should also refer to the forms that must accompany the confidential filing and should state that these forms are available through the PSC Records Office.

**4. Furnishing copies of the record.** Current PSC § 2.04(1) provides that one copy of the decision in a proceeding will be furnished to parties free of charge at the time of issuance. Current PSC § 2.36(1) also provides that proceedings in hearings will be transcribed and one copy of the transcript will be furnished each party free of charge. Proposed PSC 2 is silent with respect to the requirement to transcribe proceedings and to provide free of charge the transcript and decision in a proceeding. The rule should be amended to include these provisions.

**5. Failure to address pre-filed testimony, exhibit requirements and post-hearing procedures.** Procedural rules should guide the practitioner. The current procedural rules provide guidance on the format of exhibits, authorize the use of written pre-filed testimony, and address briefing rights, petitions for rehearing and declaratory proceedings. Proposed PSC 2 is completely silent on these matters. The rule should be amended to address these issues. The briefing rights of parties should be made specific as in current PSC § 2.38.

**6. Discovery procedures.** Proposed PSC 2 conflicts with Wis. Stat. § 196.33 which grants any party an absolute right to take the deposition of any witness, regardless of whether the Commission or an administrative law judge permits such deposition to occur and regardless of the type of docket (proceeding, investigation, other).

Proposed PSC § 2.23(1) should be revised as follows:

~~(a) In proceedings, investigations and other dockets other than class 2 contested cases, and unless otherwise provided by the commission or the administrative law judge, parties and commission staff may take depositions and make requests for the production of documents in the same manner as provided under ch. 804, Stats. In class 2 contested cases, parties may take discovery as provided in s. 196.33 and ch. 804, Stats.~~

**7. Ex parte restrictions.** Proposed PSC 2 should address the application of rules prohibiting ex parte communications, particularly the issue of when the prohibition becomes operative and to whom the prohibition applies.

**8. Notice of hearing.** Current PSC § 2.30(1) provides that "[w]ritten notice of hearing will be sent to all parties and also to others requesting notice. The notice will be mailed sufficiently in advance to give parties, after receipt thereof, the full time provided by statute." Proposed PSC 2 should be revised to incorporate this notice guarantee.

**9. Definition of "complaint."** The phrase "authorized to be filed" in proposed PSC § 2.02(5) is too restrictive. The definition should be revised as follows: "Complaint" means a complaint filed pursuant to chs. 196 or 200, Stats.

**10. Definition of "docket."** Proposed PSC § 2.02(7) would require that there be an affirmative vote of the Commission before any matter has official status. We are aware of no reason why a vote is necessary to open a docket. The Commission has many ongoing statutory responsibilities which take the form of dockets but should not have to jump this hurdle. The proposed rule should be revised as follows:

"Docket" means an investigation, proceeding, or other matter pursuant to chs. 196 or 200, Stats.

**11. Request requirements for opening a docket.** Proposed PSC § 2.07 would require persons to request that the Commission open a docket. The Committee is concerned that the information required to be filed with the request is much too formal and restrictive, especially for

Commissioners Bie, Mettner and Garvin  
November 8, 2001  
Page 5

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ordinary citizens. The prior procedure, without these onerous requirements, has worked fine. Proposed PSC 2 should be modified to delete § 2.07(2).

Thank you for your consideration of this request. If you wish to discuss this matter further, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "R.C. Moen". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Rodney C. Moen

00-187

Sen. Lazick



WISCONSIN STATE SENATE

**RODNEY C. MOEN**

SENATOR - 31ST DISTRICT

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State Capitol, P.O. Box 7882, Madison, Wisconsin 53707-7882 Phone: (608) 266-8546 Toll-free: 1-877-ROD-MOEN

**To:** Members, Senate Committee on Health, Human Services, Aging, Corrections, Veterans and Military Affairs

**Info:** David Lovell, Legislative Council

**From:** Senator Rod Moen, Chair

**Re:** Paper Ballot Motion

**Date:** August 14, 2001

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Attached please find a paper ballot motion recommending modifications to Clearinghouse Rule 00-187, relating to practice and procedure before the Public Service Commission.

Please return your ballots to my office by 12:00 noon on Thursday, August 16, 2001. If you have any questions, please do not hesitate to contact me.

**MOTION: CLEARINGHOUSE RULE 00-187, RELATING TO PRACTICE AND PROCEDURE BEFORE THE COMMISSION.**

**Move adoption of the following motion:**

Moved: That the Senate Committee on Health, Utilities and Veterans and Military Affairs recommend the following modifications to Clearinghouse Rule 00-187. If the Public Service Commission does not agree, in writing, to consider modifications to Clearinghouse Rule 00-187 by 4:00 pm on August 17, 2001, then the committee objects to the promulgation of the rule on the grounds set forth in Chapter 227.19(4)(d)(6) and moves that Clearinghouse Rule 00-187 be referred to the Joint Committee on the Review of Administrative Rules for appropriate action.

The Committee recommends the following modifications to the rule:

- 1. Definition of "party."** In s. PSC 2.02 (10) define "party" broadly to include any person whose interests may be affected by commission action or inaction in a docket.
- 2. Intervention.** Define "intervenor" broadly in s. PSC 2.20 (1) (e); provide broad opportunities for intervention, without deadlines, in s. PSC 2.21; and delete s. PSC 2.21 (3) and (4).
- 3. Confidentiality.** Delete s. PSC 2.11 (5) (c) and modify s. PSC 2.11 (5) (b) to require the PSC to grant a request for confidential treatment of a record or portion of a record if it determines that the record or portion of a record is eligible for confidential treatment under one of the grounds listed in s. PSC. 2.11 (3) (a); create a s. PSC 2.11 (8) allowing parties access to confidential records as entitled by law, subject to appropriate protective measures, such as confidentiality agreements; modify s. PSC 2.11 (6) to give confidential treatment for 30 days to any record for which confidential treatment has been requested, provided that parties are given access to the records subject to protective measures; and include references to and instructions on how to obtain all forms required for requesting confidential treatment of records.
- 4. Furnishing copies of the record.** Include in the proposed new ch. PSC 2 the provisions of current ss. PSC 2.04 (1) and 2.36 (1) regarding the furnishing of copies of the record.
- 5. Failure to address pre-filed testimony, exhibit requirements and post-hearing procedures.** Include in the proposed new ch. PSC 2 guidance to practitioners regarding pre-filed testimony, exhibit requirements, post-hearing procedures, the briefing rights of parties and other matters, as are included in the current ch. PSC 2.

6. **Discovery procedures.** Modify s. PSC 2.23 (1) to read: "In proceedings, investigations and other dockets, parties may take discovery as provided in s. 196.33 and ch. 804, Stats."
7. **Ex parte restrictions.** Include in the proposed new ch. PSC 2 guidance on application of the prohibition on *ex parte* communications, including in particular the issues of when the prohibition becomes operative and to whom it applies.
8. **Notice of hearing.** Include in the proposed new ch. PSC 2 the provisions of current s. PSC 2.30 (1) regarding who is to receive notice of hearings and when such notice must be mailed.
9. **Definition of "complaint."** In s. PSC 2.02 (5), define complaint as "a complaint filed pursuant to ch. 196 or 200, Stats."
10. **Definition of "docket."** In s. PSC 2.02 (7), define "docket" as "an investigation, proceeding, or other matter pursuant to ch. 196 or 200, Stats."
11. **Request requirements for opening a docket.** Delete s. PSC 2.07 (2).

Aye

No

Signature: \_\_\_\_\_

*Mary A. Layich*

Date: \_\_\_\_\_

*August 16, 2001*



6. **Discovery procedures.** Modify s. PSC 2.23 (1) to read: "In proceedings, investigations and other dockets, parties may take discovery as provided in s. 196.33 and ch. 804, Stats."
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Aye

No

Signature: X

Date: 8-14-01

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Aye  
 No

Signature: Mark Meyer

Date: 8/15/01

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Aye

No

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

*John D. L. Roberts*  
*Aug. 16, 2001*

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Aye  
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Signature: \_\_\_\_\_

Date: \_\_\_\_\_

8/14/01

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Aye

No

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

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Aye

No

Signature: 

Date: 08.16.01

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Aye

No

Signature: \_\_\_\_\_



Date: \_\_\_\_\_

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PSC Motion - page 2

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Aye

No

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

*Roger Breske*  
8-16-01





# Public Service Commission of Wisconsin

Ave M. Bie, Chairperson  
Joseph P. Mettner, Commissioner  
Robert M. Garvin, Commissioner

610 North Whitney Way  
P.O. Box 7854  
Madison, WI 53707-7854

October 29, 2001

Mr. Mark Penaherrera, Plant Manger  
AGA Gas, Inc.  
4802 Pflaum Road  
Madison, WI 53718

Re: Application of Madison Gas and Electric Company for Authority to  
Change Electric and Natural Gas Rates

3270-UR-110

Dear Mr. Penaherrera:

I have just become aware that you filed a brief on behalf of your company. Please be advised that only lawyers admitted to practice in Wisconsin may lawfully represent parties before the Commission. *State ex rel. State Bar of Wisconsin v. Keller, 21 Wis. 2d 100, 123 N.W. 2d 905 (1963).*

Please feel free to contact me if you have any questions.

Sincerely,

Edward S. Marion  
General Counsel

ESM:kcd:k:\ESM\Letters\2001\3270-UR-110 Penaherrera (10-29-01)

cc: David Whitcomb  
Service List

November 5, 2001

Senator Moen  
Room 122 South  
Capital Building  
Madison, WI

*RE: Public Service Commission Proposed Rules of Procedure (PSC 2)*

Dear Senator Moen:

I am writing to you and your commission in hopes that you can help my current situation. I am the plant manager of an industrial facility owned by AGA Gas, Inc. (AGA) located on the east side of Madison. The facility has been in operation for 7½ years employing over 50 people directly and indirectly. One of the considerations for choosing Madison for a plant site was the competitive electric rates. While the rates are still competitive, they are increasing rapidly.

In the past two years, our power bills have increased approximately 9.0% due solely to increase in rates and our utility Madison Gas & Electric (MG&E) was proposing to increase them an additional 12% this year alone. And since power costs represent over 70 % of our production costs the rate increases have a great impact on our ability to be a viable business. To this end we have monitored very closely the proposals put to the PSC by MG&E. Being one of the only industrial consumers in MG&E's service territory has penalized us in that we cannot pool the resources to research the merits of the increases and then bring any of the issues in front of the rate makers. In essence it has been MG&E and the Public Service Commission (PSC) determining how the increases to the cost of generating the electricity will be distributed amongst the ratepayers.

In the most recent rate case, my company decided that we should increase our involvement to ensure that our voice could be heard to help determine how to equitably distribute the rate. In increasing our involvement, we studied the issues and worked with lawyers and non-lawyers to understand how the rate case process functions. We asked for and were granted full party status to the case and were





present at the hearing. At the hearing I asked questions of the representatives of MG&E that AGA considered valuable to our arguments. I filed a post hearing brief making our arguments with the hopes that it would have some impact on the final decision.

One week later I received a letter from Ed Marion the General Counsel of the PSC. The letter advised me that because I was not a lawyer I could not represent parties before the Commission. While AGA believes the PSC to be an excellent governing body, we wish to ensure that companies like ours can present materials and information without extraordinary expenditures. We have already spent a great deal of time ensuring that the documents we present are correct in appearance but more importantly that the material is relevant to the current case. In the end, our only goal is to receive equitable treatment in the rate cases by being allowed to make our arguments known to the parties involved and the PSC. The only way that will happen is if people or groups of people who have in vested interest in these rate cases are allowed to be involved with every step of the process including representing parties before the Commission.

Sincerely,

Mark Penaherrera  
Plant Manager  
AGA Gas, Inc.

Enclosure: PSC Letter from Ed Marion

cc: Senator Roger Breske  
Senator Robert Cowles  
Senator Jon Erpenbach  
Senator Mary Lazich  
Senator Mark Meyer  
Senator Scott Fitzgerald  
Senator Peggy Rosenzweig  
Senator Judy Robson



WISCONSIN STATE SENATE

**RODNEY C. MOEN**

SENATOR – 31ST DISTRICT

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State Capitol, P.O. Box 7882, Madison, Wisconsin 53707-7882 Phone: (608) 266-8546 Toll-free: 1-877-ROD-MOEN

November 7, 2001

Ave Bie, Chairperson  
Robert Garvin, Commissioner  
Joseph Mettner, Commissioner  
Public Service Commission  
PO Box 7854  
Madison, WI 53707-7854

Dear Commissioners,

On August 16, 2001, the Senate Committee on Health, Utilities and Veterans and Military Affairs requested, by a vote of 8-1, that the Public Service Commission make modifications to Clearinghouse Rule CR00-187 – practice and procedure before the commission.

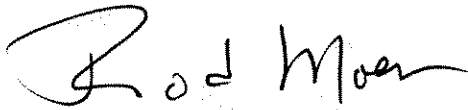
Among modifications requested by the committee were changes in definitions of “party,” “complaint” and “docket”; issues of intervention; confidentiality; pre-filed testimony, exhibit requirements and post-hearing procedures; discovery procedures; ex parte restrictions; notices of hearing and requirements for opening a docket. The list of requested modifications was extensive, because members of the committee felt strongly that shortcomings in the rule submitted by the commission were extensive.

On October 31, 2001, approximately ten weeks after the committee requested that the commission consider modifications, the chair received a letter from the commission informing the committee that the commission, the day before, had voted unanimously not to adopt **any** of the requested modifications. The commission said the time had come to move the rulemaking forward, despite the fact that the commission failed to address any of the provisions the committee thought needed modification.

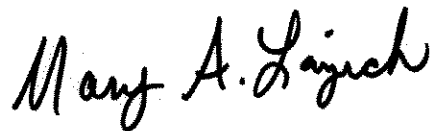
In all our years as members of standing committees of the state Senate, we do not recall a state agency, after a committee requested modifications of an administrative rule, to refuse to consider, in any meaningful way, the suggested modifications to that rule and then voting, without notification, not to adopt the modifications.

The Health, Utilities and Veterans and Military Affairs Committee has jurisdiction over CHR 00-187 until November 14, 2001. Between now and then, if the commission stands by its decision of October 30 that it is unwilling to consider modifications to the rule, the committee will take a vote to object to the rule. The rule will then be referred to the Joint Committee for the Review of Administrative Rules.

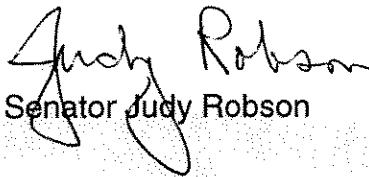
Sincerely,



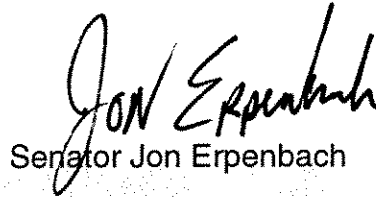
Senator Rod Moen



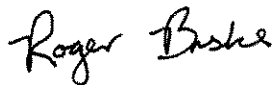
Senator Mary Lazich



Senator Judy Robson



Senator Jon Erpenbach



Senator Roger Breske



Senator Mark Meyer



# Public Service Commission of Wisconsin

Ave M. Bie, Chairperson  
Joseph P. Mettner, Commissioner  
Robert M. Garvin, Commissioner

610 North Whitney Way  
P.O. Box 7854  
Madison, WI 53707-7854

VIA FACSIMILE

November 8, 2001

The Honorable Rodney Moen  
The State Senate  
State Capitol, Room 122 South  
Madison, WI 53702

Re: Clearinghouse Rule 00-187

Dear Senator Moen:

I am writing to notify you that I have added to the Commission's agenda for today's meeting further consideration of our revised rules on practice and procedure.

It is only within the last 24 hours or so that we have become aware of some of the Committee members' continued interest in the modifications requested in your August 16 letter to the Commission. The Commission's general counsel had been told, at the meeting you had requested, that the attorneys group with which you had been working was no longer seeking the specific modifications contained in your letter. We reasonably assumed that the Committee felt as the attorneys group felt.

In place of consideration of the Committee's requested modifications, the Commission was asked to convene a workgroup to negotiate other modifications to the rules. The Committee had not made a similar request. Moreover, only one member of the attorneys group objecting to the rules agreed to serve on the workgroup.

Through conversations with members of your Committee, I have learned that some of the members of the Committee remain interested in the modifications requested in the August 16 letter. Therefore, the Commission will consider taking action this afternoon which would operate to extend the Committee's jurisdiction to permit expeditious discussions on the Committee's proposed modifications.

Sincerely,

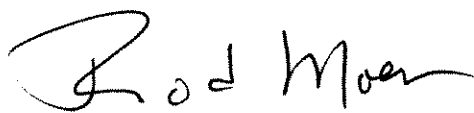
Ave M. Bie  
Chairperson

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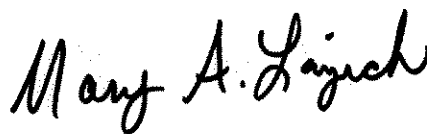
cc: Commissioner Joseph P. Mettner  
Commissioner Robert M. Garvin  
Senate Committee on Health, Utilities and Veterans and Military Affairs (via facsimile)

The Health, Utilities and Veterans and Military Affairs Committee has jurisdiction over CHR 00-187 until November 14, 2001. Between now and then, if the commission stands by its decision of October 30 that it is unwilling to consider modifications to the rule, the committee will take a vote to object to the rule. The rule will then be referred to the Joint Committee for the Review of Administrative Rules.

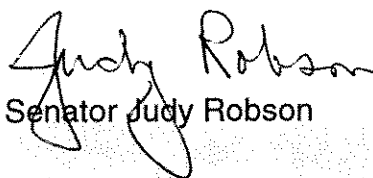
Sincerely,



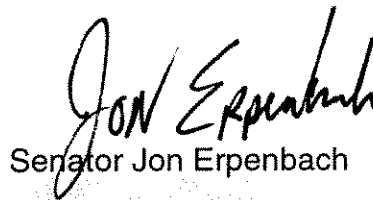
Senator Rod Moen



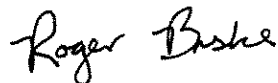
Senator Mary Lazich



Senator Judy Robson



Senator Jon Erpenbach



Senator Roger Breske



Senator Mark Meyer