Statement of Need and Reasonableness

Cost-Share Maxi-Audit Program

I. The 1983 legislature established a program for public school districts to receive funds to perform building energy audits for eligible institutions applying for an energy investment loan in Laws of Minnesota 1983 Chapter 323, Sec. 5, Subd. 4. The procedures for this program were published at State Register, January 30, 1984, p 1784-1786 (8 S.R. 1784). The program was continued in Laws of Minn. 1985, First Special Session, Chap. 13, Sec. 28, Subd. 8, and in Laws of Minn. 1987, Chapter 358, Sec. 13, Subd. 5, to provide matching grants to conduct building energy audits.

Minn. Statute 116J.035 Subd. 2 as amended by Laws of Minn., 1987, Chap. 312, Article 1, Sec. 8, Subd. 3 and Reorganization Order Number 140, dated December 29, 1986 empowers the commissioner to adopt rules necessary to implement the program to provide matching grants to conduct building energy audits.

This Statement of Need and Reasonableness describes the permanent rules proposed for the Cost-Share Maxi-Audit Grant Program. The proposed rules are modeled on the rules of the Department and other state agencies which operate similar programs and also on the procedures published at State Register January 30, 1984 (8S.R. 1614).

II. Impact on Small Business

The proposed rules create a program of financial assistance to Minnesota public school districts and units of local government to conduct building energy audits and, as such, have no direct effect on small businesses. Rules covering programs such as this are exempted from Minn. Stat., sec. 14.115 by subd. 7(b) which exempts rules which do not directly affect small businesses.

III. Need and Reasonableness of Each Rule Provision.

Proposed part 7680.0100 states the purpose of the proposed rule. This part is needed to introduce the proposed rules and its reasonableness is self evident. To clarify the rulemaking authority citation, this part will be amended in the rule as adopted to incorporate a reference to Laws of Minnesota 1987, Chapter 312, Article 1, Section 8, Subdivision 3 and Reorganization Number 140 dated December 29, 1986, which transfer the powers and duties of the Commissioner of Energy and Economic Development under 116J.035 to the Commissioner of Public Service. This does not constitute a substantive change under Minnesota Rules 2010.1000, Item D.

Proposed part 7680.0110 defines terms which have distinct meanings when used within the context of these rules.

Subpart 1 is needed as an introductory and explanatory sentence regarding the use of the definitions. Its reasonableness is self evident.

Subpart 2 defines an authorized cost-share maxi-auditor as a person who has met the requirements of part 7680.0140 of the proposed rules. It is needed to give the reader a specific definition for a term used often within the rule. As such, its reasonableness is self-evident.

Subpart 3 defines building as any existing, separate, enclosed, heated structure owned and operated by a municipality. This definition is needed to identify those buildings which are eligible for the grant program. It is necessary and reasonable to specify existing because an audit cannot be conducted on a building not yet constructed. It is necessary to specify separate to make clear that building wings or additions are not individually eligible for grants. It is reasonable to require that buildings be audited as a whole because the energy use in part of a building is inextricably intertwined with use in other parts. It is necessary to specify enclosed to eliminate buildings such as band shells and picnic shelters from grant consideration. It is reasonable to exclude such buildings because their energy saving potential is small, and, given the limited funds available for audits, those funds should be directed toward buildings with greater savings potential. It is necessary to specify owned and operated by a municipality (as defined in 7680.0110, Subpart 9) to clearly state the types of organizations that are eligible for a grant, and the buildings for which they are eligible. It is reasonable to limit eligibility to municipalities because the budget documents submitted to the legislature, on which

the biennial appropriation was based, specify grants for public buildings. It is reasonable to require that a building be owned and operated by a municipality because, ultimately, the purpose of the grant program is to induce municipalities to make capital improvements in their facilities that may have a near term negative effect on cash flow, but which over the useful life of the improvement provide a significant net benefit. While present ownership and operation does not guarantee that the municipality will remain the beneficiary over the useful life of an improvement, the municipality, as owner, does control the decision to change that status. Futhermore, if the building is sold, such capital improvements should be reflected in the sale price.

Subp. 4 defines Cost-Share Maxi-Audit. This definition is needed to establish a specific meaning for a term that is not in common usage. It is reasonable because is consistent with other definitions of maxi-audit in statute (116J.06,Subd. 12; 116J.37,Subd. 1, paragraph b as amended by Laws of Minnesota 1987, Chapter 289, Section 1, paragraph b).

Subp. 5 defines Cost-Share Maxi-Audit manual or manual as the manual incorporated by reference in part 7680.0200 of these rules. It is needed to provide a shorthand term for a reference used often in the rule, and is reasonable because it makes the rule easier to read.

Subp. 6 Cost-Share Maxi-Audit report is defined as a written document prepared according to the cost-share maxi-audit manual as the result of a cost-share maxi-audit of a building. It is needed to provide a shorthand term for a document referred to often in the rule, and is reasonable because it makes the rule easier to read.

Subp. 7 defines department to mean the Minnesota Department of Public Service. It is needed and reasonable to provide a shorthand term to make the rule more readable.

The definition in Subp. 8 was mistakenly included in the rule as proposed. This term is not used in the final version of the proposed rule and, therefore, should be deleted in the rule as adopted.

Subp. 9 (to be renumbered as Subp. 8 in the rule as adopted) defines municipality to mean a public school district, statutory or home rule charter city, county or town in Minnesota or joint power of these. It is needed to give specific meaning to a term used in the rule. It is reasonable because it is consistent with a definition in the statute for a related program (116J.37, Subd. 1 as amended by Laws of Minnesota 1987, Chapter 289, section 1).

Proposed part 7680.0120 establishes the criteria for eligibility for grants. The need and reasonableness of the provisions in the first sentence of this part are explained in the portion of this statement related to part 7680.0110, subp. 3. These provisions are repeated here for clarity's sake.

The second sentence of this part is necessary to exclude a building from grant consideration for five years after receiving a cost-share grant to allow limited grant funds to remain available for other buildings. It is reasonable because, were a limit not imposed, a municipality could repeatedly receive grants to do "new audits" that would essentially be minor updates of the previous audit. Institutions often do minor updates, at their own expense, to prepare applications for grant and loan programs operated by the department.

If these qualified for a cost-share audit grant, it is likely that as much as one-third of the available funds would be used for that purpose, thereby severely limiting the funds available to other institutions. It is reasonable to set the limit at five years because after that period it can be assumed, based on the department's experience, that sufficient changes in technology and costs have occured to make the existing audit obsolete, while within that period the audit should remain sufficiently current.

7680.0130 establishes the requirement that cost-share maxi-audits be prepared in accordance with the manual as defined in the 7680.0100, Subp. 5., and incorporated by reference in 7680.0200. It is necessary and reasonable to specify a standard for cost-share maxi-audit reports to provide objective criteria to determine if grant conditions have been fulfilled, and to insure that both the state and the grantee receive reasonable value for their investment. It is reasonable to require this standard because it meets minimum requirements for audits submitted in application for funds available to municipalities from the department and the U.S. Department of Energy to implement recommended energy conservation measures (ECM). In addition, the professional engineering community is familiar with this standard.

7680.0140 establishes criteria for cost-share maxi-auditor authorization. It is necessary to set standards for maxi-auditors to ensure that the auditor is technically qualified to perform an audit, familiar with the specific requirements of the audit, and qualified, under rule, to perform an audit eligible for submission in an ECM loan or grant application. It is necessary to provide for authorization of auditors to establish a means to resolve problems with audits not meeting the required standard, and to establish a means to remove a recalcitrant auditor from eligibility for future audit work.

It is necessary and reasonable to specify that an auditor be a professional electrical or mechanical engineer or architect to ensure that the auditor is knowledgable in the areas necessary to perform an audit, and to comply with requirements of ECM grant and loan programs. It is necessary and reasonable to require that an auditor be registered in Minnesota to ensure that the auditor is familiar with Minnesota's Building Code and Energy Code, and to comply with requirements of ECM grant and loan programs. It is necessary to require that an auditor agree to abide by the requirements of this part in conducting maxi-audits to provide a clear indication on the part of the auditor that he/she is aware of and consents to these requirements. It is reasonable to do so because loss of authorization is a consequence of noncompliance with these requirements, and if the department is to impose such a penalty, it should assure itself that the auditor was aware of that penalty.

It is necessary to require that an auditor agree to attend mandatory training sessions to ensure that the department is able to disseminate information it believes to be essential to the successful completion of an audit. It is reasonable to require that an auditor attend such sessions because, in the department's experience, auditor training is best accomplished through the use of both written materials and in-person presentations. It is necessary to require an auditor to sign and submit the authorization agreement to provide a written record of the auditor's awareness of and consent to the authorization requirements. It is reasonable to do so because, given the severity of the penalty for noncompliance, the department should provide itself with proof of an auditor's consent. It is necessary and reasonable to require that the agreement be signed after completion of training to ensure that the auditor's consent be informed. It is necessary to require an auditor to agree to make appropriate changes to an audit report to make clear that the auditor understands that it is his/her responsibility to rectify any shortcomings in an audit report. It is reasonable to do so because the auditor's role in the audit grant process is to properly perform an audit, and statisfactory completion of an audit occurs only upon submission of a report meeting the audit standard. It necessary and reasonable to require that changes be made within thirty days of written notice to provide a specific time limit for fulfillment of the requirement. It is reasonable to set that limit at thirty days because it allows ample time to make any needed changes. It is necessary to require an auditor to adhere to the requirements of this part to maintain authorization to provide the department with a means of enforcement of these requirements. It is reasonable because the

department requires a municipality to contract with an auditor on the authorized list (7680.0180). While the department makes no guarantee as to an authorized auditor's performance, it would be remiss in knowingly providing a list that includes auditors who have previously failed to comply with minimum requirements.

Part 7680.0150 describes the application process.

Subp. 1 states that an applicant must submit an application to the department on a form provided by the department. This subpart is needed to inform applicants of the proper recipient of an application, and to provide a consistent format for all applications. It is reasonable to require a standard application form to assist the applicant in identifying the information necessary for a complete application. The subpart then lists the required contents of an application. It is needed to clearly delineate the required contents. It is reasonable to do so because, for determining order of funding, an application will be considered to be received by the department only if it is complete (7680.0190). if the department is to decide that an application is incomplete, it must have a specific standard for doing so. The need and reasonableness of requiring the applicant's name and address and the name and address of the building for which application is being made are self-evident. It is necessary and reasonable to require the building square footage to determine the funding limit for that building. It is necessary and reasonable to require the building audit status to assist the department in determining whether the building is eligible under part 7680.0120. It is necessary and

reasonable to require the date of application to distinguish an application from any others submitted for that building on other dates. It is necessary and reasonable to require a contact person's name, title and telephone number to identify a representative of the applicant designated to receive the grant contract and to contact should the department require further information.

Subp. 2 states that the department will process applications in accordance with part 7680.019 subp. 1 until all funds are encumbered. It is necessary and reasonable to inform the reader of the department's actions upon receipt of an application. The need for and reasonableness of part 7680.0190 subp. 1 will be discussed at that part.

Part 7680.0160 describes the contract process.
Subp. 1 states that the department will determine funding limits according to part 7680.0190 subp. 2 and prepare a grant contract for each building in an eligible application. The need to assign these tasks to one of the involved parties is self-evident. It is reasonable that the department determine the funding limits and prepare the grant contracts to ensure that the funding limit is properly calculated and that the state's interests, as grantor, are properly protected in the contracts. It is necessary and reasonable to prepare a contract for each building because, in the department's experience, grantees often apply for funds for more buildings than are eventually audited. The department believes that it is simpler, for both parties, to void the contracts for those buildings not audited (or allow the contracts to expire) than to amend a single multi-building contract each time the grantee decides to eliminate a building from the scope of work to be performed.

Subp. 2 states that the department will send the prepared contract to the applicant for signature by two of the applicant's officials authorized to sign contracts. It is necessary and reasonable to require the signature of two officials to insure that an official does not act unilaterally in committing the applicant to the contract. Subp. 2 also states that a contract must be signed and returned within 45 days of mailing by the department, and that if this requirement is not met, the funds may be redistributed to other applicants. This provision is necessary to compel timely execution of contracts, and to allow the department to redirect funds if the applicant does not act in a timely manner. It is reasonable to do so because, barring such a provision, the department could not redirect those funds until the expiration date of the pending contract. If all available grant funds have been encumbered, and other applicants await funds, the department believes that it is appropriate to allow another applicant an opportunity to use those funds. It is reasonable to limit the time allowed to 45 days because, as the governing bodies of municipalities generally meet at least once within that timespan, it allows ample time to secure the governing body's approval, if needed. Subp. 2 also states that, after complete execution of the contract, the department will send the municipality a copy of the fully executed contract, required scope of work, and a list of authorized cost-share maxi-auditors. It is necessary and reasonable to send the grantee a copy of the contract and required scope of work so that the grantee has a record of the requirements of the agreement. It is necessary and reasonable to send the grantee a list of authorized auditors to inform the grantee of the group of persons who are eligible to perform the audits.

Part 7680.0170 describes the Cost-Share Maxi-Audit report review. It states that the department will review audit reports to verify that the requirements of the audit manual have been met. It is necessary and reasonable because compliance with the requirements of the audit manual is a condition of grant fulfillment (7680.0180, D). The part further states that, if shortcomings are identified, the department will notify both the grantee and the auditor. The need and reasonableness of notifying the grantee is self-evident. It is necessary and reasonable to notify the auditor because, under part 7680.0140(D), the auditor is required to make the needed corrections. The part also states that the department may conduct an on-site verification of audit data. It is necessary and reasonable to allow the department to resolve questions concerning audit data, if written and oral information do not provide adequate clarification. Finally, the part states that a notice of acceptance will be sent to the grantee upon determination that the audit requirements have been met. It is necessary and reasonable to inform the grantee of the department's determination.

Part 7680.0180 states the conditions to be met for payment of the grant funds. (A) It is necessary to require that work cannot be contracted for or begun before receipt of the fully executed grant contract to discourage applicants from entering into contractual obligations prior to securing a means of repayment. It is reasonable because, in requiring the applicant to wait until an executed contract is in hand, the impact of a potential misunderstanding of the department's intent to fund an application can be minimized. B) The need for and reasonableness of the requirement that an audit be conducted by an authorized auditor are discussed at the section of this statement pertaining to part 7680.0140. (C) It is necessary and

reasonable to require the grantee to submit the maxi-audit report so the department can determine that the audit requirements have been met. It is necessary and reasonable to require the grantee to submit the invoice for the audit work, itemized by building, to determine the allowable grant amount for each building. It is necessary to require that the audit and invoice be submitted 90 days prior to the expiration of the grant contract to allow sufficient time for department review, corrections and additions if needed, and processing of the payment request. It is reasonable to allow sufficient time because payment on the grant cannot be made after the expiration date of the grant. (D) The need for and reasonableness of the requirement that the audit meet the requirements of the manual are discussed at the section of this statement pertaining to part 7680.0130.

Part 7680.0190 describes the priorities and funding limits under which grants will be awarded. Subpart 1 states that applications will be funded on a first come, first served basis, except when sufficient funds are not available to fund all eligible applications received on the same day. The subpart then establishes a funding priority for applications for buildings not previously audited and provides for proportional funding of applications when sufficient funds are not available to fully fund those applications. The subpart also provides for proportional funding of applications for previously audited buildings after fully funding applications for buildings not previously audited. This subpart is needed to establish a method to determine the priority of an application. It is reasonable because, when sufficient funds are available, all eligible applicants are given an equal opportunity to receive loan funds. It is reasonable

to give unaudited buildings a higher priority when sufficient funds are not available because an applicant with a previous, albeit outdated, audit has some useful information available in the existing audit, and has a document that can be used for grant and loan applications. Having made this priority determination, the department believes that any other fair assessment of priority would require the submission of a burdensome amount of financial information by the applicant. It is, therefore, more reasonable to give an equal percentage of the eligible grant amount to each applicant with the same priority.

Subp. 2 sets grant funding limits at the lesser of 50% of the audit cost or a funding maximum based on the building's area. It is necessary and reasonable to set a maximum funding limit to allow widespread distribution of grant funds, and to discourage overcharging for audits. The limits used are reasonable because they are based on average historical costs for maxi-audits funded by the department and its predecessors. It is necessary to limit grants to a percentage of audit costs to provide a local investment in the audit. It is reasonable to do so because, with limited grant funds, the department wishes to leverage other funds to increase the impact of this program. Futhermore, experience has shown that, when no local contribution is required, applicants have given little consideration to cost effectiveness in choosing buildings to audit. Applicants required to make an investment in an audit tend to examine more carefully the potential benefit of the audit. It is reasonable to set the limit at 50% because it allows a significant leveraging of other funds while providing sufficient inducement for program participation.

Subp. 3 restricts the use of these grant funds as a match for other grant funds available from the department. It is necessary to provide a local investment in the audit. the reasonableness of requiring local investment is discussed in the previous paragraph.

In part 7680.0200, the Cost-Share Maxi-Audit Manual (1987) is incorporated by reference. The need for and reasonableness of this standard are discussed at the section of this statement pertaining to part 7680.0130. The need for and reasonableness of the incorporation by reference are self-evident.