Bill Draft
Relating to Enforcement of One-Call Excavation Notice System

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

Before: **Natural Resources Committee**
Senator Tim Flakoll, Chairman

Date: **30 July 2008**

TESTIMONY

I am Illona Jeffcoat-Sacco, General Counsel with the Public Service Commission. The Commission asked me to appear here today to testify on the proposed bill draft relating to enforcement of one-call excavation notice system.

The Commission is willing to handle the responsibilities of enforcing any civil penalty provisions for One-Call violations that the legislature may enact. However, the Commission has substantial concerns with the language of the bill draft. These concerns are specified in the 25 July 2008 memo prepared by Illona Jeffcoat-Sacco, a copy of which is attached. The Commission needs to have these concerns addressed before it can support this bill. This concludes my testimony. I will be happy to answer any questions you may have.

MEMORANDUM

To: Commissioners Wefald, Cramer and Clark
Al Moch, Testing and Safety
Pat Fahn, Compliance and Competitive Markets
Jeff Nelson, Legislative Council
Ron Ness, ND One-Call Board

From: Illona A. Jeffcoat-Sacco

Re: Proposed Legislation

Date: 25 July 2008

Thanks to Mr. Ness and the One-Call Board, and to Jeff Nelson, for their work on the proposed legislation regarding One-Call violation penalties. I have reviewed the proposal we received from Ron Ness, and existing law and rules, and have the following comments.

Perhaps it is a case of not seeing the forest for the trees, but it is my opinion that because the One-Call legislation is in Title 49, the subject matter is already within the Commission's jurisdiction. N.D.C.C. Section 49-01-01 defines public utility as including any person engaged in any business enumerated in Title 49. Further, N.D.C.C. Chapter 49-02 provides the Commission with general jurisdiction over businesses enumerated in Title 49. Finally, N.D.C.C. Chapter 49-07 provides penalties for all parts of Title 49 except Chapter 49-22 (siting).

Given this, all existing Commission authority is currently available to handle One-Call issues, including violations. This authority includes, for example, authority in the Commission to promulgate rules, file complaints on its own motion, process, hear and settle complaints, impose penalties, assign matters to an Administrative Law Judge for procedural or substantive assistance, informally handle letters and other informal complaints, etc.

Consequently, the only matters that would need to be addressed in a bill draft are matters where the drafters want One-Call violations treated or handled differently than other violations under the Commission's jurisdiction, such as a different amount for the penalty and a different process for disposition of the proceeds of penalties. These differences can be stated in the One-Call Chapter (N.D.C.C. Chapter 49-23) or in the other specific, relevant portions of Title 49 (for example, N.D.C.C. Chapter 49-07).

Existing law addresses similar situations differently. There currently is a specific gas safety violation penalty in the general penalty chapter (N.D.C.C. Chapter 49-07). On the other hand, there is also a specific siting penalty stated in the siting chapter (N.D.C.C. Chapter 49-22) and siting is specifically excluded

from Chapter 49-07. In the One-Call case, if the needed penalty provisions are included in N.D.C.C. Chapter 49-23, then exceptions for Chapter 48-23 should be noted in the other relevant chapters.

An additional consideration is whether One-Call should be in Title 49 at all, given that, generally, businesses enumerated in Title 49 are considered public utilities under Commission jurisdiction. I cannot recommend specific language to accomplish what I understand to be the objective of the draft until a determination is made about whether the One-Call legislation remains under Title 49 or not.

The following links to laws and rules might be helpful:

Definition of Commission for all of Title 49 is in Chapter 49-01:
http://www.legis.nd.gov/cencode/t49c01.pdf

General powers of Commission, including rulemaking, enforcing laws, rules and orders, and procedures: see Chapter 49-01 (above) and Chapter 49-02:
http://www.legis.nd.gov/cencode/t49c02.pdf

Penalty provisions for all of Title 49, except Chapter 49-22 (siting):
http://www.legis.nd.gov/cencode/t49c07.pdf

General procedural requirements for complaints and hearings - Chapter 28-32, specifically sections 21 to the end: http://www.legis.nd.gov/cencode/t28c32.pdf

General procedural rules governing Commission proceedings:
http://www.legis.nd.gov/information/acdata/html/69-02.html

General procedural rules governing Commission proceedings where there is no applicable specific Commission rule (or specific law) – procedural rules of the Office of Administrative Hearings:
http://www.legis.nd.gov/information/acdata/html/98-02.html

In addition to the general comments about jurisdiction, above, I have the following specific comments on the draft that was e-mailed to us by Ron Ness:

Page 1, line 17

- Page 1, line 12 – no definition for Commission is necessary as there is a definition in N.D.C.C. Chapter 49-01.

Page 9, line 29

- Page 8, line 9 – Given that One-Call is in Title 49, this proposed sentence would make the stated penalties apply in addition to the penalties already in Chapter 49-07. I am guessing this is not the intent, but rather than the intent is to make the state civil penalties effective in addition to the *criminal*

penalties in existing One-Call law, found on the bottom of page 7 and top of page 8.

Page 9

- Page 8 and throughout the penalty language, it is not necessary to repeat the phrase "or any rule adopted to implement this chapter." The violation applicability language in N.D.C.C. Section 49-07-01.1 should suffice. (Likewise, since the existing One-Call criminal violation (page 7, lines 30-32) is a Class A misdemeanor, that language in Chapter 49-23 could be deleted and Section 49-07-01 would suffice there, as well.)

Page 9, line 31 – Page 10, line 4

- Page 8, lines 11-14, since the proposed penalty amounts differ from those in Chapter 49-07, the specific amounts could be included here with a reference to Chapter 49-07, or included in 49-07 as an exception to the standards amounts found there. In addition, the last sentence beginning on line 13 and ending on line 14 is unnecessary.

Page 9, lines 5-11

- Page 8, lines 15-20 - the same comments apply.

Page 9, lines 12-14

- Page 8, lines 21-23 – Again, the general language in Chapter 49-07 is sufficient and these provisions are unnecessary.

Page 9, lines 15-23

- Page 8, lines 24-30 – this language should be reworked to be consistent with how earlier changes are implement, and I am not sure of some of the intended provisions. With additional information, I would be happy to work on proposed language.

Page 9, lines 23-24

- Page 8, lines 30-31 – I recommend that the language "a letter" be revised to say "in writing" instead, thus allowing the filing of either a letter or a formal complaint, and if sufficient, a letter can be treated as a formal complaint under other procedural rules and laws.

Page 10, line 30 – Page 11, line 7

- Page 9, lines 4-10 – this language is unnecessary because the procedure the Commission and parties must follow in complaint proceedings is already stated under existing procedural laws and rules.

Page 11, lines 8-11

- Page 9, lines 11-14 – this language appears to require the Commission to forward every filing to the board for review and testimony. If the One-Call Board is under the Commission's jurisdiction, this language is unnecessary because the One-Call Board is a resource for the Commission, much like any of the PSC's staff. If the One-Call Board is not or should not be under the Commission, then I recommend that the action contemplated by this language not be mandatory but rather discretionary. If discretionary, no further provisions are needed. The filings would be open records, and the Commission can avail itself of whatever expertise it needs or wants, subject to procedural due process requirements.

Page 11, lines 12-28

- Page 9, lines 15-27 – Much of this paragraph is also unnecessary, since standard procedural laws and rules apply and cover most of what is included here. Also, the prohibition on additional evidence (lines 18-21) has the potential to deny due process, while the existing protections in procedural law against ex parte communications are sufficient to protect against receipt of any evidence not obtained consistent with due process. Additionally, "probable cause" (line 19) is a different evidentiary standard than statutorily applies in administrative cases and I do not know if the different standard is intended. Again—nothing need be stated if the normal evidentiary standard is to apply. Finally, if the Commission is to implement the penalty provisions, the Commission should determine when and if an alleged violation is referred to the ALJ for a recommended decision.

- An additional concern throughout this area is the concept of imposing a penalty without a hearing or opportunity for hearing. Although it is somewhat unclear, it appears that the hearing opportunity arises after an ALJ recommendation is made. I would recommend against such a limitation on the right to a hearing. If upon service of a complaint a respondent defaults, or consents to imposition of a penalty, due process concerns are met. However, asking an ALJ to make a recommended factual decision on evidence that is not obtained under oath and not subject to cross examination raises substantial due process concerns.

Page 12, lines 5-15

- Page 10, lines 5-13 - requiring the Commission to accept the recommendation of the ALJ unless a hearing is requested is not consistent with existing procedural law, rules and due process protections. Additionally, existing procedural laws and rules regarding notice and hearing should be followed and need not be repeated (or revised) in the draft.

Page 12, lines 17-18

- Page 10, lines 14-15 – replace the unnecessary language "by the Commission as a result of violations of this chapter or any rule adopted to implement" with "under."

Page 12, lines 16-22

- Page 10, lines 16-18 – This language should be reviewed by the drafters and Legislative Council staff to be sure a continuing appropriation is intended and if so, that the correct language for a continuing appropriation is used.

Page 12, lines 23-29

- Page 10, lines 19-28 – the first paragraph contains some conflicting language ("30 days" v. "after the time for appeal"). Again, in general, existing law sufficiently covers the service of agency decisions and how assessed civil penalties can be recovered. Further, existing law governs both appeals of agency decisions and civil actions for recovery of penalties, and much of the proposed language in the draft is either unnecessary or in conflict with existing law. Unless there is an extremely good reason, I do not recommend writing procedural provisions that conflict with settled law. Even then, an extremely good reason for wanting a differing procedural provision will not save a provision that runs contrary to constitutional protections.

Page 12, lines 30-31 & Page 13, lines 1-17

- Page 10, lines 25-30 and Page 11, lines 1-9 – the Commission has a formal docket and case management system that electronically and physically tracks and maintains filings and no further language is necessary. The Commission also records hearings and other proceedings, and has authority to retain a court reporter and procure a transcript if necessary. The Commission produces certified records for court proceedings or other needs. The Commission's cases and filings are all subject to the state's open records requirement.

Page 13, lines 18-19

- Page 11, lines 10-11 – this language is also unnecessary and potentially troublesome. Under existing standard procedural laws and rules, a complainant has the burden of proof. N.D.C.C. Chapter 49-05 contains several sections that govern the impact and consequences of Commission decisions and the appeal of those decisions. Existing Chapter 49-05 is consistent with the general procedural provisions of N.D.C.C. Chapter 28-32 and other requirements. This is another example of where caution should be exercised in using language that revises settled law.

Page 13, lines 21-25

- Page 11, lines 12-15 raise some concern. These lines appear to determine the venue for penalty hearings and appeals, and allow for the payment of attorney's fees. The venue for penalty proceedings should be within the discretion of the Commission. Having hearings throughout the state could be costly, and should not be mandated. Rather, the Commission should be able to determine where the interests of justice require any particular hearing to be held. Further, it appears that the language in this section would require the Commission to determine awards of attorney's fees in some situations. Existing law governing administrative procedures (N.D.C.C section 28-32-50) includes provisions for a court to award attorney's fees in administrative cases in certain circumstances. I do not know if these two provisions will work together or conflict. Also, imposition of this responsibility on the Commission is likely to substantially increase the time and resources it will take to handle One-Call violations. The attorney's fees provision, its impact on implementation of any penalty law, and its coordination with Chapter 28-32 should be further investigated.