

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1106

2001 HOUSE JUDICIARY

HB 1106

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1106

House Judiciary Committee

☐ Conference Committee

Hearing Date 01-17-01

Tape Number	Side A	Side B	Meter #
Tape II	x		686 to 4183
Committee Clerk Signature <i>Joan Diers</i>			

Minutes: Chr DeKrey opened the hearing on HB 1106. Relating to electronic records and electronic signatures.

Jay Buringrud: Assistant Director of the Legislative Council, Uniform State Laws (refer to page 286 Uniform Electronic Transactions Act found in the Report of the North Dakota Legislative Council) Urged a do pass on this bill.

Rep Kretschmar: How many states have adopted this bill?

Jay Buringrud: 23 states have adopted this.

Chr DeKrey: Anyone else wishing to testify in favor of this bill?

Marilyn Foss: general counsel for the North Dakota Bankers Association (see testimony attached)

Rep Onstad: What about the records that have to be notarized?

Ms Foss: There is a section in this bill that does address the requirements of this.

Mark Johnson: North Dakota Association of Counties. Under the definition of a government agency, on line 6 on page 2. Refers to the bill and then adds does it include political subdivisions.

Jay Buringrud: When this was proposed - it was reviewed and it was decided but it applies to all governments of the state and it would be best to limit it to state government . The reason in section 16 and 17, that is the only place that government is referred to.

Rep Grande: Section 10 refers to notarization, how do you do this?

Jay Buringrud: I'm not involved, so I don't know how this would apply. A notary would validate.

Rep Grande: How would the notary recognize this and ok it?

Jay Buringrud: Yes, not necessary to have a signature to notarize it can be something else.

Mark Johnson: In section 16 thru the remaining portions of the bill, I would like to have a little more time and discussion so that it may include political subdivisions.

Claus Lembke: North Dakota Association of Realtors: testified in favor of this bill and gave reasons and examples of how this would help his organization.

Howard Anderson: on the executive board of the State Board of Pharmacy - testified in favor of the bill and gave testimony on how his organization is already doing this.

Rep Mahoney: Can a doctor call in a prescription.

Howard Anderson: If it is a controlled substance it has to have an original signature.

John Mielke: executive Secretary for the Public Service Commission (see attached testimony)

Rep Klemin: Has the PSC had any discussions about these concerns?

Mr Mielke: No.

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Mike Ressler: Director of Operations at ITD, We will be happy to work with Mark Johnson. The way it works today, county government does not have to follow the records management program that is in place today, only state agencies. That is why we did not include county governments.

Bill Roach: Information Analyst ITD, (see attached testimony). Also see attached testimony from Don Litchfield of the Greater North Dakota Association.

Chr DeKrey: Any further testimony on HB 1106, if not we will close the hearing on HB 1106.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1106A

House Judiciary Committee

☐ Conference Committee

Hearing Date 01-24-01

Tape Number	Side A	Side B	Meter #
TAPE III	X		55 to 800
Committee Clerk Signature <i>Joan Disro</i>			

Minutes: Chairman DeKrey opened the committee meeting on HB 1106. Relating to electronic records and electronic signatures. The committee discussed points of the bill, especially those items that deal with a notary. The committee discussed the amendments. Chairman DeKrey called for a voice vote. The amendments were moved by Rep Delmore and seconded by Rep Onstad. The amendments passed on a voice vote.

Rep Disrud moved for a DO PASS as amended and seconded by Rep Delmore.

Chairman DeKrey: The clerk will call the roll on a DO PASS as amended on HB 1106. The motion passes with 11 YES, 1 NO AND 3 ABSENT. Floor assignment - Rep Disrud.

10031.0201
Title.0300

Adopted by the Judiciary Committee
January 24, 2001

VR
1/24/01

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1106

Page 2, line 3, replace "an" with "a verifiable"

Remember accordingly

Date: 01-24-01
Roll Call Vote #: 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB-1106

House JUDICIARY Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken D. Pass as amended

Motion Made By Rep Disrud Seconded By Rep Delmore

Representatives	Yes	No	Representatives	Yes	No
CHR - Duane DeKrey	✓				
VICE CHR -- Wm E Kretschmar	✓				
Rep Curtis E Brekke	✓				
Rep Lois Delmore	✓				
Rep Rachael Disrud	✓				
Rep Bruce Eckre	✓				
Rep April Fairfield	✓				
Rep Bette Grande		✓			
Rep G. Jane Gunter					
Rep Joyce Kingsbury					
Rep Lawrence R. Klemin	✓				
Rep John Mahoney	✓				
Rep Andrew G Maragos					
Rep Kenton Onstad	✓				
Rep Dwight Wrangham	✓				

Total (Yes) 11 No 1

Absent 3

Floor Assignment Rep Disrud

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

REPORT OF STANDING COMMITTEE (410)
January 25, 2001 9:13 a.m.

Module No: HR-13-1584
Carrier: Dlarud
Insert LC: 10031.0201 Title: .0300

REPORT OF STANDING COMMITTEE

HB 1106: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (11 YEAS, 1 NAY, 3 ABSENT AND NOT VOTING). HB 1106 was placed on the Sixth order on the calendar.

Page 2, line 3, replace "an" with "a verifiable"

Renumber accordingly

2001 SENATE JUDICIARY

HB 1106

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1106

Senate Judiciary Committee

☐ Conference Committee

Hearing Date March 12th, 2001

Tape Number	Side A	Side B	Meter #
1		x	3.1-end
Committee Clerk Signature			

Minutes: **Senator Traynor**, opened the hearing on HB 1106.

Jay Buringurd, (testimony attached) from Legislative Council, didn't expect to be here this early. Is here in support of the bill. Act applies only where both parties agree to conduct transaction by electronic means. Electronic signatures are valid as written signatures. Electronic transactions are mostly faceless transactions. If the legislature starts to amend this act. First 15 sections deals with electronic transactions. Last part deals with authority of the state. I have a set of amendments to undo the house amendments. Addressees concern by state agencies.

Senator Traynor, is Professor Fry comfortable with the amendments?

Jay Buringurd, yes.

Senator Trenbeath, does this preserve the transactions between two parties?

Jay Buringurd, it cold be more than 2.

Senator Trenbeath, 2nd question, preserving agreement with section 4?

Jay Buringurd, yes.

Senator Trenbeath, question. On page 5, on number 9. Could you explain this to me in fewer words than it is communicating?

Jay Buringurd, I don't know. I would have to guess.

Senator Trenbeath, Whoever takes information in working with an interpretation of that written record. Isn't that a problem?

Jay Buringurd, I don't see that as a problem if you have a competent software system.

Discussion between Senator Trenbeath and Jay Buringurd.

Senator Traynor, calling attention to section 6, line 13- If you have a document that seeks recording that uses electronic signatures, isn't an electronic acknowledgment entitled to record?

Jay Buringurd, I don't understand.

Senator Traynor, this says that the electronic signatures satisfies the law. If it all comes electronically does this mean the deed is entitled to records though it wasn't original signatures?

Jay Buringurd, I would believe so.

Senator Watne, have you looked at HB 1252- Does this require additional signatures?

Jay Buringurd, I don't believe so.

Senator Traynor, any states that declined?

Jay Buringurd, none that I'm aware of.

Senator Traynor, are there federal precepts if you don't adopt this?

Jay Buringurd, yes.

Senator Nelson, the Secretary of State says you need paper ones.

Illone Jeffcoat, (Testimony attached) suggests amendments which address a concern with section 16 and 17.

Senator Traynor, I don't see the State Record Administrator defined.

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Bill/Resolution Number 1106
Hearing Date March 12th, 2001

Senator Watne, question on section 8. Agencies now adopt rules?

Jay Burlingurd, you have rule making authority. We changed the definition in 78, 79 or 81. I'm not sure on that.

Senator Nelson, so this is no longer off limits to us?

Jay Burlingurd, the Legislature starting 97 has changed this by standardizing this. The department shall provide guidelines.

Senator Traynor, have you seen the Public Service Commission Amendment? You and the Public Service Commission need to get together on the amendments.

Todd Kranda, lobbyist for Verizon, opposed to suggested amendments. The proposed amendments address concerns with section 16 and 17 of this bill.

Senator Traynor, confer with Jay about your amendments.

Senator Bercler, regarding confidentiality of the transaction, there's no way to cross over?

Todd Kranda, technology is improving, there is still that concern. This bill does not address that.

Senator Nelson, would your competitors also have these same views?

Todd Kranda, I would assume that this applies to all.

Marilyn Foss, ND Bankers Association, appears in support of a do pass. (testimony attached)

End of side b tape 1

Senator Watne, you address mistakes that apply, does that pertain to section 9.

Marilyn Foss, in the real world, courts would decide.

Senator Traynor, would land documents be covered under this?

Marilyn Foss, I don't think so.

Senator Trenbeath, the register of deeds is a party to that transaction and can say yea or nay?

Marilyn Foss, the actual parties are the seller and the buyer. Doesn't mean that a document can't be forged.

Al Jaeger, Secretary of State. When the electronic signature became effective. I have heard about this for at least 6 years. Between the 95-97 session my office created a committee to look at electronic signatures and transactions. Questions on notaries pact designed so it would not impact electronic transactions. Section 10 of the bill is what we were concerned about. We decided after the attorney conference to leave this alone. Some states have special transactions for notaries. Back on what professor Fry said, I would recommend that the bill be amended back to what it was. It would be best to back to that language.

Senator Traynor, you said 1252 leaves the signature matter open.

Al Jaeger, yes, that is also covered in section 1. I am sure we will be involved in some other type of notary. We did not feel we were ready to get into that. Make sure the Federal Law does not override what we are doing.

Bill Roack of ITD research management testifies in support of HB 1106. Discussion.

Senator Trenbeath, what your saying is that there needs to be copies of checks?

Senator Bercier, how much of an issued would there be if this were implemented tomorrow?

Bill Roack, the technology is in place. Cost to businesses and citizens is our concern. Who will retain an outdated certificate. It will take time.

Senator Traynor, have you had time to discuss the public service commission amendments?

Jay Buringurd, no I have not.

Senator Traynor, what about the verizon amendments?

Jay Buringurd, no. I would be in opposition to the Verizon Amendments. We would be

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Senate Judiciary Committee
Bill/Resolution Number 1106
Hearing Date March 12th, 2001

opposed to them. The uniform law is too vague. Whatever the other entities come up with would be OK, except for section 2 the house amendments.

Senator Traynor, closed the hearing on HB 1106.

SENATOR WATNE MOTIONED TO ADOPT AMENDMENT .0301 FROM JAY BURINGURD, SECONDED BY SENATOR BERCIER. VOTE INDICATED 7 YEAS, 0 NAYS AND 0 ABSENT AND NOT VOTING. SENATOR NELSON MADE A SECOND MOTION TO FURTHER ADOPT PSC AMENDMENTS ON PAGE 11, SECONDED BY SENATOR TRENBEATH. VOTE INDICATED 6 YEAS, 1 NAY AND 0 ABSENT AND NOT VOTING. SENATOR NELSON MOTIONED TO DO PASS AS TWICE AMENDED, SECONDED BY SENATOR TRENBEATH. VOTE INDICATED 7 YEAS, 0 NAYS AND 0 ABSENT AND NOT VOTING. SENATOR NELSON VOLUNTEERED TO CARRY THE BILL.

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1106

Page 1, line 20, after the third comma insert "telephonic,"

Page 3, after line 8, insert:

- "4. For all purposes under this Act, an electronic signature shall also be deemed to include a mechanism that consists of a sealed package with a product contained inside the package and a written contract relating to the sale or lease of goods or to the providing of services outside the package and which, in a reasonably prominent manner:
- a. Notifies the recipient that opening the sealed package constitutes acceptance of the terms and conditions of the written contract that is located outside the package;
 - b. Urges the recipient to read such contract; and
 - c. Informs the recipient that should the recipient wish not to accept the terms and conditions of such contract, that the recipient shall not be bound by the contract, provided that the entire contents of the package are returned to a specific address within a specified period of time, which shall be no less than fifteen days after receipt of the package.

Any recipient of a package containing a mechanism, which is in compliance with this section, who does not return the contents of such package within the time period specified in the disclosures accompanying such package shall be deemed to have intentionally manifested his or her assent to all the terms and conditions with the package."

Page 3, line 9, replace "4" with "5"

Renumber accordingly

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1106

Page 2, line 3, replace "a verifiable" with "an"

Page 2, line 8, remove "federal government or of a"

Page 10, line 24, after "shall" insert "provide guidelines to"

Page 10, line 30, after "shall" insert "provide guidelines to"

Page 11, line 7, remove "and format"

Page 11, line 24, replace "may" with "shall"

Renumber accordingly

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1106

Page 2, line 3, replace "a verifiable" with "an"

Page 2, line 8, remove "federal government or of a"

Page 10, line 12, replace "indorsement" with "endorsement"

Page 10, line 24, after "shall" insert "provide guidelines to"

Page 10, line 30, after "shall" insert "provide guidelines to"

Page 11, line 1, after ~~"persons"~~ insert ⁹ (a period) ^{replace} and remove "and otherwise create, generate," with [↑]

Page 11, remove lines 2 and 3

Page 11, line 7, remove "and format" and remove "created,"

Page 11, line 8, remove "generated,"

Page 11, line 24, replace "may" with "shall"

Renumber accordingly

Date: 3/14/01

Roll Call Vote #: /

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

Senate	Judiciary	Committee
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☐ Subcommittee on _____

or

☐ Conference Committee

Legislative Council Amendment Number HB 1106

Action Taken	<u>Adopt Amendment .0301 from Jay Buringer</u>
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Motion Made By Walters Seconded By Bearin

[illegible]

Total (Yes) 7 No 0

Absent 0

Floor Assignment

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

PROPOSED AMENDMENT TO FIRST ENGROSSED HOUSE BILL NO. 1106

Page 10, line 23, replace "Creation and retention" with "Retention"

Page 10, line 24, after "shall" insert "develop guidelines to"

Page 10, line 25, remove "create and"

Page 10, line 30, replace "determine whether, and the extent to" with "develop guidelines for the process by"

Page 11, line 1, after "persons" insert ".", remove "and otherwise create, generate,"

Page 11, remove lines 2 and 3

Page 11, line 7, remove "and format", remove "created,"

Page 11, line 8, remove "generated,"

Renumber accordingly

Date: 3/14/01
Roll Call Vote #: 2

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

Senate	Judiciary	Committee
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☐ Subcommittee on _____

or

☐ Conference Committee

Legislative Council Amendment Number HB 1106

Action Taken	Further adopt PSC amendment on page 11
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Motion Made By Nelson Seconded By Penbreath

[illegible]

Total (Yes) 6 No 1

Absent

Floor Assignment

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

Date: 3/14/01
Roll Call Vote #: 3

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

Senate	Judiciary	Committee
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☐ Subcommittee on _____

or

☐ Conference Committee

Legislative Council Amendment Number HB 1106

Action Taken Do Per as requested 2 times

Motion Made By C. Nelson Seconded By Therewith

[illegible]

Total (Yes) 7 No 0

Absent 0

Floor Assignment C. Nelson

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

REPORT OF STANDING COMMITTEE (410)
March 16, 2001 9:44 a.m.

Module No: SR-46-5802
Carrier: C. Nelson
Insert LC: 10031.0302 Title: .0400

REPORT OF STANDING COMMITTEE

HB 1106, as engrossed: Judiciary Committee (Sen. Traynor, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1106 was placed on the Sixth order on the calendar.

Page 2, line 3, replace "a verifiable" with "an"

Page 2, line 8, remove "federal government or of a"

Page 10, line 12, replace "indorsement" with "endorsement"

Page 10, line 24, after "shall" insert "provide guidelines to"

Page 10, line 30, after "shall" insert "provide guidelines to"

Page 11, line 1, replace "and otherwise create, generate," with a period

Page 11, remove lines 2 and 3

Page 11, line 7, remove "and format" and remove "created,"

Page 11, line 8, remove "generated,"

Page 11, line 24, replace "may" with "shall"

Renumber accordingly

2001 TESTIMONY

HB 1106

TESTIMONY OF MARILYN FOSS

ON BEHALF OF THE NORTH DAKOTA BANKERS ASSOCIATION

HB 1106- **UNIFORM ELECTRONIC TRANSACTIONS ACT**

Chairman DeKrey, members of the Judiciary Committee, my name is Marilyn Foss. I am general counsel for the North Dakota Bankers Association. The Uniform Electronic Transactions Act (UETA) is intended to establish legal recognition of both electronic records and electronic signatures. This is a matter is supported by North Dakota financial institutions. In the interests of full disclosure I want to let you know that my written comments have been taken largely from information which has been supplied to NDBA by the American Bankers Association or obtained from others with more expertise on this subject than I have.

Goals: The goals of UETA include (1) the removal of inadvertent barriers to e-commerce resulting from state laws drafted in a paper-based environment and (2) providing procedural provisions to validate and facilitate--but not mandate--electronic commerce.

Scope. With certain exceptions, UETA "applies to electronic records and electronic signatures relating to a transaction." Exceptions include laws governing the creation and execution of wills, codicils, or testamentary trusts and transactions under several articles of the UCC. However, sales and leasing transactions which are covered by Articles 2 and 2A of the UCC are also covered UETA.

I would point out that there is an important technical provision that provides the Act applies to an electronic record or electronic signature otherwise excluded to the extent that the record or signature is governed by a law other than those specifically named. An example from the banking industry illustrates the application of this provision: Although UETA does not apply to an electronic record of a check when used in a transaction governed by Article 4 of the UCC; i.e., the Act does not validate so-called electronic checks, for purposes of the check retention statutes, the same electronic record of the check is covered, so that retention of an electronic image/record of a check will satisfy independent check retention statutes if other UETA requirements for retention are met.

Prospective Application. The Act is proposed to apply to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after July 31, 2001.

Use of E-Records and E-Signatures, Variation by Agreement. It is extremely important to note that UETA is permissive. It does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form. The Act applies only to transactions between parties who have each agreed to conduct the transactions by electronic means. A party who has agreed to enter a transaction by electronic means may refuse to conduct other transactions by electronic means. This right to decline future electronic transactions may not be waived by agreement. However,

except as otherwise provided in the Act, the effect of any of its provisions may be varied by agreement.

Legal Recognition of E-Records, E-Signatures, and E-Contracts. For transactions which are covered by the Act: 1) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form. 2) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation. 3) If a law requires a record to be in writing, an electronic record satisfies the law. 4) If a law requires a signature, an electronic signature satisfies the law.

Provision of Information in Writing and Presentation of Records. UETA includes a savings provision which provides standards for satisfying laws that require persons to provide information in writing or that require a record to be provided in a particular manner or method. For example, if the parties have agreed to conduct a transaction by electronic means and a law requires a person to provide information in writing to another person, this requirement may be satisfied if the information is provided in an electronic record capable of retention by the recipient at the time of receipt.

Attribution. UETA rules of attribution of e-records and e-signatures are in place to protect parties from fraud and "e-forgery". Under the rules a party is bound only by that party's actions. Once a transaction or signature is attributed to a party, the effect of attribution is determined by the context of the transaction and the circumstances surrounding its effectuation.

Effect of Change or Error. The Act contains rules regarding the effect of changes and errors occurring when records are exchanged between parties.

Notarization and Acknowledgment. If a law requires a signature or record to be notarized or acknowledged, the requirement is satisfied if the electronic signature of the person authorized to perform those acts (together with all other information required to be included by other applicable law) is attached to or legally associated with the signature or record.

Retention of E-Records, Originals, Retention of Checks. If a law requires a record or an original to be retained, the requirement may be satisfied by retaining an electronic record meeting standards of finality and access. I would note that check retention requirements are specifically satisfied by retention of an electronic record of the information on the front and back of the check in accordance with the Act's standards. The Act gives individual states discretion in this area by providing that a record retained as an e-record in accordance with specified standards satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after the effective date of this Act specifically prohibits the use of an e-record for the specified purpose.

Admissibility in Evidence. In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.

Automated Transaction. There are specific rules which apply to an "automated transaction." For example, a contract may be formed by the interaction of electronic

agents of the parties even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

Time and Place of Sending and Receipt. There are default rules regarding when and from where an e-record is sent and when and where an e-record is received. These rules apply when the parties haven't made their own agreement on the subject.

Transferable Records. This is the only provision in UETA which is there to encourage the development of e-commerce. A "transferable record" is an electronic record that (1) would be a promissory note under UCC Article 3 or a document under UCC Article 7 if the electronic record were in writing (2) where the issuer of the electronic record expressly has agreed to transferable record status. The development of e-notes and e-documents depends upon the existence of generally applicable standards for determining whether a person has control of a transferable record, the rights of parties to transferable records, and the mechanisms for enforcing an e-note or e-document. The transferable records provisions of UETA were developed in part because of the substantial commercial interest in this area.

Governmental E-Records and E-Signatures. The last sections of the bill contain provisions relating to creation and retention of e-records and conversion of written records by governmental agencies, the acceptance and distribution of e-records by governmental agencies, and the adoption of governmental standards in this area.

Federal law - E-sign. On October 1, 2000, a new federal electronic signature act started taking effect. That law, the Electronic Signatures in Global and National Commerce Act, or "E-sign" for short, overlaps with UETA in a number of areas.

E-sign also has preemptive effect which is to say that federal preempts inconsistent state electronic signature laws. However, E-sign preserves state digital signature law if the state law is the standard form of UETA as HB 1106 is. Nonetheless, because there is a federal law on the subject, the question arises: "Is there still a reason to adopt UETA?" People who know, including the American Bankers Association, say the answer is "yes". Although there is considerable overlap between UETA and E-sign, UETA is more comprehensive and, in some respects, different than E-sign in important areas.

E-notes and e-documents. I have previously discussed "transferable records". E-sign has no provision for these as promissory notes and documents have traditionally been matters which are addressed by state laws.

Attribution. The attribution rules of HB 1106 (Section 8) and the effect of attribution (Section 9) are the rules to protect a person from fraud and "electronic forgery" as it were. There aren't comparable E-sign provisions. Under sections 8 and 9 a party is bound only to electronic transactions and electronic signatures which were the acts of that person. Furthermore, the effect of attribution is determined by the context of the transaction and the circumstances of the transaction at the time of creation, execution or adoption of the electronic record.

Agreement. UETA operates in the main as a default statute. It permits the parties to decide upon different rules to govern their transaction than are provided in the law. E-sign doesn't have this flexibility. Accordingly, in states which have adopted UETA,

the parties will have more freedom than under E-sign to customize the rules which will govern their electronic transaction.

Errors and Changes. UETA has specific rules for dealing with mistakes when they occur in a situation where an individual is dealing with an electronic agent, provides the laws on mistake apply to electronic transactions, and addresses failures to use agreed upon security measures. E-sign is silent about this and leaves it up to the courts.

Sending and Receiving. UETA provides rules for determining when an electronic record is sent and received if the parties haven't established their own rules and provides the place for these events. E-sign doesn't cover either topic.

Evidence. E-sign doesn't address electronic records as matters of evidence. UETA provides the electronic format is not a reason to deny the records admissibility in a court or administrative proceeding.

Access to electronic records. E-sign access rules may be interpreted to require party access to electronic records only under general discovery rules (i.e., formal rules for obtaining evidence in judicial or quasi-judicial proceedings.) UETA requires electronic records to be accessible to the parties.

Record Retention. UETA is clearer about how parties may retain electronic records. For example, the use of third party storage is permitted.

I understand UETA also gives state governments more flexibility about moving state operations into an electronic record environment.

This list of UETA / E-sign differences is not all inclusive, but it does exemplify the point. There are numerous good reasons to adopt UETA, even after E-sign.

Accordingly, NDBA supports a Do Pass recommendation for HB 1106

H.B. 1106

Presented by: Jon Mielke, Executive Secretary
Public Service Commission

Before: House Judiciary Committee
Representative Duane DeKrey, Chairman

Date: January 17, 2001

TESTIMONY

Mr. Chairman and committee members, my name is Jon Mielke. I am the Public Service Commission's executive secretary. I also serve as director of the Commission's Licensing Division and as the primary staff person on railroad matters. Also with me this afternoon is Steve Kahl. Steve is the Commission's data processing administrator. This testimony is presented on behalf of the Commission.

The Public Service Commission appreciates having an opportunity to appear in support of the Uniform Electronic Transactions Act. The Commission has consistently supported the electronic workplace and makes every effort to work with regulated industries, other governmental agencies, and the public to permit and encourage electronic transactions.

The Commission's Reclamation Division provides a good example of our agency's efforts to encourage electronic transactions. During the current biennium, the Commission's staff worked closely with the Falkirk Mining Company on the submittal of a completely paperless mine permit application. Instead of submitting a permit that would fill nearly twenty, three inch, three-ring binders, the company submitted a single compact computer disk. The Commission is the only agency in the country to have accepted a mining permit application for a large coal mine in an entirely electronic format.

We recognize and appreciate the efficiencies that result from providing an electronic workplace and believe it will benefit everyone if the state standardizes the requirements for electronic transactions.

We do, however, have two concerns with the proposed law. We believe it is extremely important that only verified electronic signatures qualify as signatures which merit legal recognition. We do not see a specific limitation to this effect in the bill. Consequently, we have drafted a proposed amendment to address this concern. As provided for in the draft amendment that is attached to our testimony, we suggest inserting the word "verifiable" in the definition of electronic signature on page 2, line 3.

Our second concern is with Sections 16 and 17. In our opinion, these sections give overly broad authority to the state records administrator.

Once an agency determines that electronic transactions are appropriate for some or all of its operations, we agree that the agency's electronic records and records retention should conform to uniform state rules and standards. This is a role that should be handled by the state records administrator.

It is important to recognize, however, that the decision to do business electronically is not a "one size fits all" determination. These determinations may vary from agency to agency and even from program to program within an agency. The needs and capabilities of an auctioneer or a small grain company will be far different than those of a coal mine operator or a large public utility.

We do not believe it will be beneficial to have the state records administrator determine if and when a state agency should create or accept electronic records or what exactly should be contained in these records. This type of management decision should be left to individual agencies based on their needs and the needs and abilities of customers that they do business with. The transition to electronic transactions will be maximized if these decisions are left to the agencies involved.

We would be happy to work with your committee and other interested parties concerning possible amendments concerning Sections 16 and 17 of this bill.

Mr. Chairman, that completes our testimony. I will be happy to respond to any questions that you may have.

Prepared by Public Service Commission

PROPOSED AMENDMENT TO HOUSE BILL NO. 1106

Page 2, line 3, replace "an" with "a verifiable"

Renumber accordingly

HB 1106 TESTIMONY
JUDICIARY COMMITTEE
BY: BILL ROACH, INFORMATION ANALYST
INFORMATION TECHNOLOGY DEPARTMENT (ITD)
JANUARY 17, 2001

Mr. Chairman and members of the committee, my name is Bill Roach. I am an Information Analyst in the Records Management Section of the Information Technology Department. I am here to testify in favor of HB 1106.

As a records management professional, I understand how beneficial the legal recognition of electronic signatures and records will be. This technology will help North Dakota state government to:

- Create information more efficiently by enabling us to use intelligent forms that help individuals to provide needed information completely and accurately, the first time.
- Improve the speed of delivery of information and services by greatly reducing the queue time inherent to paper processes.
- Capture information more effectively as digitally signed, electronic forms can be validated and ported to business applications, without the need for manual data entry.
- Improve the accessibility of information by allowing us to automatically index and store records in electronic records systems.
- Reduce our storage requirements by allowing us to store records in a data format instead of paper or images as is the current practice.

In addition, this legislation will provide the same potential for benefits to businesses, organizations, and individuals of North Dakota.

I believe passage of HB 1106 will provide significant opportunities in the future.

This concludes my testimony. I would be happy to answer any questions.



House Judiciary Committee
Representative Duane Dekrey, Chairman
January 17, 2001

House Bill #1106

Mr. Chairman, members of the Committee:

My name is Don Litchfield and I am testifying on behalf of the Greater North Dakota Association (GNDA).

The Greater North Dakota Association is the voice for business and principal advocate for positive change for North Dakota. The organization's membership of 1000 is an economic and geographic cross section of North Dakota's private sector, including statewide associations and local chambers of commerce, development organizations and convention and visitors associations and public sector members.

GNDA believes that if business in our state is to be competitive in the new technology age, conducting business transactions using electronic means is a logical step in achieving that goal.

GNDA supports HB 1106 and urges a DO PASS.

Don Litchfield

GNDA

January 31, 2001

Mr. Jay Buringrud
Legislative Council
State Capitol
600 E. Boulevard Avenue
Bismarck, ND 58505-0360

Re: House Bill No. 1106

Dear Jay:

It was good to have a chance to talk with you yesterday. I hope the legislative session is going well, that the UND law students interning with you are knocking your socks off, and that life is treating you well.

As promised, the following is my analysis of the effect of the non-uniform amendment to the definition of "electronic signature" [found in Section 1.8] which has been proposed. The non-uniform amendment inserts the word "verifiable" as a modifier and restriction on the "electronic sound, symbol, or process . . ." which constitutes the signature. I believe that this amendment, however apparently appealing, has the potential to create major difficulties.

1. The amendment conflates two separate issues: [a] the existence of a signature and [b] attribution of the signature. The Uniform Electronic Transactions Act as approved by NCCUSL [UETA] deals with attribution in Section 9 [Section 8 in the bill], which provides that the attribution of the signature is to be established by whatever means are appropriate, including but not limited to technological indicia. In other words, the existence of a signature may be the relevant issue for some litigation; attribution of a signature may be the relevant issue in other. The evidence will differ and the consequences may differ.

The definition of "electronic signature" does not deal with the issue of attribution. It is not designed to concern itself with the issue of whether or not the person who signed is authorized to use that signature. The drafting committee was convinced that it should not deal with the issue of attribution in the definition of signature. A signature may exist regardless of the identity of the signer. For example, negotiable instruments law [the Uniform Commercial Code] requires that documents be signed before they may have the legal effect of a negotiable instrument. A counterfeit is a negotiable instrument. Obviously, if the instrument is counterfeited or forged, the person whose name appears is not the signer. That is, with a counterfeit or forgery the instrument is not attributed to the person whose name appears. But, provided it is signed, it is an instrument. The person liable on the instrument is the person who affixed the signature, not the person whose name was used. I hope this description and example helps to distinguish between the signature and the attribution.

To summarize, by adding the word "verifiable" as an element of the definition of signature itself, the issue of attribution has been conflated with the issue of whether there is a

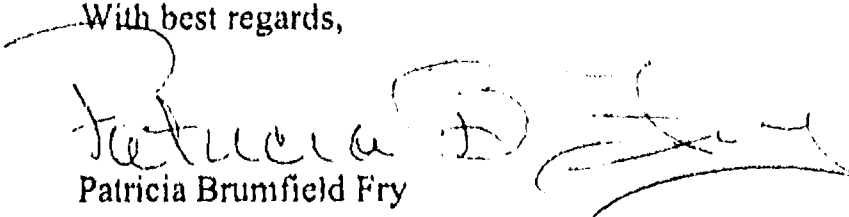
signature. By doing so, the very existence and legal viability of some electronic records may be affected. Certainly all of the subsequent provisions of UETA which involve signatures will be distorted if attribution issues are inserted.

2. The second reason for concern about this non-uniform amendment is found in the provisions of Section 102 of the federal Electronic Signatures in Global and National Commerce Act [E-Sign]. Section 102 provides that if states enact uniform UETA the State may avoid federal preemption. There is debate amongst various observers about precisely what the language of E-Sign means, but I believe all observers would agree that significant substantive changes in UETA will have the result of causing the enactment to lose its qualification under E-Sign Sec. 102[a][1]. The other way for state law to avoid preemption is to qualify under E-Sign Sec. 102[a][2], which calls for a review based on consistency with the provisions of E-Sign.

Since E-Sign Sec. 106[4] defines "electronic signature" in language identical to the uniform UETA, and since the proposed non-uniform amendment adds a qualification to signatures which is inconsistent with UETA, I believe the proposed amendment also is inconsistent with E-Sign. I believe the proposed amendment would result in preemption by the federal legislation.

If I can answer any questions or be of any assistance, please feel free to contact me at any time or to put others in touch with me. I hope this letter will be of some assistance as you work with the legislature on this important legislation. In addition, I have prepared a brief [and I hope readable] article on the interplay between UETA and Esign. If it will help, let me know and I will send along a copy.

With best regards,


Patricia Brumfield Fry
Professor of Law

TESTIMONY OF MARILYN FOSS
ON BEHALF OF THE NORTH DAKOTA BANKERS ASSOCIATION
HB 1106-UNIFORM ELECTRONIC TRANSACTIONS ACT

Chairman Traynor, members of the Judiciary Committee, my name is Marilyn Foss. I am general counsel for the North Dakota Bankers Association. The Uniform Electronic Transactions Act (UETA) is intended to establish legal recognition of both electronic records and electronic signatures. This is a matter supported by North Dakota financial institutions. In the interests of full disclosure I want to let you know that my written comments have been taken largely from information which has been supplied to NDBA by the American Bankers Association or obtained from others with more expertise on this subject than I have.

Goals: The goals of UETA include (1) the removal of inadvertent barriers to e-commerce resulting from state laws drafted in a paper-based environment and (2) providing procedural provisions to validate and facilitate--but not mandate--electronic commerce.

Scope. With certain exceptions, UETA "applies to electronic records and electronic signatures relating to a transaction." Exceptions include laws governing the creation and execution of wills, codicils, or testamentary trusts and transactions under several articles of the UCC. However, sales and leasing transactions which are covered by Articles 2 and 2A of the UCC are also covered UETA.

I would point out that there is an important technical provision that provides the Act applies to an electronic record or electronic signature otherwise excluded to the

extent that the record or signature is governed by a law other than those specifically nam. An example from the banking industry illustrates the application of this provision: Although UETA does not apply to an electronic record of a check when used in a transaction governed by Article 4 of the UCC; i.e., the Act does not validate so-called electronic checks, for purposes of the check retention statutes, the same electronic record of the check is covered , so that retention of an electronic image/record of a check will satisfy independent check retention statutes if other UETA requirements for retention are met.

Prospective Application. The Act is proposed to apply to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after July 31, 2001.

Use of E-Records and E-Signatures, Variation by Agreement. It is extremely important to note that UETA is permissive. It does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form. The Act applies only to transactions between parties who have each agreed to conduct the transactions by electronic means. A party who has agreed to enter a transaction by electronic means may refuse to conduct other transactions by electronic means. This right to decline future electronic transactions may not be waived by agreement. However, except as otherwise provided in the Act, the effect of any of its provisions may be varied by agreement. Legal Recognition of E-Records, E-Signatures, and E-Contracts. For transactions which are covered by the Act: 1) A record or signature

may not be denied legal effect or enforceability solely because it is in electronic form. 2) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation. 3) If a law requires a record to be in writing, an electronic record satisfies the law. 4) If a law requires a signature, an electronic signature satisfies the law.

Provision of Information in Writing and Presentation of Records. UETA includes a savings provision which provides standards for satisfying laws that require persons to provide information in writing or that require a record to be provided in a particular manner or method. For example, if the parties have agreed to conduct a transaction by electronic means and a law requires a person to provide information in writing to another person, this requirement may be satisfied if the information is provided in an electronic record capable of retention by the recipient at the time of receipt.

Attribution. UETA rules of attribution of e-records and e-signatures are in place to protect parties from fraud and "e-forgery". Under the rules a party is bound only by that party's actions. Once a transaction or signature is attributed to a party, the effect of attribution is determined by the context of the transaction and the circumstances surrounding its effectuation.

Effect of Change or Error. The Act contains rules regarding the effect of changes and errors occurring when records are exchanged between parties. Notarization and Acknowledgment. If a law requires a signature or record to be notarized or acknowledged, the requirement is satisfied if the electronic signature of the person

authorized to perform those acts (together with all other information required to be included by other applicable law) is attached to or legally associated with the signature or record.

Retention of E-Records, Originals, Retention of Checks. If a law requires a record or an original to be retained, the requirement may be satisfied by retaining an electronic record meeting standards of finality and access. I would note that check retention requirements are specifically satisfied by retention of an electronic record of the information on the front and back of the check in accordance with the Act's standards. The Act gives individual states discretion in this area by providing that a record retained as an e-record in accordance with specified standards satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after the effective date of this Act specifically prohibits the use of an e-record for the specified purpose.

Admissibility in Evidence. In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.

Automated Transaction. There are specific rules which apply to an "automated transaction." For example, a contract may be formed by the interaction of electronic agents of the parties even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

Time and Place of Sending and Receipt. There are default rules regarding when and from where an e-record is sent and when and where an e-record is received. These rules apply when the parties haven't made their own agreement on the

subject.

Transferable Records. This is the only provision in UETA which is there to encourage the development of e-commerce. A "transferable record" is an electronic record that (1) would be a promissory note under UCC Article 3 or a document under UCC Article 7 if the electronic record were in writing (2) where the issuer of the electronic record expressly has agreed to transferable record status. The development of e-notes and e-documents depends upon the existence of generally applicable standards for determining whether a person has control of a transferable record, the rights of parties to transferable records, and the mechanisms for enforcing an e-note or e-document. The transferable records provisions of UETA were developed in part because of the substantial commercial interest in this area.

Governmental E-Records and E-Signatures. The last sections of the bill contain provisions relating to creation and retention of e-records and conversion of written records by governmental agencies, the acceptance and distribution of e-records by governmental agencies, and the adoption of governmental standards in this area.

Federal law - E-sign. On October 1, 2000, a new federal electronic signature act started taking effect. That law, the Electronic Signatures in Global and National Commerce Act, or "E-sign..." for short, overlaps with UETA in a number of areas. E-sign also has preemptive effect which is to say that federal preempts inconsistent state electronic signature laws. However, E-sign preserves state digital signature law if the state law is the standard form of UETA as HB 1106 is. Nonetheless,

because there is a federal law on the subject, the question arises: "Is there still a reason to adopt UETA?" People who know, including the American Bankers Association, say the answer is "yes". Although there is considerable overlap between UETA and E-sign, UETA is more comprehensive and, in some respects, different than E-sign in important areas.

E-notes and e-documents. I have previously discussed "transferable records". E-sign has no provision for these as promissory notes and documents have traditionally been matters which are addressed by state laws.

Attribution. The attribution rules of HB ¹¹⁰⁶~~4-106~~ (Section 8) and the effect of attribution (Section 9) are the rules to protect a person from fraud and "electronic forgery" as it were. There aren't comparable E-sign provisions. Under sections 8 and 9 a party is bound only to electronic transactions and electronic signatures which were the acts of that person. Furthermore, the effect of attribution is determined by the context of the transaction and the circumstances of the transaction at the time of creation, execution or adoption of the electronic record.

Agreement. UETA operates in the main as a default statute. It permits the parties to decide upon different rules to govern their transaction than are provided in the law. E-sign doesn't have this flexibility. Accordingly, in states which have adopted UETA, the parties will have more freedom than under E-sign to customize the rules which will govern their electronic transaction.

Errors and Changes. UETA has specific rules for dealing with mistakes when they occur in a situation where an individual is dealing with an electronic agent, provides

the laws on mistake apply to electronic transactions, and addresses failures to use agreed upon security measures. E-sign is silent about this and leaves it up to the courts.

Sending and Receiving. UETA provides rules for determining when an electronic record is sent and received if the parties haven't established their own rules and provides the place for these events. E-sign doesn't cover either topic.

Evidence. E-sign doesn't address electronic records as matters of evidence. UETA provides the electronic format is not a reason to deny the records admissibility in a court or administrative proceeding.

Access to electronic records. E-sign access rules may be interpreted to require party access to electronic records only under general discovery rules (i.e., formal rules for obtaining evidence in judicial or quasi-judicial proceedings.) UETA requires electronic records to be accessible to the parties. Record Retention. UETA is clearer about how parties may retain electronic records. For example, the use of third party storage is permitted. I understand UETA also gives state governments more flexibility about moving state operations into an electronic record environment.

This list of UETA / E-sign differences is not all inclusive, but it does exemplify the point. There are numerous good reasons to adopt UETA, even after E-sign.

Accordingly, NDBA supports a Do Pass recommendation for HB 1106.

TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE

PROPOSED AMENDMENT BY VERIZON WIRELESS TO ENGROSSED HB 1106 UNIFORM ELECTRONIC TRANSACTION ACT

Chairman Traynor and Senate Judiciary Committee Members, my name is Todd Kranda. I am a local attorney with the Kelsch Law Firm of Mandan and I appear before you today as a lobbyist on behalf of Verizon Wireless to testify in support of Engrossed House Bill 1106, the Uniform Electronic Transaction Act and to offer an amendment.

It is the intent of the Uniform Electronic Transaction Act to, among other things, permit and encourage the continued expansion of electronic commerce through the operation of free market forces and to facilitate and promote electronic commerce by clarifying the legal status of electronic records and electronic signatures in the context of contract information. It is necessary to clearly declare that a contract transaction will not be denied legal effect solely because an electronic signature or record was used in its formation.

The definitions of "Electronic Record" and "Electronic Signature" as contained in the bill, while quite broad, are not clear, however, with respect to their scope and extent of applicability. If the intent of the bill to promote and expand electronic commerce is to be fully realized, such definitions must reliably encompass all forms of electronic transactions, (not just

those conducted by computer or over the Internet), including, for example, those that occur over the telephone whether by recorded voice or through the action of pressing a telephone keypad, and the bill should be amended to do so.

Both the telephone and mobile telephone have become an increasingly important tool in modern commerce, for business and consumers alike. Consumers have come to rely on the telephone for conducting numerous types of transactions, including the purchase of goods and services. The telephone has been an essential tool for electronic commerce almost since its invention and should not be overlooked now because of the advent of the Internet. It is undisputed that the telephone is a valid and reliable form of electronic communication.

These amendments are intended to facilitate the marketing and delivery of cellular telephones by mail or other delivery service, while providing protection to the parties under the Uniform Electronic Transaction Act. Under this marketing program, a consumer desiring wireless telephone service may call the wireless carrier and order the cellular equipment. The telephone is sent by mail or other delivery service such as UPS or Federal Express to the consumer. Under these amendments the consumer must be warned on the outside of the package in a prominent

manner that opening the package constitutes acceptance of the contract to use the equipment, that the consumer should read the enclosed contract, and that the consumer has a period of time, no less than 15 days, to return the equipment at cost to the provider. The consumer may activate the equipment by calling the cellular provider and following the instructions for activation such as the input of one's name, social security number, birth date, or other identifying characteristic by using a telephone keypad. Consumers will no doubt benefit from such clarification in the bill because it will give them a broader range of choices in goods and services that they will be able to contract for by utilizing the telephone.

Those offering goods and services to consumers, like Verizon Wireless, will feel confident that if a telephone is used to obtain an Electronic Signature, such signature will be binding and enforceable. This amendment permits this type of convenient ordering, delivery and activation to occur, while parties have the benefit of the Uniform Electronic Transactions Act.

The proposed amendment is attached for your consideration.



Senate Judiciary Committee
Senator Jack Traynor, Chairman
March 12, 2001

House Bill #1106

Mr. Chairman, members of the Committee:

My name is Don Litchfield and I am testifying on behalf of the Greater North Dakota Association (GNDA).

The Greater North Dakota Association is the voice for business and principal advocate for positive change for North Dakota. The organization's membership of 1000 is an economic and geographic cross section of North Dakota's private sector, including statewide associations and local chambers of commerce, development organizations and convention and visitors associations and public sector members.

GNDA believes that if business in our state is to be competitive in the new technology age, conducting business transactions using electronic means is a logical step in achieving that goal.

GNDA supports HB 1106 and urges a DO PASS.

Don Litchfield

GNDA

H.B. 1106

Presented by: Illona Jeffcoat-Sacco
Public Service Commission

Before: Senate Judiciary Committee
Honorable Jack Traynor, Chairman

Date: March 12, 2001

TESTIMONY

Mr. Chairman and committee members, my name Illona Jeffcoat-Sacco. I am the director of the Public Service Commission's Public Utilities Division. Also with me this morning is Steve Kahl. Steve is the Commission's data processing administrator. This testimony is presented on behalf of the Commission.

The Public Service Commission appreciates having an opportunity to appear in support of the Uniform Electronic Transactions Act. The Commission has consistently supported the electronic workplace and makes every effort to work with regulated industries, other governmental agencies, and the public to permit and encourage electronic transactions.

The Commission's Reclamation Division provides a good example of our agency's efforts to encourage electronic transactions. During the current biennium, the Commission's staff worked closely with the Falkirk Mining Company on the submittal of a completely paperless mine permit application. Instead of submitting a permit that would fill nearly twenty, three inch, three-ring binders, the company submitted a single compact computer disk. The Commission is the only agency in

the country to have accepted a mining permit application for a large coal mine in an entirely electronic format.

We recognize and appreciate the efficiencies that result from providing an electronic workplace and believe it will benefit everyone if the state standardizes the requirements for electronic transactions.

We believe it is extremely important that only verified electronic signatures qualify as signatures which merit legal recognition. In the House, we proposed an amendment to address this concern and very much appreciate the action of the House in adopting that amendment. We have, however, an additional concern with Sections 16 and 17. In our opinion, these sections give overly broad authority to the state records administrator.

Once an agency determines that electronic transactions are appropriate for some or all of its operations, we agree that the agency's electronic records and records retention should conform to uniform state rules and standards. This is a role that should be handled by the state records administrator. It is important to recognize, however, that the decision to do business electronically is not a "one size fits all" determination. These determinations may vary from agency to agency and even from program to program within an agency. The needs and capabilities of an auctioneer or a small grain company will be far different than those of a coal mine operator or a large public utility.

We do not believe it will be beneficial to have the state records administrator determine if and when a state agency should create or accept electronic records or what exactly should be contained in these records. This type of management

decision should be left to individual agencies based on their needs and the needs and abilities of customers with whom they do business. The transition to electronic transactions will move more quickly and efficiently if these decisions are left to the agencies involved.

We have attached to this testimony proposed amendments to address the concerns we have with Sections 16 and 17 of this bill.

Mr. Chairman, that completes our testimony. I will be happy to respond to any questions that you may have.

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