

# NORTH DAKOTA LEGISLATIVE MANAGEMENT

## Minutes of the

### ADMINISTRATIVE RULES COMMITTEE

Wednesday, March 14, 2012  
Harvest Room, State Capitol  
Bismarck, North Dakota

Representative Kim Koppelman, Chairman, called the meeting to order at 9:00 a.m.

**Members present:** Representatives Kim Koppelman, Randy Boehning, Duane DeKrey, Bill Devlin, Robert Frantsvog, Joe Kroeber, Blair Thoreson, Dwight Wrangham; Senators John M. Andrist, Joan Heckaman, Jerry Klein, Margaret Sitte

**Members absent:** Representatives Bill Amerman, Tracy Boe, David Monson, Mike Schatz; Senator Layton Freborg

**Others present:** See [Appendix A](#)

It was moved by Representative Thoreson, seconded by Senator Sitte, and carried on a voice vote that the minutes of the December 15, 2011, meeting be approved as distributed.

#### OIL AND GAS DIVISION

Chairman Koppelman called on Mr. Bruce Hicks, Assistant Director, Oil and Gas Division, Department of Mineral Resources, Industrial Commission, for presentation of testimony ([Appendix B](#)) relating to oil and gas industry rules adopted by the Industrial Commission.

Mr. Hicks reviewed the details of the rulemaking and pointed out several rules modifications made after public comments were received. He said the bonding requirements are substantially increased and under the rules would be about two and one-half times the requirements of most states. He said the higher bonding requirements will provide a substantial incentive for operators to comply with the rules. He said the potential for confiscation of the bond and a denial of the permit to operate are significant incentives for compliance.

Mr. Hicks said the enhanced requirements for frac water pits, drilling pits, and waste material disposal will increase compliance costs but also will take thousands of truck trips off the roads. He said hydraulic fracturing standards incorporated in the rules have been self-imposed by the oil industry and are becoming a national standard. He said since last June no incidents of failures have occurred, and during that time, the industry has self-imposed the standards.

Mr. Hicks said leak and spill cleanup requirements and reclamation requirements are enhanced. He distributed copies ([Appendix C](#)) of photographs of the damaged and current status of the Charbonneau Creek saltwater spill. He said the ruptured pipeline

resulted in the largest saltwater spill from oil production in North Dakota. He said many feared the area could not be returned to its original condition, but as the photographs indicate, the site is being returned to its natural state.

Representative Koppelman asked if Mr. Hicks foresees any legislation that may be needed on the topics covered by the rules. Mr. Hicks said the Oil and Gas Division tries to maintain an eye on future needs. He said at this time no pressing issues appear to require legislative action, but carbon dioxide storage may become an issue for legislative consideration.

Senator Klein asked if the increased bonding requirements will compromise the business climate for the oil industry. Mr. Hicks said the bonding requirement was set with concerns for environmental protection and to encourage development, production, and utilization of oil and gas resources. He said he believes the requirement balances those concerns. He said the oil industry is not entirely happy with the amount of the bond requirement but did not balk too much, so it appears the industry understands the need for the increase. Senator Klein asked if the industry would feel differently if oil drops to \$30 per barrel. Mr. Hicks said that would change opinions and would result in rigs being taken out of action.

Representative Frantsvog asked if the bond limits are flexible. Mr. Hicks said the bond amounts are set.

Representative Koppelman said it appears the rules are established not to manipulate the market but to administer the industry. Mr. Hicks said that is correct.

Senator Klein asked what the estimated cost of compliance of the rules change will be for the oil industry. Mr. Hicks said increased compliance costs for the rules would be approximately \$300,000 per well.

Representative Koppelman called on Mr. Ron Ness, Executive Director, North Dakota Petroleum Council, for comments on the rules adopted by the Oil and Gas Division. Mr. Ness distributed copies of a letter ([Appendix D](#)) he submitted to the Oil and Gas Division on November 1, 2011, observing that substantial additional expenses for the oil industry will be imposed by the rules changes, but the oil and gas industry in North Dakota is committed to "doing it right" and supports the major rules changes. He introduced a new staff member of the North Dakota Petroleum Council--Ms. Alexis Brinkman.

Mr. Ness said although the oil industry supports the rules changes, it is important to recognize that these rules are largely targeted to Bakken Formation economics and \$100 per barrel oil. He said not all drilling operations are in these circumstances, and the rules will tend to discourage activity outside the Bakken defined area and limit wildcat operations.

Mr. Ness said with regard to hydraulic fracturing disclosure, the industry is attempting to dispel some of the misinformation and fear about the environmental effects of hydraulic fracturing. He distributed copies of information (Appendix E) regarding FracFocus--an informational website providing information availability to the public and governmental officials regarding well completions, hydraulic fracturing stimulation, chemical content of injected fluids, and effects on water. He said the website allows the user to locate an individual well and get information on the depth of drilling and the maximum ingredient concentration of fluid components used in fracing. He said the oil industry thinks disclosure is the right thing to do so the public can understand the facts of oil extraction.

Senator Klein said there may be concern that if we go beyond the stringency level of rules that might apply later in time or in areas outside the Bakken Formation, it may become hard to pull back the level of restrictions. Mr. Ness said it is important for the industry and government to be cognizant of changing economics as development reaches other areas and formations. He said it is important to continue to encourage wildcatting operations to explore new areas.

Senator Andrist asked if there is flexibility in the rules to allow exploration of other areas. Mr. Ness said the oil industry believes the director of the Department of Mineral Resources must have authority to relax standards in areas outside the Bakken core, and the rules contain that flexibility.

Representative Koppelman asked if the industry has any suggestions for committee action on these rules. Mr. Ness said the industry supports these rules but wants it to be acknowledged that these changes impose significant cost increases for the industry.

Senator Klein asked if there is enough authority for the director of the Department of Mineral Resources to make appropriate adjustments for drilling operations in Bottineau County and other areas outside the Bakken area. Mr. Ness said the industry is comfortable these rules provide the necessary flexibility.

## **PUBLIC EMPLOYEES RETIREMENT SYSTEM**

Chairman Koppelman called on Mr. Sparb Collins, Executive Director, Public Employees Retirement System, who provided written testimony (Appendix F) regarding rules adopted by the Public Employees Retirement System (PERS).

Senator Klein said in the bid specifications rule-- North Dakota Administrative Code Section

71-03-01-02--the word "will" is changed to "may" and asked why the change was made. Mr. Collins said the section provides a list of types of insurance for bid solicitations and use of the word "will" may have mislead readers that all of the items on the list would be bid in one solicitation. He said the change was made to make it clear that bids may be sought for individual types of insurance coverage.

Senator Andrist said defined benefit plans around the country appear to be heading for trouble according to news reports. He asked if there are any issues of that kind in North Dakota. Mr. Collins said there are challenges for funding for defined benefit and defined contribution plans. He said PERS came to the Legislative Assembly with a funding recovery plan that was approved in 2011. He said the changes will help, and we had a 21 percent return on our plan last year, which will also help. He said the recovery plan is in place until 2015, and PERS will monitor the recovery and alert the Legislative Assembly in 2013 of any needed changes.

## **STATE LOTTERY**

Chairman Koppelman called on Mr. Randy Miller, Director, North Dakota Lottery, for testimony (Appendix G) relating to rules of the North Dakota Lottery. Mr. Miller said the rules were adopted as emergency rules effective January 15, 2012.

Senator Klein asked for a description of how the rule came into existence increasing the cost for a play of the Powerball lottery from \$1 to \$2. Mr. Miller said last June the Multi-State Lottery Association approved the change. He said North Dakota is a member of the association and voted no on the motion but a two-thirds vote was obtained, and the change was made by the Multi-State Lottery Association. He said effective January 15, 2012, North Dakota was required to offer the \$2 play for Powerball to continue its participation in the lottery.

In response to another question from Senator Klein, Mr. Miller said North Dakota is seeing about 22 percent increase in Powerball sales, which indicates that the Powerball game is losing some players but showing an increase in revenue.

In response to a question from Senator Sitte, Mr. Miller said the North Dakota Lottery transfers \$50,000 per calendar quarter to a fund for gambling addiction services. He said statistics show that lottery participation is very low on the causes of problem gambling. He said casinos and pulltabs are the highest percentage cause of gambling problems.

Senator Andrist asked if there has been consideration to dropping participation in the Powerball lottery. Mr. Miller said the Constitution of North Dakota requires participation in a multistate lottery and would not allow the state to conduct its own lottery.

Representative Wrangham said there are a couple of issues that are a concern to him. He said the issues relate to an entity from outside the state controlling the actions of the state and requiring use of

emergency rulemaking. He said out-of-state entity control of implementation deadlines requires emergency rulemaking.

Representative Wrangham asked for information on recent developments in online sales of lottery tickets. Mr. Miller said the United States Department of Justice issued an opinion that cleared state lotteries for online sales of lottery tickets. He said North Dakota has allowed other states to move forward with online sales and is waiting to consider the effects of those sales on retailers and the public. He said the lottery also is considering whether legislation would be needed to implement online sales of North Dakota lottery tickets.

Representative Boehning said North Dakota has a subscription service and asked if the subscription service will continue. Mr. Miller said the subscription service will continue, but online sales of lottery tickets differ. He said the current subscription service method takes about three weeks to become effective and receive lottery numbers. He said the new online approach method would be more of an instant play for participants. He said retailers are concerned with a possible loss of customer traffic if online sales are allowed.

Senator Sitte said she would like the lottery to stay out of online sales because it provides enhanced instant gratification, which is more addictive, without legislative approval.

### STATE DEPARTMENT OF HEALTH

Chairman Koppelman called on Mr. Kenan L. Bullinger, Director, Food and Lodging Division, State Department of Health, for testimony (Appendix H) regarding rules adopted by the department. Mr. Bullinger said his testimony covers four sets of rules adopted by the department regarding environmental health practitioner licensure, the food code, bed and breakfast facilities, and assisted living facilities.

Chairman Koppelman called on Ms. Molly Sander, State Department of Health, for presentation of testimony (Appendix I) relating to State Department of Health vaccines rules.

### SALES TAX

Chairman Koppelman called on Mr. Myles Vosberg, Director, Tax Administration Division, Tax Department, for testimony (Appendix J) relating to the existing administrative rule regarding contractors under Section 81-04.1-04-20.

Chairman Koppelman called on Mr. Paul Leverington, Custom Marketing Company, West Fargo, for comments on application of the rule for use tax application to contractors. Mr. Leverington said Custom Marketing Company has completed almost 30 years of business in North Dakota. He said the company puts up grain bins that have the capacity to dry grain, which allows farmers to store grain while it is still wet.

Mr. Leverington said the issue of concern to Custom Marketing Company came up a few years ago. He said the issue had not been encountered before, and he believes the application of the rule in question results in a double tax situation on sales by Custom Marketing Company.

Mr. Leverington said Custom Marketing Company is not a contractor. He said the company hires contractors to install its product. He said a change in tax application occurred although the company did not change its practice. He said a substantial assessment for sales taxes was imposed, and the company may be forced to relocate its employees to another state to avoid the double taxation of its product.

Mr. Rodger Mohagen, attorney, West Fargo, said he has been involved as legal counsel with Custom Marketing Company for seven or eight years. He said there are several issues that could be raised regarding sales tax application in the circumstances described, but he would like to focus the committee's attention on a couple of issues. He said Custom Marketing Company has grown into a company with a broader range of sales and sells goods to customers on a national basis. He said Custom Marketing Company is not a contractor and is not licensed as a contractor. He said for the Tax Department to find that Custom Marketing Company is subject to sales taxes, the Tax Department must make the finding that the company is a contractor to impose use tax on out-of-state sales.

Mr. Mohagen said it is the Tax Department's position that if materials come into inventory in North Dakota and are then sold and delivered to a purchaser in another state, they become subject to use tax.

Committee counsel said it is his understanding that if a use tax obligation exists for a North Dakota seller, that seller is entitled to a credit in North Dakota for any sales taxes paid on those goods in another state. Mr. Mohagen said that credit is not available in this circumstance because in North Dakota's view the North Dakota tax applies first, and the tax imposed in Nebraska is applied later. He said the Nebraska view is that North Dakota should not tax the product at all so Nebraska will not allow a credit against the Nebraska tax.

In response to a question from Senator Heckaman, Mr. Mohagen said Custom Marketing Company is agonizing over what to do. He said options being considered are moving the business to another state or beginning a court challenge of the taxes imposed by North Dakota and Nebraska.

Representative Frantsvog asked if there is another state that would not tax these sales like North Dakota does. Mr. Mohagen said that is a difficult question to answer because each state has differing interpretations and administration of sales and use tax provisions.

Senator Andrist said perhaps the committee can ask Mr. Vosberg to ask the Tax Commissioner to seek a solution to this problem.

Senator Klein asked Mr. Vosberg if something happened in 2000 or so that caused a change to administration of these provisions. Mr. Vosberg said because of sales tax confidentiality laws, he cannot describe the circumstances that led to the interpretation.

Representative Koppelman asked if the decision that Custom Marketing Company is a contractor is the key to applying the tax. Mr. Vosberg said that is correct.

Mr. Leverington stated several reasons why he believes Custom Marketing Company is not a contractor.

Mr. Vosberg asked Mr. Leverington if he would agree to Mr. Vosberg disclosing some information about transactions to help the committee understand the situation. Mr. Leverington said that would be acceptable. Mr. Vosberg said Custom Marketing Company contracts with the final customer for a bin to be erected on the customer's site. He said Custom Marketing Company then hires a contractor to install the bin. He said the Tax Department does not view this transaction as a wholesale sale. He said if Custom Marketing Company sold all of the materials to the final customer, and the customer hired a contractor to construct the bin, the Tax Department would not impose use taxes in that circumstance.

Representative Koppelman said it appears from Mr. Vosberg's description that if Custom Marketing Company changed its contracts, the company could avoid being viewed as the contractor and subject to North Dakota use taxes. He asked Mr. Vosberg if that is a correct assumption. Mr. Vosberg said perhaps that would change the circumstances and avoid the tax liability, depending on how the contract is structured.

### STATE BOARD OF PHARMACY

Chairman Koppelman called on Mr. Howard C. Anderson Jr., Executive Director, State Board of Pharmacy, for presentation of testimony (Appendix K) relating to rules adopted by the board.

Mr. Anderson said the rules relate to compounding pharmaceutical preparations, and lengthy consideration was given to the techniques and the best way to compound preparation for effectiveness and for the safety of the patient. He said the rules relate to nonsterile and sterile pharmaceutical compounding. He said compounding involves a pharmacist making a pharmaceutical preparation that is not commercially available.

Senator Heckaman asked if surrounding states are imposing these requirements. Mr. Anderson said surrounding states have adopted these kinds of requirements. He said North Dakota is maybe a little behind on putting these in place. He said the State Board of Pharmacy wanted to give some time to observe how these standards were implemented in other states before taking final action.

### PUBLIC SERVICE COMMISSION

Chairman Koppelman called on Ms. Illona A. Jeffcoat-Sacco, General Counsel, Public Service Commission, for testimony (Appendix L) relating to pipeline safety and gas safety program rules amendments adopted by the commission. Ms. Jeffcoat-Sacco said the amendments are adopted to maintain compliance with federal gas safety regulations.

In response to a question from Representative Koppelman, Ms. Jeffcoat-Sacco said adopting the federal standards by reference allows the state to enforce the rules.

Ms. Jeffcoat-Sacco provided copies of a request (Appendix M) by the Public Service Commission for an extension of time to adopt rules to implement 2011 Senate Bill No. 2196 relating to the definition of a wind energy conversion facility.

Representative Sitte asked if there are any provisions in existence requiring wind farm reclamation and imposing a bonding requirement for that purpose. Ms. Jeffcoat-Sacco said no bonds are required for wind farms at this time. She said she would bring the issue up for Public Service Commission consideration.

Chairman Koppelman said the committee practice has been to grant an extension of time to adopt rules with a specified time limit. He asked what length of extension is being requested by the Public Service Commission. Ms. Jeffcoat-Sacco said an extension until the end of November 2012 would be adequate.

**It was moved by Representative Thoreson, seconded by Senator Klein, and carried on a voice vote that the Administrative Rules Committee approve an extension of time for Public Service Commission adoption of rules regarding the definition of a wind energy conversion facility through November 2012.**

### REAL ESTATE COMMISSION

Chairman Koppelman called on Ms. Pat Jergenson, Executive Director, Real Estate Commission, for testimony (Appendix N) relating to rules adopted by the Real Estate Commission.

### DEPARTMENT OF HUMAN SERVICES

Chairman Koppelman called on Mr. Jonathan Alm, Legal Counsel, Department of Human Services, for presentation of testimony (Appendix O) relating to Medicaid eligibility and children's health insurance program rules.

Mr. Curtis Volesky, Director of Medicaid Eligibility Policy, Department of Human Services, said the rules primarily relate to definitions being moved to more appropriate placement in the rules and clarification of policies.

Mr. Alm reviewed prepared testimony (Appendix P) on rules amendments governing aid to vulnerable aged, blind, and disabled individuals and the program

for expanded service payments for elderly and disabled.

### **BOARD OF SOCIAL WORK EXAMINERS**

Committee counsel said a copy of communication (Appendix Q) from Ms. Nikki Owings was received to inform the committee that the Board of Social Work Examiners is unable to have a representative present for this meeting. He said under a 2011 statutory change the absence of an agency representative means the rules are automatically carried over for consideration at the next committee meeting.

### **WORKFORCE SAFETY AND INSURANCE**

Chairman Koppelman called on Mr. Rob Forward, staff attorney, Workforce Safety and Insurance, for presentation of testimony (Appendix R) relating to rules adopted by Workforce Safety and Insurance. Senator Sitte said in Sections 92-01-02-12 and 92-01-02-24 the new language added uses the phrase "amount of miles" which should say "number of miles" to be grammatically correct. Chairman Koppelman said the wording can be changed if agreeable to Workforce Safety and Insurance and approved by the committee. Mr. Forward said Workforce Safety and Insurance would suggest making the grammatical correction. **It was moved by Senator Sitte, seconded by Representative Boehning, and carried on a roll call vote that the committee agree with Workforce Safety and Insurance to change "amount of miles" to "number of miles" in Sections 92-01-02-12 and 92-01-02-24.** Voting in favor of the motion were Representatives Koppelman, Boehning, DeKrey, Devlin, Frantsvog, Kroeber, Thoreson, and Wrangham and Senators Andrist, Heckaman, Klein, and Sitte. No negative votes were cast.

### **AGRICULTURAL PRODUCTS UTILIZATION COMMISSION**

Chairman Koppelman called on Mr. John Schneider, Executive Director, Agricultural Products Utilization Commission, Department of Commerce, for presentation of testimony (Appendix S) relating to rules adopted by the Department of Commerce. Mr. Schneider said the rules as submitted provided for repeal of Articles 95-02, 95-03, 95-04, and 95-05. He said these repeals were not included in the rules as prepared for committee consideration. Committee counsel said it appears those repeals were omitted by mistake, and they will be added to the changes incorporated in the Administrative Code.

### **BOARD OF CLINICAL LABORATORY PRACTICE**

Chairman Koppelman called on Ms. Sandra Matthey, Board Secretary, Board of Clinical Laboratory Practice, for presentation of testimony (Appendix T) regarding rules adopted by the board.

Representative Koppelman asked if Section 96-02-10-01 is an appropriate rule since it is stated to provide an exemption from a statutory chapter. Committee counsel said the answer would depend on what statutory provisions provide. Representative Koppelman requested examination of the status of exemption by rule from a statutory provision.

### **COMMITTEE DISCUSSION**

Senator Andrist said he understands that the housing incentive fund receives a 10 percent fee for administration. He said he believes that amount to be an excessive fee and requested information on the status of the housing incentive fund fees. Ms. Karlene Fine, Industrial Commission, said the Housing Finance Agency could address that inquiry at the next committee meeting.

### **EDUCATION STANDARDS AND PRACTICES BOARD**

Chairman Koppelman called on Mr. Michael Heilman, Education Standards and Practices Board member and Assistant Superintendent of Bismarck Public Schools, for presentation of testimony from the board regarding elimination of board rules that have become obsolete because of statutory changes made in 2011. A copy of the board's testimony and request is attached as Appendix U.

**It was moved by Representative DeKrey, seconded by Senator Sitte, and carried on a roll call vote that the Administrative Rules Committee agree with the Education Standards and Practices Board on the rules changes suggested by the board to eliminate obsolete provisions in Chapter 67.2-02-02.** Voting in favor of the motion were Koppelman, Boehning, DeKrey, Devlin, Frantsvog, Kroeber, Thoreson, and Wrangham and Senators Andrist, Heckaman, Klein, and Sitte. No negative votes were cast.

**It was moved by Senator Klein, seconded by Representative DeKrey, and carried on a voice vote that the meeting be adjourned.** The meeting was adjourned at 3:30 p.m.

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John Walstad  
Code Revisor

ATTACH:21

**Presented by:** Illona A. Jeffcoat-Sacco  
General Counsel  
Public Service Commission

**Before:** Administrative Rules Committee  
Representative Kim Koppelman, Chairman

**RE:** North Dakota Administrative Code Section 69-09-03-02  
PSC Case No. GS-11-79

**Date:** March 14, 2012

### TESTIMONY

Mr. Chairman and committee members, my name is Illona Jeffcoat-Sacco, General Counsel for the North Dakota Public Service Commission. The Commission asked me to testify today regarding the referenced rulemaking proceeding.

The response to the questions posed to us by the Legislative Council's staff are presented below. In each case, the question is restated prior to our response.

1. **Whether the rules resulted from statutory changes made by the Legislative Assembly.**

No

2. **Whether the rules are related to any federal statute or regulation. If so, please indicate whether the rules are mandated by federal law or explain any options your agency had in adopting the rules.**

Yes.

The rule change adopts, by reference, changes made to federal pipeline safety regulations in effect as of June 22, 2011.

3. **A description of the rulemaking procedure followed in adopting the rules, e.g., the type of public notice given and the extent of public hearings held on the rules.**

On June 22, 2011 the North Dakota Public Service Commission issued a formal Notice of Intent to Amend Administrative Rules and Notice of Public Hearing and an abbreviated Notice.

The Abbreviated Notice was published once in 52 official county newspapers the week of July 2 through July 8, 2011. The notice was also

forwarded to the Legislative Council for publication on June 30, 2011, which was at least 30 days prior to the public hearing.

A public hearing was noticed for and held at 10:00 a.m., August 9, 2011. The hearing was held in the Commission Hearing Room, 12th floor, State Capitol, Bismarck, North Dakota.

The Commission allowed, after the conclusion of the rulemaking hearing, a comment period until August 19, 2011, during which data, views, or oral arguments concerning the proposed rulemaking could be received by the Commission and made a part of the rulemaking record to be considered by the Commission. The only comments received were of Commission staff and those comments were made at the time of the public hearing.

4. **Whether any person has presented a written or oral concern, objection, or complaint for agency consideration with regard to these rules. If so, describe the concern, objection, or complaint and the response of the agency, including any change made in the rules to address the concern, objection, or complaint. Please summarize the comments of any person who offered comments at the public hearings on these rules.**

No objections, concerns or complaints were received. Other than staff testimony explaining and supporting the proposed rule changes, no comments or testimony were received before, at, or after the hearing. The rules were adopted as proposed. A copy of Staff Testimony is attached as Attachment A.

5. **The approximate cost of giving public notice and holding any hearing on the rules and the approximate cost (not including staff time) of developing and adopting the rules.**

The gas safety rule case before you today was combined with a reclamation rulemaking case and the Notice of June 22, 2011 covered both proposals. The total cost for publishing the Notices was \$1,978.68. The cost for legal notice associated with just the gas safety rulemaking proceeding before you today was ½, or \$989.34. Other than staff time, no other significant costs were incurred.

6. **An explanation of the subject matter of the rules and the reasons for adopting those rules.**

In order to continue the Commission's role as an agent for the federal pipeline safety program, the change to North Dakota Administrative Code

Section 69-09-03-02 adopts by reference changes made to federal pipeline safety regulations in effect as of June 22, 2011.

The federal/state agreement for North Dakota's Gas Safety Program requires that North Dakota adopt the federal gas safety standards, along with any future amendments to those standards. The initial adoption took place on June 1, 1984, with additional rulemaking proceedings, such as this one, held as necessary to continue to adopt federal amendments to the standards.

A copy of the Commission Order submitting the rules to the Attorney General is attached as Attachment B.

- 7. Whether a regulatory analysis was required by North Dakota Century Code (NDCC) Section 28-32-08 and whether that regulatory analysis was issued. Please provide a copy.**

No regulatory analysis was required for the rule because State adoption of a federal standard already in place is not expected to have an impact on the regulated community in excess of \$50,000 and neither the Governor nor any member of the Legislative Assembly requested a regulatory analysis. A statement was prepared. See Attachment C.

- 8. Whether a regulatory analysis or economic impact statement of impact on small entities was required by NDCC Section 28-32-08.1 and whether that regulatory analysis or impact statement was issued. Please provide copies.**

A small entities analysis is not required because the changes are required by federal law. A statement was prepared. See Attachment C.

- 9. Whether these rules have a fiscal effect on state revenues and expenditures, including any effect on funds controlled by your agency. If so, please provide copies of a fiscal note.**

The rules impose no impact on state revenues or expenditures. However, if we do not adopt the rules, we could jeopardize our federal funding for the project.

- 10. Whether a constitutional takings assessment was prepared as required by NDCC Section 28-32-09. Please provide a copy if one was prepared.**

No takings assessment was required because the changes do not effect a regulatory taking. A statement was prepared. See Attachment C.

11. **If these rules were adopted as emergency (interim final) rules under NDCC Section 28-32-03, provide the statutory grounds from that section for declaring the rules to be an emergency and the facts that support that declaration and provide a copy of the Governor's approval of the emergency status of the rules. If these rules were adopted as emergency (interim final) rules, what steps were taken to make the rules known to persons who can reasonably be expected to have a substantial interest in the rules?**

N/A

Mr. Chairman, this completes my testimony. I would be happy to respond to any questions the committee might have.

**CHAPTER 69-09-03  
GAS PIPELINE SAFETY**

Section	
69-09-03-01	Safety
69-09-03-02	Adoption of Regulations

**69-09-03-01. Safety.** Gas pipeline facilities used for the intrastate distribution and transmission of gas shall be designed, constructed, and operated to meet the safety standards set forth in regulations of the United States department of transportation adopted in section 69-09-03-02. The commission may require such proof of compliance as it deems necessary.

**History:** Amended effective July 1, 1986; January 1, 1988.

**General Authority:** NDCC 28-32-02, 49-02-04

**Law Implemented:** NDCC 49-02-01.2, 49-02-04

**69-09-03-02. Adoption of regulations.** The following parts of title 49, Code of Federal Regulations in effect as of ~~August 1, 2009~~ June 22, 2011, are adopted by reference:

1. Part 190 - Department of Transportation Pipeline Safety Enforcement Procedures.
2. Part 191 - Department of Transportation Regulations for Transportation of Natural Gas by Pipeline; Reports of Leaks.
3. Part 192 - Transportation of Natural and Other Gas by Pipeline: Minimum Safety Standards.
4. Part 199 - Control of Drug Use in Natural Gas, Liquefied Natural Gas, and Hazardous Liquids Pipelines.

Copies of these regulations may be obtained from:

Public Service Commission  
600 East Boulevard, Dept. 408  
Bismarck, ND 58505-0480

**History:** Effective June 1, 1984; amended effective July 1, 1986; January 1, 1988; March 1, 1990; February 1, 1992; August 1, 1993; August 1, 1994; February 1, 1996; July 1, 1997; July 1, 1998; September 1, 1999; August 1, 2000; January 1, 2002; November 1, 2003; May 1, 2005; July 1, 2006; April 1, 2008; January 1, 2010; April 1, 2012.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 49-02-01.2

**Attachment  
A**

**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

**Public Service Commission  
Gas Pipeline Safety  
Rulemaking**

**Case No. GS-11-79**

**PUBLIC SERVICE COMMISSION STAFF TESTIMONY**

**August 9, 2011**

I am Patrick Fahn, Director of the Compliance and Competitive Markets Division with the Public Service Commission.

The proposed change to North Dakota Administrative Code Section 69-09-03-02 adopts, by reference, changes made to federal pipeline safety regulations and in effect as of June 22, 2011.

The Commission acts as agent for the U.S. Department of Transportation, Pipeline and Hazardous Materials Administration (PHMSA) by entering into a federal/state agreement and receives federal funding for the enforcement of minimum gas pipeline safety standards on all gas distribution and intrastate transmission facilities within North Dakota. While all gas distribution and intrastate transmission facilities within North Dakota are required to comply with the federal minimum pipeline safety standards regardless of the state adoption of those standards, as a PHMSA agent, the state must be able to enforce the standards.

The federal/state agreement requires that North Dakota adopt the federal gas safety standards, along with any future amendments to those standards. The initial adoption took place on June 1, 1984, with additional rulemaking

proceedings, such as this one, held annually if necessary, to continue to adopt federal amendments to the standards. A summary of federal standards amended and effective from August 1, 2009 through June 22, 2011 is attached to this testimony.

All gas distribution and intrastate transmission facilities within North Dakota are required to comply with the federal minimum pipeline safety standards regardless of the state adoption of the federal standards. Therefore, there is no additional impact on the regulated community as a result of state adoption of the standards.

**North Dakota Public Service Commission**  
**2011 Proposed Gas Pipeline Safety Amendments**  
**GS-11-79**

**Rule Summary**

**June 22, 2011**

**49 CFR Part 190**

**49 CFR Part 190 – Federal Register Cite 74 FR 62503** (Amendment Number 15) - This final rule corrects editorial errors, makes minor changes in the regulatory text, reflects changes in governing laws, and improves the clarity of certain provisions in the pipeline safety regulations. This rule is intended to enhance the accuracy and reduce misunderstandings of the specified regulations. The amendments contained in this rule are non-substantive changes.

**Effective Date of final rule:** January 29, 2010.

**49 CFR Part 192**

**49 CFR Part 192 – Federal Register Cite 74 FR 2889** (Amendment Number 109) - This final rule adopts, with minor modifications, an interim final rule issued by PHMSA on March 28, 2008, conforming PHMSA's administrative procedures with the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006 by establishing the procedures PHMSA will follow for issuing safety orders and handling requests for special permits, including emergency special permits. The rule also notifies operators about electronic docket information availability; updates addresses for filing reports, telephone numbers, and routing symbols; and clarifies the time period for processing requests for written interpretations of the regulations. This final rule makes minor amendments and technical corrections to the regulatory text in response to written public comments received after issuance of the interim final rule.

**Effective Date of final rule:** February 17, 2009.

**49 CFR Part 192 - Federal Register Cite 74 FR 17099** (Amendment Number 110) – This direct final rule incorporates by reference the most recent editions of API Specification 5L "Specification for Line Pipe" and API 1104 "Welding of Pipelines and Related Facilities." The purpose of this update is to enable pipeline operators to utilize current technology, materials, and practices to help maintain a high level of safety relative to their pipeline operations. PHMSA is not eliminating the use of the current referenced standards but simply allowing the additional use of these new standards. PHMSA may in the future propose to eliminate the incorporation of the existing referenced standards.

**Effective Date of final rule:** April 14, 2009.

**49 CFR Part 192 - Federal Register Cite 74 FR 62503** (Amendment Number 111) – This final rule corrects editorial errors, makes minor changes in the regulatory text, reflects changes in governing laws, and improves the clarity of certain provisions in the pipeline safety regulations. This rule is intended to enhance the accuracy and reduce misunderstandings of the specified regulations. The amendments contained in this rule are non-substantive changes.

**Effective Date of final rule:** January 29, 2010.

**49 CFR Part 192 - Federal Register Cite 74 FR 63310 (Amendment Number 112)** – PHMSA is amending the Federal pipeline safety regulations to address human factors and other aspects of control room management for pipelines where controllers use supervisory control and data acquisition (SCADA) systems. Under the final rule, affected pipeline operators must define the roles and responsibilities of controllers and provide controllers with the necessary information, training, and processes to fulfill these responsibilities. Operators must also implement methods to prevent controller fatigue. The final rule further requires operators to manage SCADA alarms, assure control room considerations are taken into account when changing pipeline equipment or configurations, and review reportable incidents or accidents to determine whether control room actions contributed to the event.

Hazardous liquid and gas pipelines are often monitored in a control room by controllers using computer-based equipment, such as a SCADA system, that records and displays operational information about the pipeline system, such as pressures, flow rates, and valve positions. Some SCADA systems are used by controllers to operate pipeline equipment, while, in other cases, controllers may dispatch other personnel to operate equipment in the field. These monitoring and control actions, whether via SCADA system commands or direction to field personnel, are a principal means of managing pipeline operation.

This rule improves opportunities to reduce risk through more effective control of pipelines. It further requires the statutorily mandated human factors management. These regulations will enhance pipeline safety by coupling strengthened control room management with improved controller training and fatigue management.

**Effective Date of final rule:** February 1, 2010. **Compliance Date:** An operator must develop control room management procedures by August 1, 2011 and implement the procedures by February 1, 2012. **Incorporation by Reference Date:** The incorporation by reference of certain publications listed in this rule is approved by the Director of the Federal Register as of February 1, 2010.

**49 CFR Part 192 - Federal Register Cite 74 FR 63905 (Amendment No. 113)** – PHMSA is amending the Federal Pipeline Safety Regulations to require operators of gas distribution pipelines to develop and implement integrity management (IM) programs. The purpose of these programs is to enhance safety by identifying and reducing pipeline integrity risks. The IM programs required by this rule are similar to those required for gas transmission pipelines, but tailored to reflect the differences in and among distribution pipelines. Based on the required risk assessments and enhanced controls, the rule also allows for risk-based adjustment of prescribed intervals for leak detection surveys and other fixed-interval requirements in the agency's existing regulations for gas distribution pipelines. To further minimize regulatory burdens, the rule establishes simpler requirements for master meter and small liquefied petroleum gas (LPG) operators, reflecting the relatively lower risk of these small pipelines.

In accordance with Federal law, the rule also requires operators to install excess flow valves on new and replaced residential service lines, subject to feasibility criteria outlined in the rule.

This final rule addresses statutory mandates and recommendations from the DOT's Office of the Inspector General (OIG) and stakeholder groups.

**Effective Date of final rule:** February 2, 2010.

**49 CFR Part 192 - Federal Register Cite 75 FR 48593 (Amendment Number 114)** – PHMSA is amending the Federal pipeline safety regulations to incorporate by reference all or parts of 40 new editions of voluntary consensus technical standards. This action allows pipeline operators to use current technologies, improved materials, and updated industry and management practices. Additionally, PHMSA is clarifying certain regulatory provisions and making several editorial corrections. These amendments do not require pipeline operators to take on any significant new pipeline safety initiatives.

***Effective Date of final rule:*** October 1, 2010.

**49 CFR Part 192 - Federal Register Cite 75 FR 72877 (Amendment Number 115)** – This final rule revises the Pipeline Safety Regulations to improve the reliability and utility of data collections from operators of natural gas pipelines, hazardous liquid pipelines, and liquefied natural gas (LNG) facilities. These revisions will enhance PHMSA's ability to understand, measure, and assess the performance of individual operators and industry as a whole; integrate pipeline safety data to allow a more thorough, rigorous, and comprehensive understanding and assessment of risk; and expand and simplify existing electronic reporting by operators. These revisions will improve both the data and the analyses PHMSA and others rely on to make critical, safety-related decisions, and will facilitate both PHMSA's and states' allocation of pipeline safety program inspection and other resources based on a more accurate accounting of risk.

***Effective Date of final rule:*** January 1, 2011.

**49 CFR Part 192 - Federal Register Cite 76 FR 5494 (Amendment No. 116)** – This final rule is an amendment to PHMSA's regulations involving DIMP. This final rule revises the pipeline safety regulations to clarify the types of pipeline fittings involved in the compression coupling failure information collection; changes the term "compression coupling" to "mechanical fitting," aligns a threat category with the annual report; and clarifies the Excess Flow Valve (EFV) metric to be reported by operators of gas systems. This rule also announces the OMB approval of the revised Distribution Annual Report and a new Mechanical Fitting Failure Report. Finally, this rulemaking clarifies the key dates for the collection and submission of the new Mechanical Fitting Failure Report.

***Effective Date of final rule:*** April 4, 2011.

**49 CFR Part 199 - Federal Register Cite 74 FR 2889 (Amendment Number 25)** – This final rule adopts, with minor modifications, an interim final rule issued by PHMSA on March 28, 2008, conforming PHMSA's administrative procedures with the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006 by establishing the procedures PHMSA will follow for issuing safety orders and handling requests for special permits, including emergency special permits. The rule also notifies operators about electronic docket information availability; updates addresses for filing reports, telephone numbers, and routing symbols; and clarifies the time period for processing requests for written interpretations of the regulations. This final rule makes minor amendments and technical corrections to the regulatory text in response to written public comments received after issuance of the interim final rule.

***Effective Date of final rule: February 17, 2009.***

# Attachment B

## STATE OF NORTH DAKOTA PUBLIC SERVICE COMMISSION

Public Service Commission  
2011 Gas Pipeline Safety Rules  
Rulemaking

Case No. GS-11-79

### ORDER SUBMITTING RULES TO ATTORNEY GENERAL

September 20, 2011

#### Appearances

Commissioners Tony Clark, Brian P. Kalk, and Kevin Cramer

#### Preliminary Statement

On June 22, 2011, the North Dakota Public Service Commission (Commission) issued a formal Notice of Proposed Rulemaking and an Abbreviated Notice proposing to revise Articles 69-09 of the Administrative Code. The proposed amendments relate to the adoption by reference of federal gas safety requirements.

In summary, in order to continue the Commission's role as an agent for the federal pipeline safety program, the proposed change to the North Dakota Administrative Code Section 69-09-03-02 adopts by reference changes made to federal pipeline safety regulations since February 17, 2009. The proposed amendment will not have an incremental impact on the regulated community in excess of \$50,000.

#### Public Hearing and Comments

The Abbreviated Notice was published once in all 52 official county newspapers the week of July 2 through July 8, 2011. The Notice of Intent to Amend Administrative Rules and Notice of Public Hearing and proposed rules were also sent to those identified as interested or affected parties. The notices were forwarded on June 30, 2011, to the Legislative Council for publication.

A public hearing on the proposed rule changes was noticed for and held at 10:00 a.m. August 09, 2011. The hearing was held in the Commission Hearing Room, 12th floor, State Capitol, Bismarck, North Dakota. No one other than commission staff appeared at the hearing on this proposed rule. Commission staff testified at the hearing in support of the proposed rule.

The Commission allowed, after the conclusion of the rulemaking hearing, a comment period until August 19, 2011, during which data, views, or oral arguments concerning the proposed rulemaking could be received by the Commission and made a part of the rulemaking record to be considered by the Commission.

The only written comments filed were received at the hearing and were those of Commission staff.

#### **Discussion**

Staff prepared and filed a statement regarding the required regulatory analysis, takings assessment, and small entity regulatory analysis.

Staff testified at the hearing that the proposed changes are intended to incorporate into state rules changes in federal rules that must also apply to the state gas pipeline safety program, and summarized these required changes.

No other comments were received and no changes are being made to the rules as originally proposed.

#### **Order**

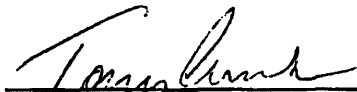
The Commission orders:

The proposed changes to Sections 69-09-03-02 of the North Dakota Administrative Code, as attached to and made a part of this order, be submitted to the Attorney General for an opinion that the rules are approved as to legality.

#### **PUBLIC SERVICE COMMISSION**



**Kevin Cramer**  
Commissioner



**Tony Clark**  
Chairman



**Brian P. Kalk**  
Commissioner

**PROPOSED RULE**

69-09-03-02. Adoption of regulations. The following parts of title 49, Code of Federal Regulations in effect as of ~~August 1, 2000~~ June 22, 2011 are adopted by reference:

1. Part 190 - Department of Transportation Pipeline Safety Enforcement Procedures.
2. Part 191 - Department of Transportation Regulations for Transportation of Natural Gas by Pipeline; Reports of Leaks.
3. Part 192 - Transportation of Natural and Other Gas by Pipeline: Minimum Safety Standards.
4. Part 199 - Control of Drug Use in Natural Gas, Liquefied Natural Gas, and Hazardous Liquids Pipelines.

Copies of these regulations may be obtained from:

Public Service Commission  
600 East Boulevard, Dept. 408  
Bismarck, ND 58505-0480

History: Effective June 1, 1984; amended effective July 1, 1986; January 1, 1988; March 1, 1990; February 1, 1992; August 1, 1993; August 1, 1994; February 1, 1996; July 1, 1997; July 1, 1998; September 1, 1999; August 1, 2000; January 1, 2002; November 1, 2003; May 1, 2005; July 1, 2006; April 1, 2008.

General Authority: NDCC 28-32-02  
Law Implemented: NDCC 49-02-01.2

STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

Public Service Commission  
2011 Gas Pipeline Safety  
Rulemaking

Case No. GS-11-79

Statement on Regulatory Analysis, Small Entity Analysis and Takings  
Assessment

June 22, 2011

The purpose of this rulemaking is to adopt, by reference in state administrative rule, the most recent amendments to pipeline safety regulations adopted by the United States Department of Transportation, Pipeline and Hazardous Materials Safety Administration. A summary/ explanation of the specific changes to be adopted by reference is attached.

**Regulatory Analysis**

N.D.C.C. § 28-32-08 requires an agency to prepare a regulatory analysis if the rule is expected to have an impact on the regulated community in excess of fifty thousand dollars. The law provides, in part:

2. The regulatory analysis must contain:
  - a. A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
  - b. A description of the probable impact, including economic impact, of the proposed rule;
  - c. The probable costs to the agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues; and
  - d. A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why the methods were rejected in favor of the proposed rule.

North Dakota individuals subject to Commission jurisdiction who may be affected by the federal amendments proposed to be adopted by reference for the state

gas pipeline safety program include intrastate natural gas transmission pipeline operators and intrastate natural gas distribution system operators.

The Commission acts as agent for the United States Department of Transportation, Pipeline and Hazardous Materials Safety Administration (PHMSA), in the enforcement of the minimum gas pipeline safety standards on all gas distribution and intrastate transmission facilities within the state. This is accomplished by entering into a 601055(a) Title 49 agreement with the United States Department of Transportation which requires North Dakota to adopt all of the federal gas safety standards, along with any future amendments to those standards. This rulemaking is a part of that ongoing agreement.

The intrastate natural gas transmission pipeline operators and intrastate natural gas distribution system operators must comply with the federal amendments and therefore were impacted in excess of fifty thousand dollars when PHMSA adopted the amendments. Consequently, adoption of these amendments for the state gas pipeline safety program will have no additional impact on the regulated community.

#### **Small Entity Regulatory Analysis**

N.D.C.C. § 28-32-08.1 requires that before adoption of any proposed rule, the adopting agency prepare a regulatory analysis in which the agency considers options to minimize adverse impact on small entities. The law provides, in part:

2. . . . The agency shall consider each of the following methods of reducing impact of the proposed rule on small entities:
  - a. Establishment of less stringent compliance or reporting requirements for small entities;
  - b. Establishment of less stringent schedules or deadlines for compliance or reporting requirements for small entities;
  - c. Consolidation or simplification of compliance or reporting requirements for small entities;
  - d. Establishment of performance standards for small entities to replace design or operational standards required in the proposed rule; and
  - e. Exemption of small entities from all or any part of the requirements contained in the proposed rule.

This regulatory analysis is not required under Chapter 28-32-08.1, N.D.C.C. because the proposed amendments to existing rules are mandated by federal law.

### **Takings Assessment**

N.D.C.C. § 28-32-09 requires an entity to prepare a written assessment of the constitutional takings implications of a proposed rule that may limit the use of private real property. The law provides, in part:

1. . . . The agency's assessment must:
  - a. Assess the likelihood that the proposed rule may result in a taking or regulatory taking.
  - b. Clearly and specifically identify the purpose of the proposed rule.
  - c. Explain why the proposed rule is necessary to substantially advance that purpose and why no alternative action is available that would achieve the agency's goals while reducing the impact on private property owners.
  - d. Estimate the potential cost to the government if a court determines that the proposed rule constitutes a taking or regulatory taking.
  - e. Identify the source of payment within the agency's budget for any compensation that may be ordered.
  - f. Certify that the benefits of the proposed rule exceed the estimated compensation costs.

None of the above proposed federal amendments will result in a regulatory taking.

The purpose of the proposed federal amendments is stated above.

We do not expect any impact on private property owners as a result of the proposed federal amendments. The proposed rules should not limit the use of private property.

The proposed amendments will not limit the use of private real property and estimated compensation costs will be zero.



# Public Service Commission

## State of North Dakota

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**COMMISSIONERS**

Tony Clark  
Brian P. Kalk  
Kevin Cramer

Executive Secretary  
Darrell Nitschke

600 East Boulevard, Dept. 408  
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ND Toll Free: 1-877-245-6685  
Fax: 701-328-2410  
TDD: 800-366-6888 or 711

7 March 2012

Mr. John Walstad  
Code Revisor  
North Dakota Legislative Council  
State Capitol  
600 East Boulevard, 2<sup>nd</sup> Floor  
Bismarck, ND 58505-0360

RE: N.D.C.C. section 28-32-07 - Extension of time request

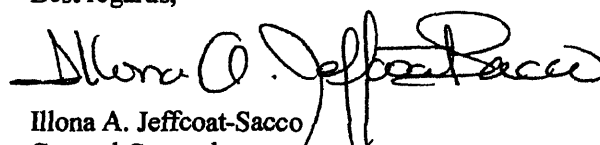
Dear Mr. Walstad:

The Public Service Commission respectfully requests an extension of time to promulgate rules implementing Senate Bill 2196 relating to the definition of a wind energy conversion facility.

The commission has been working with stakeholders to draft revisions to the siting rules and will soon be considering the working group's draft amendments. These will include a streamlined application process for small wind farms that are now jurisdictional under Senate Bill 2196.

A copy of the Bill is attached. Thank you for your consideration of this matter.

Best regards,

  
Ilona A. Jeffcoat-Sacco  
General Counsel

attachments

**Sixty-second Legislative Assembly of North Dakota  
In Regular Session Commencing Tuesday, January 4, 2011**

SENATE BILL NO. 2196  
(Senators Wardner, Christmann, Lyson)  
(Representatives Brandenburg, DeKrey, Porter)

AN ACT to amend and reenact subsection 5 of section 49-22-03 and subsection 1 of section 49-22-22 of the North Dakota Century Code, relating to the definition of energy conversion facility and to siting application fees.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. AMENDMENT.** Subsection 5 of section 49-22-03 of the North Dakota Century Code is amended and reenacted as follows:

5. "Energy conversion facility" means any plant, addition, or combination of plant and addition, designed for or capable of:
  - a. ~~Generation by wind energy conversion exceeding one-half megawatt of electricity;~~
  - b. ~~Generation by any means other than wind energy conversion exceeding sixtyfifty megawatts of electricity;~~
  - b-c. Manufacture or refinement of one hundred million cubic feet [2831684.66 cubic meters] or more of gas per day, regardless of the end use of the gas;
  - e-d. Manufacture or refinement of fifty thousand barrels [7949.36 cubic meters] or more of liquid hydrocarbon products per day; or
  - d-e. Enrichment of uranium minerals.

**SECTION 2. AMENDMENT.** Subsection 1 of section 49-22-22 of the North Dakota Century Code is amended and reenacted as follows:

1. Every applicant ~~for a certificate of site compatibility under this chapter~~ shall pay to the commission an application fee in:
  - a. ~~An applicant for a certificate of site compatibility shall pay~~ an amount equal to five hundred dollars for each one million dollars of investment in the proposed facility as defined in the federal energy regulatory commission uniform system of accounts. ~~Every~~
  - b. ~~An applicant for a certificate of corridor compatibility shall pay to the commission an application fee in~~ an amount equal to five thousand dollars for each one million dollars of investment in the proposed facility as defined in the federal energy regulatory commission uniform system of accounts. ~~Every~~
  - c. ~~An applicant for a waiver shall pay to the commission an application fee in~~ the amount which would be required for an application for a certificate of site or corridor compatibility for the proposed facility. If a waiver is not granted for a proposed facility, such application fee paid shall be allowed as a credit against fees payable under this section in connection with an application under this chapter for a certificate or permit for the proposed facility.
  - d. ~~An applicant for a transfer of a certificate or permit shall pay an amount to be determined by the commission to cover anticipated expenses of processing the application.~~