

SUBJECT: Negotiated rulemaking at state agencies

COMMITTEE: State Affairs — favorable, without amendment

VOTE: 13 ayes — Wolens, S. Turner, Alvarado, Brimer, Carter, Craddick,
Danburg, Hilbert, Hunter, Longoria, McCall, Ramsay, Stiles

0 nays

2 absent — Counts, D. Jones

SENATE VOTE: On final passage, April 7 — voice vote

WITNESSES: For — None

Against — None

On — Andrea Cowen, Comptroller's Office; Andrew Bowman and Jan
Summer, Center for Public Policy Dispute Resolution

BACKGROUND : Under the Administrative Procedure and Practice Act, state agencies must
follow certain procedures when making rules involving notice, public
comment, statements for reasons for and against a rule's adoption, and
legislative review of proposed rules.

DIGEST: SB 882 would enact the Negotiated Rulemaking Act to encourage state
agencies to provide for input from affected interests when drafting rules.

In order to engage in negotiated rulemaking, the agency would first have to
appoint a convener to identify parties likely to be affected by the rule. The
convener could be an agency employee or an outside contractor. After
discussing the process and issues with these parties, the convener would
make recommendations to the agency on the feasibility of using negotiated
rulemaking to develop the proposed rule. If the agency elected to go
forward with negotiated rulemaking, it would have to publish timely notice
of this intent, accept and review comments, and establish a committee with
members representing the identified interests.

The agency also would have to appoint a facilitator, subject to the approval of the committee, to preside over meetings, establish procedures, and encourage a consensus without compelling or coercing any party. The facilitator would be an impartial third party without a financial or other interest in the outcome.

At the conclusion of negotiations, the committee would send a written report to the agency with the text of the proposed rule and specifying the issues on which a consensus was reached and those that remained unsolved. The committee would be automatically abolished on the adoption of the proposed rule.

The communications, records, conduct, notes of the facilitator, and committee members would be confidential subject to review by the attorney general and the Travis County district court. The report and recommendations would be public information available on request to the public. This bill would not affect the process for adopting rules laid out in the Administrative Procedure Act.

The bill would take effect September 1, 1997.

**SUPPORTERS
SAY:**

SB 882 would provide authority for state agencies to engage in negotiated rulemaking when drafting proposed rules and would implement a Texas Performance Review recommendation to expand the use of negotiated rulemaking among state agencies. This consensus-based approach complements the traditional notice, comment, and public hearing process with a preliminary intensive negotiation effort among interested parties, reducing the incidence of protracted battles over small issues that can seriously delay formal rulemaking processes.

Negotiated rulemaking has been used successfully by the General Land Office, the Texas Natural Resource Conservation Commission, the Texas Parks and Wildlife Department, other states, and the federal government. Negotiated rulemaking does not infringe on an agency's ultimate authority to determine the content of proposed and final rules, and no decisionmaking authority is delegated by the agency.

Negotiated rules are more likely to be accepted by the affected industries and other interested parties involved in developing them. Negotiation also may reduce the time it takes to proceed from the proposed to the final rule. Other advantages to negotiated rulemaking include reduced litigation, greater public awareness and involvement, greater information sharing and cooperation among parties, innovation in problem solving, higher compliance rates, savings in money and effort, earlier implementation and improved accuracy in rules involving complex subjects.

OPPONENTS
SAY:

No apparent opposition.

NOTES:

A related bill, SB 694 by Brown, encouraging alternate dispute resolution at state agencies, was passed by the House on May 21.