

FISCAL NOTE
Requested by Legislative Council
01/07/2019

Bill/Resolution No.: HB 1217

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2017-2019 Biennium		2019-2021 Biennium		2021-2023 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$0	\$0	\$0	\$0
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2017-2019 Biennium	2019-2021 Biennium	2021-2023 Biennium
Counties	\$0	\$0	\$0
Cities	\$0	\$0	\$0
School Districts	\$0	\$0	\$0
Townships	\$0	\$0	\$0

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

HB 1217 enacts a new section to N.D.C.C. Chapter 49-02 requiring the Commission, upon petition, to determine if government is in competition with private industry.

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

The fiscal impacts of HB 1217 are unknown due to the Commission's inability to determine prospectively if and how often the new section may be used, and what the results might be. Subsection 2 of Section 1 of the bill could have fiscal impact because, in order to meet legal and due process requirements for processing a case, the Commission would incur costs. These could include publication costs and the costs of hearing officers and attorneys. Also, if the commission finds an agency or institution is in competition with private business and directs the agency or institution to cease the activity, that agency or institution could be impacted fiscally. If this section is used extensively, there may be a large fiscal impact. Subsection 6 of Section one of the bill could also have fiscal impact on any agency or institution the commission permits to continue in competition with private business, if the commission assesses a fee for that activity.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

There is no expected fiscal impact on revenues.

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

The impact on expenditures is unknown. To the extent that the new section is used will determine the fiscal impact on expenditures, both for the commission and for other agencies and institutions. See response to 2B, above.

- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

The impact on appropriations is unknown. See responses above.

Name: John Schuh

Agency: Public Service Commission

Telephone: 701-328-2421

Date Prepared: 01/09/2019

2019 HOUSE GOVERNMENT AND VETERANS AFFAIRS

HB 1217

2019 HOUSE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee Fort Union Room, State Capitol

HB 1217
1/24/2019
31401

- Subcommittee
 Conference Committee

Committee Clerk Signature Carmen Hart

Explanation or reason for introduction of bill/resolution:

Relating to competition between the government and private industry and to require a report to the legislative management

Minutes:

Attachments 1, 2, 3, 4

Chairman Kasper opened the hearing on HB 1217.

Rep. Nathan Toman appeared in support. This bill allows a person to petition, in this case, the public service commission, and complain that they are being competed against and then the public service commission would determine if that is true based on Lines 15-19 if any of them would come into play. If not, then they would order the state or any government agency to cease their competition.

Rep. Rohr: Give an example.

Rep. Toman: It is a free market idea to keep government honest. We are looking at funding ag. mitigation or setting up a state ag. mitigation bank. There are already companies that are doing mitigation work for airports and highways.

Rep. Rohr: You don't see this as retroactive?

Rep. Toman: Correct. We might need to tighten up some of this for say the bank or the mill because we all know we get those profits and that helps fund state government, and we don't have banks going out of business because we have a state bank or being competed out of business.

Rep. C. Johnson: Referring to Line 16, Subsection b, if a private enterprise comes in with a bid that is 9% higher than the state agency, that would require them to take the higher price option there?

Rep. Toman: It is kind of an arbitrary number I picked.

Chairman Kasper: You have indicated you have not had any complaints from private business regarding this bill. It simply is a philosophical bill from your perspective?

Rep. Toman: Correct.

Chairman Kasper: Do you have an amendment you want to introduce?

Rep. Toman: I have two amendments, but talking with some of the agencies, I would rather present one amendment that is clean with some of those statutory things. I wouldn't ask you to work on the amendment, but I would like if we could come up with an amendment to present to the committee to fix some of these things that were missed before it was submitted.

Chairman Kasper: Do you have the amendment.

Rep. Toman: I have an amendment that cleans up some of the language that I missed, but talking with a couple of the agencies representatives before this hearing, we talked about working on an amendment together to clean up some of their concerns on this.

Chairman Kasper: How long do you think that would take?

Rep. Toman: I would hope to start working on it today and get it tomorrow.

Chairman Kasper: The problem this bill has a fiscal note.

Rep. Toman: I don't think that any of the amendments we would be working on should alter that.

Opposition

Sherry Neas, Office of Management and Budget, Central Services Division, appeared in opposition. Attachment 1. (9:05-13:31)

Rep. Schauer: Have you been in contact with the public service commission as far as these concerns?

Sherry Neas: OMB has been in contact with the public service commission and they will be testifying later.

Rep. Rohr: Can you think of any examples where the private industry could have done the business cheaper and more efficiently than the government entity?

Sherry Neas: I cannot think of anything right off. A lot of times as ___, there is this decision whether you do something in house or outsource. With budget cuts, there is a lot of that going on now.

Rep. Hoverson: It seems like a philosophical idea. It seems like your concern is whether or not everybody is able to sell and have equal access to contracting with the state. I

understand the bill to indicate if private industry can do the job, the state should not unless there is a compelling public interest or statutory mission. Is there a difference there?

Sherry Neas: The angle of my testimony is specific to procurement and the existing laws that allow purchases and contracts directly with government. The bill itself is broader than the scope of my testimony. One of the primary concerns is the existing state agencies that have authority to perform functions or provide goods or services. This bill would allow them to be challenged, so they would be in defense mode about something that they have existing statutory authority, and the conflict is this is an administrative process that would be challenging statute.

Rep. Hoverson: Isn't that the point he was trying to make?

Sherry Neas: That may be the intent of the bill. OMB is willing to have more conversations if there is an amendment on the bill, but as written, those are the problems we do see that challenge existing statutory authority.

Chairman Kasper: To me Lines 16-17 are the heart of the problem of this bill. How can you possibly determine that statement when there are hundreds of contracts out there?

Sherry Neas: If there is something that government is doing and there is a possibility that it is not an efficient, effective way to do it and there was a challenge, there would have to be a very detailed analysis process which would have to consider more than just cost.

Rick Gardner, Director, Rough Rider Industries, appeared in opposition. (20:58-26:29)
Attachment 2.

Rep. Schauer: How much pay do the inmates get per hour?

Rick Gardner: We do not have a cap on inmate pay, so if a lifer is working out at industries, he can continue to get pay raises for his employment there which is almost unheard of in the United States. On average, it is roughly about \$1.67/hr.

Rep. Schauer: In the private sector, that \$1.67 would be anywhere from \$12-\$15 depending on experience.

Rick Gardner: That is true. If something was to be run through our PIECP, it allows us to participate in interstate selling of our merchandise, and they would get prevailing wage in that.

Rep. Schauer: Have you calculated if you went to the private sector wages for your inmates, how much loss to your program?

Rick Gardner: I haven't calculated that, but I can say prison inmates aren't always the most efficient. We have a lot of communication barriers set up.

Rep. Hoverson: Would you say there is a compelling public interest for what your mission is?

Rick Gardner: When we turn them back, one of the biggest barriers they are going to face is finding a job, and so when they return back to the community, any job skills we can give these individuals would find the community to think that to be a compelling reason to do what we do.

Rep. Hoverson: I don't think this bill would affect your mission.

Rep. Schneider: How much does it cost to keep a person in jail for a year?

Rick Gardner: Last estimate was around \$40,000 a year.

Rep. Rohr: Do you think if this bill would pass, Rough Rider Industries will shut down?

Rick Gardner: It would pose great harm. We are limited as to who we can sell to. With the recent budget cuts, state agencies weren't spending, so our revenue has been down. State agencies had a 10% revenue cut. We took a 38% revenue cut, so if this was to open up, I think it would be absolutely devastating to our industries.

Waylen Hedegaard, President of the ND AFL-CIO, appeared in opposition. As written this opens the door to several concerns. The state bank and state mill could be viewed as direct competition. This concerns me that this opens up the door to radical changes to our state.

Ellen Huber, President, Economic Development Association of ND, was unable to appear but provided written testimony in opposition. Attachment 3.

Neutral

John Schuh, Public Utility Staff Counsel, Public Service Commission, appeared in a neutral position. Attachment 4. (34:00-37:52)

Chairman Kasper closed the hearing.

2019 HOUSE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee
Fort Union Room, State Capitol

HB 1217
1/25/2019
31510

- Subcommittee
 Conference Committee

Committee Clerk Signature Carmen Hart

Explanation or reason for introduction of bill/resolution:

Relating to competition between the government and private industry and to require a report to the legislative management

Minutes:

Chairman Kasper opened the meeting on HB 1217.

Rep. Rohr made a motion for a **DO NOT PASS**.

Rep. Laning seconded the motion.

Rep. Louser: I had a bill last session to propose allowing inmates to build housing. That bill was turned into a study and unanimously passed the House and went to legislative management and unanimously rejected as a study. The private industry jumped in and said this competes with us, so don't allow it to happen. That is what triggers Rough Rider Industries testimony yesterday. I think there are safeguards in our state, and we are accessible to private industry and if they ever feel they are being competed, we are going to hear about it.

Rep. Karls: I point out that Rough Rider Industries build these strange configured desks we use. I don't know how you would afford something like that through private.

Rep. Rohr: I am supporting the do not pass, because I think there are things in place to make sure an imbalance.

Chairman Kasper: The bill puts the onus on the public service commission, and they testified they had no desire to get in the middle of that. I also have heartburn with Line 21 regarding the 20 days.

Rep. Schneider: I agree with all the previous comments and supporting the do not pass.

Rep. Hoverson: I like it ideologically, and he did put in there plenty of language that says for statutory mission or compelling public interest. I will vote no.

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A roll call vote was taken. 10-4, 0 absent.

Rep. Louser will carry the bill.

Date: 1-25-19
 Roll Call Vote #: 1

**2019 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 1217**

House Government and Veterans Affairs Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Rep. Rohr Seconded By Rep. Lansing

Representatives	Yes	No	Representatives	Yes	No
Chairman Jim Kasper	X		Rep. Pamela Anderson	X	
Vice Chair Vicky Steiner		X	Rep. Mary Schneider	X	
Rep. Jeff Hoverson		X			
Rep. Craig Johnson	X				
Rep. Daniel Johnston		X			
Rep. Karen Karls	X				
Rep. Ben Koppelman		X			
Rep. Vernon Laning	X				
Rep. Scott Louser	X				
Rep. Karen Rohr	X				
Rep. Austen Schauer	X				
Rep. Steve Vetter	X				

Total (Yes) 10 No 4

Absent 0

Floor Assignment Rep. Louser

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1217: Government and Veterans Affairs Committee (Rep. Kasper, Chairman)
recommends **DO NOT PASS** (10 YEAS, 4 NAYS, 0 ABSENT AND NOT VOTING).
HB 1217 was placed on the Eleventh order on the calendar.

2019 TESTIMONY

HB 1217

Office of Management and Budget

Testimony on HB 1217

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Government and Veterans Affairs

Rep. Jim Kasper, Chairman

Chairman Kasper and members of the Committee. My name is Sherry Neas, Office of Management and Budget, Central Services Division. OMB is opposed to HB 1217 as written. This bill is essentially the same language as HB 1162 during the 2017 legislative session. The broad language could allow anyone to petition that any state agency or institution is alleged to be competing with private sector. This creates the potential for many petitions that could result in substantial workload for the Public Service Commission and interruption of state agency operations.

Page 2 line 8 states, "Unless a state agency or institution demonstrates a compelling public interest for an activity to be in competition with private enterprise, it must be the policy of the state to contract with private enterprise."

OMB is the administrative agency for state purchasing practices, and OMB fully supports a competitive procurement process with opportunity for vendors to compete and win state contracts. Attached to my testimony are sections in existing state purchasing law, N.D.C.C. Chapter 54-44.4:

It is state policy to provide comprehensive purchasing services based upon sound procurement practices and principles wherein, through full competition with fair and equal opportunity to all qualified persons to sell to the state, each state agency and institution shall obtain its necessary commodities and services at competitive cost, consistent with quality, time, and performance requirements, except as otherwise provided by law.

There are several state agencies and institutions that have statutory authority to perform functions or provide goods and services that also exist in private sector. Procurement law allows state agencies and institutions obtain needed goods and services directly from correctional institutions and other government agencies. This statute is also attached to my testimony.

Government sources of supply may be established for efficiency, security, or a specific mission of the agency. Using OMB as an example, OMB has statutory authority to operate a central mailroom, central supply, printing operations, and surplus property operation. There are several other state agencies and institutions that perform functions or provide goods and services also provided by private sector individuals and businesses. Often times, government entities have the option to use the government source or conduct a procurement process to select a private sector provider.

OMB Testimony on HB 1217

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This bill describes a process whereby the Public Service Commission determines whether a government entity is in competition with private sector, and determines whether or not the government entity can continue the activity. This bill describes an administrative process. In considering this bill, OMB has concerns regarding how this administrative process can override statutory authority for an agency or institution to provide the goods or services being petitioned.

Page 2, line 10 also states, "If a state agency or institution is authorized to engage in an activity in competition with private enterprise, the commission shall set a fee for that activity to reflect the fair market value and the actual costs incurred."

Involving the Public Service Commission in establishing fees for government entities that provide goods and services would create substantial additional work for the Public Service Commission, and likely reduce the efficiencies of government programs. Again, using OMB as an example, the laws that authorize OMB to operate a surplus property operation require OMB to transfer property at fair market value. OMB operates surplus property and has subject matter expertise in that area, so OMB would be the logical entity to establish rates for that program.

In conclusion, existing law does emphasize opportunities for private sector entities to compete for government contracts, while also authorizing purchases directly from existing government and correctional institutions. OMB opposes the broad language of this bill which could conflict with existing laws and create substantial additional work for state agencies and institutions.

This concludes my testimony, and I would welcome any questions you might have.

Sherry Neas, Director, Central Services Division
Office of Management and Budget (OMB)
Desk: 701-328-1726, Cell: 701-426-5354, Email: sneas@nd.gov

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N.D.C.C. § 54-44.4-01. Declaration of policy - Definitions.

It is state policy to provide comprehensive purchasing services based upon sound procurement practices and principles wherein, through full competition with fair and equal opportunity to all qualified persons to sell to the state, each state agency and institution shall obtain its necessary commodities and services at competitive cost, consistent with quality, time, and performance requirements, except as otherwise provided by law.

N.D.C.C. § 54-44.4-05. Competitive, limited competitive, noncompetitive, and negotiated purchases - Exempt records.

1. Except as otherwise provided in section 44-08-01, chapter 25-16.2, and this chapter, purchasing contracts must be awarded through a competitive bidding process to the lowest responsible bidder considering conformity with specifications, terms of delivery, and quality and serviceability, unless it is determined to be advantageous to the state to select a contractor through a competitive proposal process using other or additional criteria. The procurement officer may reject any or all bids or negotiate for a lower price with a successful bidder. Each bid received, with the name of the bidder, must be recorded. The office of management and budget may enter into term contracts for the acquisition of commodities or services and may make multiple awards for term commodity or service contracts when it deems a multiple award to be in the best interests of the state. All bids received under this chapter pursuant to a competitive sealed bid are exempt records under subsection 5 of section 44-04-17.1 until the date and time the bids are opened.

2. The office of management and budget shall adopt rules specifying the circumstances under which competition may be waived or limited, when negotiation may be used, and specifying the required justifications and procedures for using those methods of purchasing. The office of management and budget shall adopt rules related to sending notice of intent to make limited competitive, noncompetitive, and negotiated purchases in accordance with this chapter. The notice must describe the needed commodity or service and the intended procurement method and must state that vendors are permitted to submit bids or proposals for contracts to be awarded under this section. The circumstances that may permit limited competitive, noncompetitive, or negotiated purchases include:

- a. The commodity or service is available from only one source.
- b. The commodity or service is to be purchased for experimentation or trial.
- c. No acceptable bid or proposal was received pursuant to a competitive bidding or competitive proposal process.
- d. Commodities are being purchased for over-the-counter resale.
- e. Acceptable commodities or services are produced or provided by correctional institutions or other government agencies or a work activity center as defined in section 25-16.2-01.
- f. The anticipated cost of purchasing specified commodities or services is less than an amount determined by the office of management and budget which would justify the expense of a competitive bidding or competitive proposal process.
- g. A used commodity is advantageous to the state and the commodity is available only on short notice.
- h. The commodity is a component or replacement part for which there is no commercially available substitute and which can be obtained only from the manufacturer.
- i. Compatibility with equipment currently owned by the state is essential to the proper functioning of that equipment.
- j. The agency provides documentation indicating that the services or the circumstances are of such a nature that deviation from the procurement procedure is appropriate.

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HOUSE GOVERNMENT AND VETERANS AFFAIRS COMMITTEE

Representative Jim Kasper, Chair

January 24, 2019

North Dakota Department of Corrections and Rehabilitation

Rick Gardner, Director, Rough Rider Industries

Presenting Testimony in opposition to House Bill 1217

Good morning, Chairman Kasper and members of the Government and Veterans Affairs Committee. My name is Rick Gardner and I am the Director of Rough Rider Industries (RRI). I am here on behalf of the Department of Corrections and Rehabilitation (ND DOCR) to provide testimony in opposition to House Bill 1217.

House Bill 1217 proposes to give the Public Service Commission oversight over government operations when an individual claims the state agency or institution is engaged in competition with private enterprise. HB 1217 places this jurisdiction in Chapter 49-02, which is in the same chapter that authorizes the Public Service Commission to exercise regulatory jurisdiction over contract and common carriers, telecommunications services, pipeline utilities, electric, gas and heating utilities, warehouses that handle marketing, storage, or handling of agricultural products, and other public utilities engaged in business within the state.

The word "prison" does not invoke many positive thoughts. Most of us have little sympathy for people who don't play by the rules. Today, around 1,700 men and women are incarcerated in the North Dakota correctional system. Prison is not a pretty place and should be a place no one wants to go; yet it has to be a place with hope in order to rehabilitate. Incarcerated individuals who are compliant with their treatment, education, and demonstrate good behavior may earn a chance to work at Rough Rider Industries (RRI).

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In 1965, the North Dakota State Legislature first authorized the Warden of the North Dakota State Penitentiary, under the direction and with the approval of the then existing state agency, the Board of Administration, “to establish, and engage in such new prison industries as the board deems necessary, and which are of greatest benefit to and in the best interest of the state of North Dakota, the state penitentiary, the North Dakota state farm, and the inmates of said institutions.” The authority to establish prison industries appeared in the North Dakota Century Code as section 12-48-03.1. The authority of the Board of Administration over prison industries was transferred to the North Dakota Director of Institutions in 1973 and in 1989, when the Legislature established the Department of Corrections and Rehabilitation, the Legislature placed the authority over prison industries with the director of the department.

Although the name “Roughrider Industries” was commonly used for the state’s prison industries program, the name was actually acknowledged by the Legislature in 1991 in a statute authorizing RRI to establish its own operating fund with the Bank of North Dakota, with all interest on the operating fund going to the state’s general fund.

North Dakota Century Code Section 12-48-03.1 authorizes the prison industries to make goods to be purchased directly by governmental agencies, including federal, state, and tribal agencies and political subdivisions for use in official business, and by nonprofit organizations, and through wholesale or retail outlets possessing a valid sales tax permit, and for products manufactured under the Prison Industries Certification Program (PIECP), in interstate commerce. RRI may also sell commissary items and RRI-made clothing to inmates.

RRI is a self-funded state agency which does not use any taxpayer dollars to support the DOCR’s correctional programs and mission. All RRI employee salaries and inmate compensation, equipment, capital improvements, and operating expenses are paid from revenues generated by the sale of RRI’s diverse products and services, including wood and furniture manufacturing, metal fabrication, sign production, laser engraving, sewing, upholstery, and welding services. While each of these prison industries products and services may have a similar counterpart in the commercial sector in North Dakota, RRI’s

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operations supplement private industry and should not be considered as direct competition. All projects commissioned with RRI allow for the purchase of materials from local suppliers enhancing trickle-down economics. During the last biennium, RRI purchased \$21.3 million in raw materials, supplies, component parts, equipment and services to support its operations and mission. Out of these RRI purchases, all lumber, stain and finish, hardware, miscellaneous accessories, and raw steel product were purchased directly from North Dakota providers.

RRI's job skills training program provides many benefits to the state, including:

1. Increasing the learning and work rehabilitative opportunities for incarcerated individuals. Teaching and instilling valuable job skills to this population has been proven to lessen the cost of incarceration. Correctional Industry programs report significant reductions in recidivism rates for participants. RRI worker recidivism rates for those individuals previously enrolled in our program from 13-24 months is 38%; individuals enrolled 25+ months have a 28.6% recidivism rate, which compares very favorably to the ND DOCR's current rate of 49%. A 2015 study conducted by the Washington State Institute for Public Policy found for every \$1 spent on correctional industries, \$4.77 is saved in future criminal justice costs attributable to the reduction in recidivism.
2. Fewer work opportunities make for a less safe prison environment, along with having an increase in cost to the state government. RRI's training programs offset the need to spend additional taxpayer dollars for offender supervision and alternative programming costs.
3. Providing work opportunities allow RRI participants to send a portion of their earnings home to support their families, offsetting the need for additional taxpayer public assistance programs. It also increases the participant's ability to contribute to their financial obligations from their earnings.
4. Purchasing through RRI allows the state government to have a second spend on the state's monies, along with providing an opportunity to train and employ an underutilized workforce to help offset the labor shortage that exists in the state.

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The passage of HB 1217 would pose irreparable harm to the DOCR, RRI and our rehabilitative mission, and on behalf of the ND DOCR, a do-not pass vote is requested.

Mr. Chairman, I would be happy to answer any questions at this time. Thank you.



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January 24, 2019

Chairman Kasper and Members of the House Government and Veterans Affairs Committee:

EDND represents more than 80 large and small and rural and urban economic development organizations on the front line of growing businesses and communities in North Dakota. The primary purpose of the organization is to promote the creation of new wealth throughout North Dakota to develop more vibrant communities and improve quality of life. EDND would like to express its opposition to HB 1217.

While EDND agrees with the intent of this bill, to limit competition between government and private industry, we feel the bill could have unintended consequences. Petitions could potentially be filed against state agencies such as the North Dakota Department of Transportation, the North Dakota Department of Commerce, the North Dakota Housing Finance Agency, the Bank of North Dakota, the North Dakota Information Technology Department, and other agencies with which EDND partners. One example could be if a petition was filed against the North Dakota Information Technology Department providing services to the North Dakota University System. This bill could potentially require universities to use a higher-priced option, resulting in higher costs to the system and higher tuition rates for students. There are efficiencies in state agencies working together and using a private company could result in higher costs for North Dakota taxpayers.

Thank you for the opportunity to express EDND's concern about HB 1217.

Sincerely,

A handwritten signature in cursive script that reads 'Ellen Huber'.

Ellen Huber
President

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House Bill 1217

Presented by: John Schuh
Public Utility Staff Counsel
Public Service Commission

Before: Government and Veterans Affairs Committee
The Honorable Jim Kasper, Chairman

Date: January 24, 2019

TESTIMONY

Mister Chairman and committee members, I am John Schuh, Staff Counsel with the Public Service Commission. The Public Service Commission is neutral on the HB 1217 but asked me to appear to express some of the Commission's concerns with the bill in its present form.

The Commission has the powers given to it by the legislature, and the Commission will work to implement any task or responsibility the legislature asks the commission to undertake. However, as written, the bill poses serious concerns and conflicts that will make implementation problematic. For the sake of time, I will only generally address them. There are constitutional questions regarding separation of power, interpretation problems, and conflict of interest concerns, and practical implementation problems.

The legislature mandates and appropriates funding to state agencies and institutions. HB 1217 appears to delegate authority to the Commission to effectively overturn or negate legislative decisions related to other agencies or institutions. This is a broad delegation of legislative authority and extends well

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beyond the normal jurisdiction for an administrative agency. Furthermore, the bill asks the Commission to exercise this power beyond the Commission's core areas of expertise.

A few problems of interpretation arise when discussing the "fee" provision. The Commission is unsure if the "fee" provision is a penal provision against the other agency or if the intent is to set an amount to represent the good or service provided by the agency. Both interpretations are legally dubious, but it also unclear is the manner in which they should be applied. For example: Who pays the fair market value to whom? Who receives the fee? How should this be accomplished?

Other terms and phrases are also vague, ambiguous or overly broad. For example, narrowing the definition of "state agency or institution" may also be helpful for the purposes of clarifying the scope of the bill.

The Commission also asked me to bring some practical concerns to your attention. It isn't clear what type of administrative proceeding is envisioned. Is it the intent that it should be carried out under Chapter 28-32 (and Commission's rules practice and procedure) or under some other process? What process applies to appeals? Should other entities or competitors receive notice who may have an interest aside from the petitioner? The cost and time of the proceedings can vary greatly depending on a number of these factors. Further, the bill does not address what process should be used if an entity brings a petition against the Commission itself competing against private business.

The Commission also requests consideration for removing the twenty day period to submit a written decision after a hearing. Consistent with administrative

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practice, if the Commission deems additional information is required or that post-hearing filings are needed, deliberation may extend well beyond twenty days. This may be more notable when decision-making factors involve evaluation of emergencies, irreparable harm or loss of substantial funds, compelling public interest, and determining fair market value for services not commonly the subject of Commission jurisdiction.

If this is the the legislature's intent to have the Commission preside over this course of action, it may be helpful to narrow its scope and application and provide clarification on how it should be administered. The Commission appreciates the opportunity to express its concerns and the committee's consideration.

Mister Chairman, this concludes our testimony. I will be happy to answer any questions.