

**2019 HOUSE INDUSTRY, BUSINESS AND LABOR**

**HB 1133**

# 2019 HOUSE STANDING COMMITTEE MINUTES

## Industry, Business and Labor Committee Peace Garden Room, State Capitol

HB 1133  
1/14/2019  
30739

- Subcommittee  
 Conference Committee

Committee Clerk: Ellen LeTang

### Explanation or reason for introduction of bill/resolution:

Limiting increases on electrical rates.

### Minutes:

Attachment 1, 2

**Chairman Keiser:** Opens the hearing on HB 1133

**Rep Porter~District 34 Mandan:** This should be set as policy so that you can't mandate & penalize from another state & put the citizens in ND the rate increase. We don't want our rate payers to be penalized from a different state who has mandated within their policy for utilities.

**4:00**

**Rep Ruby:** Doesn't the PSC already does a push back from one state? Is this necessary with the practice with the PSC at this point?

**Rep Porter:** Nothing is certain; they are in elected position. The internal could easily change that when we don't agree with. This is the current practice of the PSC but I want to make it law so it won't be manipulated in the future.

**Chairman Keiser:** Illona will come up & gives us a tutorial but she will testify in the neutral position later on.

**Illona Jeffcoat-Sacco~General Counsel with the Public Service Commission:**  
Attachment 1.

**15:00**

**Chairman Keiser:** Anyone else here to testify in support, opposition on HB 1133?

**Chairman Keiser:** There seems to be some disagreement between Rep Porter & your statement. I thought that Rep Porter said this is the current policy of the commission not to charge for the actions of the other states make? Is that true or not?

**Illona Jeffcoat-Sacco:** As I understand, the current policy is to look at all the factors that could mandate of other states. The commission constitutionally should not only be looking only at that state's mandate. The mandate of the other state is the only reason something is done.

The commission incorporates this bill the analysis of all those factors to consider to approve or not approve. The bill mandates, that if it's due to the other states mandated, it's disallowed. That's the sole point that we are trying to bring out is that it removes the discretion to say yes to a resource that might be the best idea which another state has mandated.

**Rep Schauer:** Do you have an example from another state's mandate?

**Illona:** I do not have an example where the commission has used only the other state mandate. I could refer you to Jack, our expert, who could give you a long list.

**Rep Ruby:** How could it increase from another state be a good idea?

**Illona:** Even if you are being frugal, you are talking about a rate increase because costs are going up. What this says is the commission may not improve the rate increase application due to this law enacted by another state. My reading & legal words, it does not allow the commission to consider any of the other factors we talked about. The commission could never say yes under this law, something that is mandated by another state. Even if it was the best idea.

**Rep Kasper:** Why would we as a state, where we can provide energy at a lower cost, that the state to the east of us, utilities used, would increase the cost & put the rate increase back on us. We have enough energy, why would we let that increase come into ND?

**Illona:** The companies that operate in multiple jurisdictions, have what is called an intergrated system. All of their costs are combined & a portion of it is allocated to ND & the other jurisdictions it serves.

When a resource is added, the commission is analyzing the need for that additional resource, the cost of it long term & whether or not that is a smart or dumb idea.

What the bill says, if it happens to be also a Minnesota law, forget it, can't do it. We can't even look at it. That's where the concern comes in. The discretion is already there, but it's taking away with unintended consequences.

**Rep Kasper:** What you're not talking about is the political philosophy & correctness of certain people in certain states who see thing different than we do. It appears that we are held hostage to their political rates. Why wouldn't we say no?

**Illona:** There are these constitutional & statutory restrictions about how you set the rates. The discretion to look at all of them, sift through, rule it out, that is what the commission expertise is used. The bill hamstrings that to some extent.

**Rep Kasper:** Can you provide us the constitutional issues that you are referring to.

**Illona:** It's the 5<sup>th</sup> Amendment of US Constitution. We can send you the provision.

**Chairman Keiser:** If we pass this bill, you would not be able to deduct the green charges & provide a rate. Then those costs would have to be absorbed on the Minnesota side. Why can't we do that?

**Illona:** The cost may or may not be absorbed on the Minnesota side. The company may end up eating those costs.

**Chairman Keiser:** They ultimately won't eat it because we guarantee the profit. We just say, you can, whatever profit you want based on everything but those mandates from those other states. For them to stay in business, they have now go to the other states & say, we have a problem, ND is not honoring it, you passed it, you get to own it.

**Illona:** I don't know. I do want to say, when they come in with these green charges, yes, some have been thoroughly vetted by the commission & approved as the right thing to do.

**Rep Ruby:** The point about the constitutional issue that could rise. Basically ND would be guaranteeing that their profit was there & able to charge the rate necessary. If it was denied on the Minnesota, it would be on them who would be violating the constitution. Do you see it that way?

**Illona:** Not exactly right. The constitutional right is to recover a reasonable return on investment made to serve ND. If ND is at 7% of the NSP system, than NSP has a constitutional right this return that we set. We set it at the right number. If the underlined investment is disallowed, that is where their constitutional argument is. They say we don't have to pay for that because it's not part of the 90% we pay. These constitutional principles, we can write something that is not as general.

**Rep Ruby:** What I'm wondering is if that's the better way to go for the company's system to provide cheap product, why would it take a law or mandate by the state to do that?

**Illona:** I can't speculate.

**33:00**

**Carlee McLeod~President of the Utility Shareholders of ND:** Attachment 2.

**36:40**

**Rep Schauer:** This bill would disallow projects that were least cost options. Can you give me an example & back up the statement?

**Carlee McLeod:** Gives an example.

**Rep Ruby:** You mentioned that there are other states that have laws that our similar to ours, is there a way to place the blame of the rate on a law from another state?

**Carlee McLeod:** The language of the bill doesn't say only a law in another state, it says subject to a law in another state. We don't have to prove that it's only jurisdiction of another state, we have to just show that's it's subject to any jurisdiction in another state.

**Rep Kasper:** Could you provide those constitutional sites that you talked about?

**Carlee McLeod:** Sure.

**Rep Kasper:** Least cost option met the rule of law from another state, they are least cost because they mandate. They are not least cost options; they are mandates by people making law in those other states. Isn't it possible that some of these least cost options maybe least cost because they have to follow the mandate from another state?

**Carlee McLeod:** No, that's not true is the simple answer, we are not building because of the mandates.

**Rep M Nelson:** Would you see a differentiation in those classes of law, rules & jurisdiction?

**Carlee McLeod:** No, I think that most of the cases, law has come a federal jurisdiction that would preempt this.

**Chairman Keiser:** I struggle with the language & it's very broad. Their laws are different from our so therefore we would have to disallow anything that came from them in the process as it's written? That's your position?

**Carlee McLeod:** That's my interpretation.

**Chairman Keiser:** Is there any movement on changing position on reciprocity? Whatever you do to us, we do to you?

**Carlee McLeod:** I think we treat our neighbors like what we would like to be treated.

**Chairman Keiser:** We do have reciprocity in purchasing. We have clear language on the purchasing side.

**Carlee McLeod:** I don't know about this issue.

**Chairman Keiser:** Anyone else here to testify in opposition, neutral position on HB 1133.

**Brian Krosch~ND PSC Commissioner:** Talks about background of why ND tax payers pay increasing costs for another state's policy. The news article was false & misleading. Conceptually, I couldn't agree more with HB 1133. We look at the net cost. I answer to North Dakotans only.

51:45

**Julie Fedorchak~ND PSC Commissioner:** Provides additional examples of how they use the tools given to them by law. I look at two things; is it needed & what does it cost? We have title 49-06-04 & it's titled "Fair Market Price to be Allowed in Fixed Evaluation". It says that the commission shall fix & allow as part of the evaluation or rate bases only the reasonable & fair market price of such items at the time of purchase, elimination all such factious, excessive prices or values. That says to me that you are to pick the least cost available resource at the time to meet the customers. This is the tool that the commission has been doing.

**Rep Ruby:** You pointed out that you have the tools, so why do you testify in the neutral position? Obviously you feel the bill is necessary. Just testify negatively.

**Julie Fedorchak:** I don't think its objectionable or necessary.

**Chairman Keiser:** What if they needed the energy, what would the commission done?

**Julie Fedorchak:** The have models to look at all the comparisons.

**Chairman Keiser:** I understand that but Minnesota says no.

**Julie Fedorchak:** I would say no to Minnesota.

**Chairman Keiser:** Is there anyone else here to testify in a neutral position on HB 1133?  
Closes the hearing. We will hold the bill.

# 2019 HOUSE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee  
Peace Garden Room, State Capitol

HB 1133  
1/14/2019  
30734

- Subcommittee  
 Conference Committee

Committee Clerk: Ellen LeTang

## Explanation or reason for introduction of bill/resolution:

Limiting increases on electrical rates.

## Minutes:

**Chairman Keiser:** Reopens the hearing on HB 1133.

**Rep Adams:** Moves a Do Not Pass.

**Rep Richter:** Rep Richter.

**Rep D Ruby:** I'm going to resist the motion. Commissioner Fedorchak stated that it's something they are already doing. Rep Porter said it's something they are doing now but could change. I think for policy purposes; I think it's a good way to state our position in ND.

**Rep Laning:** I echo Rep D Ruby. We don't know what's down the road but another state should mandate rates in ND.

**Rep Schauer:** I will vote yes for a do not pass. There are professional who deals with this every day. I understand the intent & leads to potential problems.

**Chairman Keiser:** It doesn't matter what the intent is, it's matters what the word say. We need to read this carefully. I support the intent but if it's taken to court, we will hang on this.

**Roll call was taken on HB 1133 for a Do Not Pass with 9 yes, 4 no, 1 absent & Rep Schauer is the carrier.**

Date: Jan 14, 2019

Roll Call Vote #: 1

2019 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES

BILL/RESOLUTION NO. 1133

House \_\_\_\_\_ Industry, Business and Labor \_\_\_\_\_ 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 Adams Seconded By Rep Richter

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	X		Rep O'Brien	X	
Vice Chairman Lefor	Ab		Rep Richter	X	
Rep Bosch	x		Rep Ruby		X
Rep C Johnson	x		Rep Schauer	X	
Rep Kasper		X	Rep Adams	x	
Rep Laning		X	Rep P Anderson	X	
Rep Louser		X	Rep M Nelson	X	

Total (Yes) 9 No 4

Absent 1

Floor Assignment Rep Schauer

**REPORT OF STANDING COMMITTEE**

**HB 1133: Industry, Business and Labor Committee (Rep. Keiser, Chairman)**  
recommends **DO NOT PASS** (9 YEAS, 4 NAYS, 1 ABSENT AND NOT VOTING).  
HB 1133 was placed on the Eleventh order on the calendar.

**2019 TESTIMONY**

**HB 1133**

## House Bill 1133

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

**Before:** House Industry, Business and Labor Committee  
The Honorable George Keiser, Chairman

**Date:** January 14, 2019

### TESTIMONY

Mr. Chairman and committee members, I am Illona Jeffcoat-Sacco, General Counsel with the Public Service Commission. The Commission asked me to appear today to share information about the Commission's ratemaking process, and the effects of House Bill 1133.

The Commission is a constitutional agency tasked with setting reasonable utility rates in accordance with the laws of North Dakota. The Commission is committed to ensuring safe and reliable utility service at reasonable rates. Under current law, the Commission has vast discretion to entertain, investigate, analyze and decide rate and rate-related cases, and exercises this discretion consistent with constitutional standards and case precedent.

Appellate courts tend to defer questions of fact, such as those involved in rate regulation, to the administrative agency that holds expertise in the subject matter and that weighed the facts in the first instance. Courts usually do not substitute their judgment for that of the agency, unless the agency abused its discretion. Given this settled legal principle, the Commission, then, has great latitude in applying ratemaking standards to any particular set of facts.

The Commission expects and requires public utilities to provide reliable, adequate, and quality service at the lowest reasonable cost. In its most simple terms, ratemaking is the process by which a regulator determines what annual revenue a utility needs in order to meet that objective. This annual revenue requirement consists of the utility's reasonable operating expenses, plus a return on the utility's prudent capital investment used to provide service. When one speaks of 'allowing' or 'disallowing' a certain generation resource in rates, what that means is that the utility's annual revenue requirement will either include or exclude a return on the utility's capital investment in that generation resource, and correspondingly, the utility's annual expenses for that resource will similarly be either included or excluded.

The Commission's authority to make these decisions is found in N.D.C.C. title 49, including chapters 49-02, 49-05 and 49-06. Chapter 49-02 sets out the Commission's general powers, including the power to "originate, establish, modify, adjust, promulgate and enforce tariffs, rates, joint rates and charges of all public utilities." Chapter 49-05 sets out procedure and provides that the Commission, after hearing, must establish rates that are "just and reasonable." Chapter 49-06 governs valuation of utility property in order to determine reasonable rates. It provides that "the commission, for the purpose of ascertaining just and reasonable rates and charges of public utilities . . . shall investigate and determine the value of the property of every public utility . . . used and useful for the service and convenience of the public . . . ." Later the chapter defines the "value of the property

of a public utility, as determined by the commission for ratemaking purposes, is the money honestly and prudently invested therein by the utility . . . .”

Terms such as ‘just and reasonable,’ ‘used and useful,’ and ‘prudently’ are among several traditional ratemaking standards used in statutes and case law to describe and define how regulators should determine annual revenue requirement, and hence, appropriate rates. These terms are not defined in statute, and current law does not limit the Commission’s discretion to interpret them. Instead, their meaning is derived from Commission and court interpretations over the years, on a case by case basis. Just what set of facts will result in a finding of reasonableness or prudence will depend on the circumstances of each case. Just what generation resource will be ‘allowed,’ i.e. determined used and useful, reasonable, least-cost, prudent, etc., likewise will depend on the facts of each case.

Fundamentally, ratemaking is prospective and requires complicated projecting, modeling, and analysis of the utility’s future needs and the resources available to meet them. The objective is to plan for sufficient resources in order to provide safe, reliable and adequate service in the future, at the lowest reasonable cost. There is a fluidity to ratemaking. It involves a broad view of infrastructure, jurisdictional allocation of costs, and qualitative needs for customer service.

For a multi-jurisdictional utility, one that could be impacted by HB 1133, regulators in each jurisdiction review the utility’s resource selections in determining rates for that jurisdiction. Many times, across all the jurisdictions, the resource selections are needed, reasonable, least cost, and will benefit all

customers. Sometimes they are not. There may be times when acceptable (i.e. allowable) resource additions result in an increase in rates, but have the effect of avoiding future rate increases, energy purchases, or capacity needs, at least for a time. Similarly, there may be times when a higher cost resource is proposed but not justified, due to the mandate of another state or for other reasons. Then the resource addition would not be included in the revenue requirement.

The current statutory scheme works, and works well. Key to its success is the built in flexibility and discretion in the Commission's tool box. Without this flexibility and discretion, the Commission would be unable to apply its considerable expertise to issues arising in this rapidly evolving industry. HB 1133 would limit the Commission's ability to exercise this discretion and to apply its judgment to the facts of each case as it arises.

It is difficult to reconcile HB 1133 with the nature of ratemaking described above, and also with its constitutional footings. A settled constitutional principle prohibits government action that would 'take' private property without paying 'just compensation.' Strict application of HB 1133 could erode returns over time until the utility is obligated to provide service without receiving sufficient revenue to provide the utility an adequate rate of return. If the Commission prohibits a public utility from recovering an adequate rate of return for its prudent, used and useful, reasonable investment, an unconstitutional taking could result.

Mr. Chairman, this concludes my testimony. Thank you for the opportunity to present this information. I will be happy to answer any questions.



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Attachment 2  
Jan 14, 2019  
Page 1

**House Bill 1133**  
**Testimony in opposition**  
**Industry, Business, and Labor Committee, Chairman Keiser**  
**Carlee McLeod, president, USND**

Chairman Keiser, members of the committee, I am Carlee McLeod, president of the Utility Shareholders of North Dakota. I come before you today to testify in opposition to this bill on behalf of my members, ALLETE, Montana-Dakota Utilities, Otter Tail Power Company, and Xcel Energy. We believe this bill is unnecessary. Further, it raises Constitutional concerns.

We commend the bill sponsors for their goal to keep utility costs low for North Dakotan consumers. As utilities, providing low-cost, reliable energy is our utmost priority. We achieve that priority by integrated resource planning on a system-wide basis, which ultimately yields the addition of lower cost resources instead of a balkanized planning for each state in which a public utility operates.

The Public Service Commission already has the ability to deny the recovery of costs it believes are not for the benefit of North Dakotan consumers, so this bill is unnecessary. For example, in a recent case before the PSC, the commission allowed costs from one project because the company was able to demonstrate it was the lowest-cost option for consumers. In a separate case, the commission disallowed costs from an out-of-state project it believed did not serve the customers of North Dakota. This bill would add language sure to inhibit the commission from making sound decisions based on evidence.

There would likely be unforeseen and unusual circumstances not contemplated by this bill which could negatively impact North Dakotan rate payers. For example, this bill would disallow projects that were least-cost options AND met the law or rule of another state. All rate increases can be traced back to compliance with laws of various states. Most states have laws requiring utilities to plan, to act prudently, to ensure that service is reliable, and that rates are just and reasonable. In that way, it could be said that all rate increases are "due to [laws] enacted in another state." A flaw in this bill is that it is based on an assumption that if a neighboring state enacts a law, North Dakota would not want the same outcome of that law.

Lastly, this bill is likely to be impermissible extraterritorial legislation and a per se violation of the dormant Commerce Clause. North Dakota recently won a case against Minnesota for enacting a law similarly unconstitutional in *North Dakota v. Heydinger*.