

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2039

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2003 SENATE JUDICIARY

SB 2039

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2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2039 - 01/08/03

Senate Judiciary Committee

☐ Conference Committee

Hearing Date 01/08/03

| Tape Number | Side A | Side B | Meter # |
|---|--------|--------|---------|
| 1 | x | | 00-3105 |
| | | | |
| | | | |
| Committee Clerk Signature <i>Maria L. Salberg</i> | | | |

Minutes: Senator John T. Traynor, Chairman, called the meeting to order. Roll call was taken and all committee members present. Sen. Traynor requested meeting starts with testimony on the bill.

Testimony in support of SB 2039

Senator Larry Robinson, Dist. #24, testified as a member of the Information Technology

Committee, discussed that this bill was passed unanimously with the ITD Committee.

Mr. Curt Wolfe, ITD Coordinator, ND, testified that when ITD was a part of OMB we were exempt from the open records statute as is OMB still is. We moved in 1999 and became a

separate department of the Government the issue still has to be addressed. Discussion (meter

14.0) Definition of "administrative agency" and "administrative rule" are only in the application of exempting us to go out and hold public hearing for; policies, standards, and guidelines. (meter

15.5) due to the sensitivity of security in these three areas.

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Senate Judiciary Committee

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John Walstad, Legislative Council, testified how the ITD department under 5459, is not an "administrative rule" due to a lack of having any force and affect of law. They need the ability to make changes quickly. ITD was an independent agency and was exempt from the definition of "administrative agency" prior to the department transfer. (meter 18.5)

Testimony in opposition of SB 2039:

There was no testimony in opposition of bill.

Senator Trenbeath moved a DO PASS. Seconded by Sen. Lyson.

Roll Call Vote: 6Yes. 0 No. 0 Absent

Carrier: Senator Trenbeath

Date: January 8, 2003
Roll Call Vote #:

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2039

Senate JUDICIAL Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Sen. Thomas Trenbeath Seconded By Senator Stanley W. Lyson,

| Senators | Yes | No | Senators | Yes | No |
|---------------------------------|-----|----|---------------------|-----|----|
| Sen. John T. Traynor - Chairman | X | | Sen. Dennis Bercier | X | |
| Sen. Stanley Lyson - Vice Chair | X | | Sen. Carolyn Nelson | X | |
| Sen. Dick Dever | X | | | | |
| Sen. Thomas L. Trenbeath | X | | | | |
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Total (Yes) SIX No NONE

Absent NONE

Floor Assignment Senator Thomas L. Trenbeath

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

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REPORT OF STANDING COMMITTEE (410)
January 8, 2003 12:31 p.m.

Module No: SR-02-0368
Carrier: Trenbeath
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2039: Judiciary Committee (Sen. Traynor, Chairman) recommends **DO PASS**
(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2039 was placed on the
Eleventh order on the calendar.

2003 HOUSE JUDICIARY

SB 2039

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2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2039

House Judiciary Committee

☐ Conference Committee

Hearing Date 2-26-03

| Tape Number | Side A | Side B | Meter # |
|---|--------|--------|-----------------|
| 1 | xx | | 7.2-40 |
| 1 | xx | xx | 41.3-end / 0-22 |
| 2 | xx | | 5.6-6.9 |
| Committee Clerk Signature <i>A. Penrose</i> | | | |

Minutes: 12 members present, 1 member absent (Rep. Onstad).

Chairman DeKrey: We will open the hearing on SB 2039.

Sen. Larry Robinson: Introduced bill SB 2039. The next two bills on your agenda, 2038 and 2039 were the result of the Information Technology Interim Committee. I was chairperson of that committee. We have John Bjornson here from LC to answer technical aspects of the bills. We also have Mike Ressler from ITD that can get into some of the background of the bills, the direction of the bills, why the bills are necessary. Both bills did enjoy unanimous support from the IT committee in the interim and both are short and to the point. SB 2039 is the second bill before you this morning, and basically is relates to activities ITD excluded from the Administrative Agency Practices Act. The bill draft states that policy, standards and guidelines adopted by the ITD, under chapter 54-59 are not considered rules under the Administrative Agency Practices Act. It authorizes ITD to establish IT policies, standards and guidelines. ITD's policies, standards and guidelines can change quickly. We all know that the rule-making process

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sometimes takes 3-6 months or more. For that reason, this bill would allow for those policies of ITD to be exempt. This means that they would have to hold public meetings before creating ITD policies, standards and guidelines. Keep in mind that this agency works with other agencies. When ITD adopts rules and policies and guidelines, they are dealing with agencies throughout the system of state government. We believe that there is a difference and I think Mr. Bjornson and Mr. Ressler can get into the technical aspects of the bill. Again, this bill received unanimous support from the IT interim committee and strong support of both the committee and on the floor of the Senate.

Rep. Delmore: Administrative rules have never been one of my favorite committees that we have, but I think they are a necessary evil. How much money are we looking at in this budget, without any oversight of the administrative rules process.

Rep. Robinson: I can't speak exactly to the budget. We're talking about significant dollars, but built into the process, we have advisory committees, we have other checks and balances and we would like to believe, that there is more than ample opportunity for checks and balances at several steps along the way. I know through the House action on ITD in the first half of the session, we feel that the agency is monitored very closely, not only by the IT Interim Committee, but there are other entities in place, and we feel we would be redundant, repetitive and a step we really don't need to take, because of the checks and balances that are really in place already.

Rep. Delmore: However, I don't know of anybody else that is exempted from Administrative Rules. What legislative oversight would we have if there isn't anybody. I guess this is a bill that concerns me.

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Rep. Robinson: I think that is the very issue that Mr. Ressler can talk to regarding what is in place, why the necessity for SB 2039. In this particular situation, we believe that the bill is necessary.

Rep. Maragos: If they had the ability to do the emergency rule-making and had it subjected to the review by the Administrative Rules, would that be acceptable, if they didn't have to worry about the 3-6 months.

Rep. Robinson: I would think not. I would refer that question to Mr. Ressler. I think once you hear from Mr. Bjornson and Mr. Ressler, I think your concerns will be addressed.

Chairman DeKrey: Thank you.

John Walstad, LC Staff: Neutral (see attached definitions). I work with the Administrative Rules Committee. This bill came from the IT Committee. This bill deals with an Administrative Rule-making issue. What I have passed out is a copy of Chapter 54-59. That's the chapter of law that is referenced in this bill. Some background as follows: when ITD was CDP and part of OMB. When CDP was a division of OMB, that division was exempt. It was not an administrative agency under the Administrative Agencies Practices Act because generally OMB is exempted. That chapter has a definition of Administrative Agency, basically is said that everybody is an administrative agency except and then there is a list. OMB is on that list. ITD is not on that list. As you know, ITD was made an independent agency last session, and when it was made an independent agency is fell into that first part of the definition, which said everybody's an agency, so now technically ITD has become an administrative agency. What that means is that everything ITD does, in terms of policy making, should be done through the Administrative Rulemaking process. The bill before you does not change the definition of

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administrative agencies, so this bill does not change the fact that ITD is an administrative agency.

What this bill does is provide that administrative rule does not include this statement on line 7 of this bill, "the policies, standards and guidelines" under this chapter that I passed out. ITD would remain an Administrative Agency, which means there are two aspects of being an Administrative Agency. One, is rule-making, one is in regard to administrative hearings. I don't know if ITD would be involved in administrative hearings under current law, but if, in the future, some sort of grievance procedure is set up for agencies to launch through an administrative hearing process, the agency would still be governed by Chapter 28-32 policies that apply to administrative hearings. The significance of a rule is, an administrative rule properly adopted under Chapter 28-32 has the force and effect of law. It's basically the same as if the legislature had enacted the provision. In the eyes of the court, there is really no difference. The other aspect of being an administrative rule, the administrative rules committee reviews whatever the agency adopts and publishes. This bill exempting the agency from Rule, its procedures would not be governed by that statutory process which requires publication and notice in the newspaper, 30 day waiting period before public hearing, another 30 day waiting period to receive comments, then review of those comments, and preparation of the record, submitting all of the rules adopted to the Attorney General's office, Senator Robinson mentioned that that process is 3-6 months, it truly is more like 6-9 months to get rules in place. I think that is why ITD had a problem with being subjected to the rule-making procedure through all formal mechanisms, and the policies they adopt are not generally applicable to all of the citizens of the state. Generally administrative rules are applicable to all the citizens of the state. I can't answer the technical questions about what ITD's functions actually are.

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Chairman DeKrey: If this bill were to fail, would they have emergency rule-making ability, or does that have to be specifically encoded to give them that.

Mr. Walstad: I think I would read current law, if this bill was not enacted, ITD would be an administrative agency, would be required to go through these processes, and because of the way the statute is written on what constitutes an emergency rule, I do not believe that ITD would qualify. There are very limited instances when emergency rule-making is appropriate, plus it is necessary for the agency to get approval from the Governor.

Rep. Maragos: Can you tell me what the rationale was for exempting OMB.

Mr. Walstad: I don't know. That exemption predates my presence here. At the time the Administrative Agencies Practices Act was adopted, somebody sat down and looked at every agency and all of the functions of every agency and they looked at three factors, one of which was statewide applicability. Are the policies being adopted by this agency applicable generally statewide and applicable to all of the citizens of the state or are the functions of this agency limited to internal (like state government/management type issues). I think that was the dividing line on which OMB was thrown into this category, not an administrative agency. There were some exceptions. Some of the functions of OMB were excepted from the exception, so that they were subject to rule-making, plus the data processing function was not one of those things.

Rep. Maragos: As far as the emergency rule-making process, is there some way we could probably just incorporate it into this bill that they have it, without eliminating the administrative rule oversight.

Mr. Walstad: I could certainly change this bill so that it would accomplish what you are suggesting, that ITD would go through the normal rule-making processes, then create a specific

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exception saying "notwithstanding all those limitations under emergency rules", anything that ITD does is an emergency rule and becomes effective as of the date the agency adopts the rule.

Rep. Bernstein: If we enact this, ITD will have no legislative oversight whatsoever. You have to stop and think, ITD affects a lot of people. First off, ITD is a secondary, with Human Services and everything else, and not only that, you know in the last couple of sessions, DPI was put under the administrative rules and now we're asking an agency to be taken away from there. That way you lose all legislative oversight.

Mr. Walstad: I think Sen. Robinson mentioned that there are some mechanisms in existing law, where there is some oversight over what ITD does. In the chapter I passed out, ITD is required to file an annual report with the IT Committee of the legislative council. At least annually, whatever the agency is doing, is going to be reviewed by the IT Committee. That is an ongoing review. That committee takes part of its role as looking at the functions of the agency each time it gets together. There are also some provisions in this chapter for various groups that will review what ITD does. In response to your question, this agency is a bit different from other agencies because of some things that are built into this chapter in law.

Rep. Maragos: Would the IT Committee and Legislative Council be able to reverse any decision made by ITD.

Mr. Walstad: Not by law, but as you know, legislative committee has other methods.

Rep. Maragos: Assuming that it would have to take place during the next legislative session.

Mr. Walstad: If there is to be a statutory requirements to overturn a decision. If it is a policy decision of ITD, and the committee persuades the agency that that policy needs to be changed, I

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think that could be done on the spot, if that is not an administrative rule. Changing an administrative rule would take the time to go through the process.

Rep. Maragos: If they had emergency rule-making authority, then their rules become law immediately, but then are subject to review.

Mr. Walstad: Administrative rules are commenced by drafting a proposed rule, then publication of newspaper notice about a public hearing on the proposed rule, also filing a copy of notice of rule-making with the legislative council office. The notice we receive goes out to subscribers. An emergency rule cannot be adopted to be effective any sooner than the date of filing the notice with the Legislative Council. That's how fast we can make an emergency rule.

Rep. Maragos: How long does it take to file with the Legislative Council. Five minutes.

Mr. Walstad: The physical part is easy, but they have to make some cognitive function process about what are we going to do with the rule, get it on paper. One step down, it's filed and can be adopted effective that instant.

Rep. Maragos: In other words, it can done as soon as they adopt the rule and take it to you and file it, it's a rule. Do they generally ask you for assistance when they are adopting a rule to make sure that from a code standpoint, that it's acceptable and fits all of the requirements.

Mr. Walstad: I get a lot of calls from agencies. I'm not sure what % of those are run past me before they file them.

Rep. Delmore: Can you think of any other agency with the power, all the computers here and all the agencies are controlled by ITD. A great deal of money and power in this and I guess I can't see any advantage to having absolutely no legislative oversight. As I look at the committee, there are a lot of very good people on them, but I don't see anybody with any legislative authority to be

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kept updated with what's going on and what's happening with this. Is there an advantage to not having anybody oversee it.

Mr. Walstad: That is a policy call. That's a legislative decision, so I don't feel qualified to say yes or no.

Rep. Klemin: This Chapter 54-59 was adopted in 1999, and since that time has ITD adopted any administrative rules under Chapter 54-59.

Mr. Walstad: No. ITD has not adopted any administrative rules to date.

Rep. Klemin: So they've been in operation for four years, and they've not had a situation where they needed to adopt an emergency rule.

Mr. Walstad: I'm not sure whether they had a situation like that, but they have not adopted any rules, they have not appeared before the Administrative Rules Committee. I think it took a couple of years before anybody realized they are an administrative agency now.

Rep. Klemin: What kind of policies, standards and guidelines would they be adopting outside of Chapter 54-59.

Mr. Walstad: I'm not sure what else the agency does. I can't think of anything.

Rep. Klemin: We have in our administrative practice act a requirement for regulatory analysis when there is an effect on other entities, businesses. Do I understand that those rules they adopt are not rules for this purpose, then they are probably not rules for purposes of regulatory analysis.

Mr. Walstad: That would be my conclusion, that they would not be subject to the requirement.

Rep. Klemin: One of the duties of the department is to provide network services in a way that facilitates open communications with the citizens of the state. Yet, what this would do, this provision, would take that away as far as the state having input.

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Rep. Kretschmar: Are there definitions in the statute of these words: policies, standards and guidelines. What is the difference.

Mr. Walstad: I don't know that there is a definition of what each of those words mean. It seems to me that I took those words right out of Chapter 54-59.

Chairman DeKrey: Further testimony in support of SB 2039.

Mike Ressler, CIO, ITD: Support (see attached testimony, Tape 1, side A, #41.3-46.7)

Chairman DeKrey: I have been contacted by a few statewide officials who actually said they are afraid to come down and testify against this bill because ITD has gotten so big, into their own business so much, that they were afraid of retribution. To me, that almost means that this is really important that we need to be under administrative rules. Then I've heard comments from legislators on the floor that ITD is into our computers so much, into control, that they are actually afraid that they can actually look at what we're doing on our computers and look at our stuff. And to exempt you from any oversight whatsoever, I'm not quite sure I understand. And then you tell us that you haven't done a rule in four years, what's the fear here. Why do you need to be exempt.

Mr. Ressler: I am not aware of ITD using a heavy-hand on anybody. I guess I would like to see some instances because we need to address those. With regards to not promulgating any rules, that was advice we got from our attorney at the Attorney General's office that said it is questionable for us to write rules.

Rep. Maragos: You were explaining to us about the appeal process as it went up from the IT Committee of the Legislative Council. If there was a disagreement between the CIO and the Legislative Technology Committee, assuming the CIO said you people don't understand, so I'm

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not changing my rule, an appeal on that rule would probably be denied until the next legislative session, is that correct.

Mr. Ressler: I think that is accurate. The authority that the Legislative IT Committee has, is they can propose to the OMB to shut down the project or give direction in another way from a financial standpoint. The CIO decides on that IT Committee. There are seven legislators that work with the CIO. He could say, "I'm not going to listen to you, and I'm going to do my own thing."

Rep. Wrangham: Can you give us an example of possibly some rule or standard in the past that you would have liked to have put in place, but didn't because you didn't want to go through process of the administrative rule overview. Or can you see in the future, a rule.

Mr. Ressler: We feel all the standards we've put in place to do, they weren't rules under the definition of rule. Therefore, we haven't not implemented any rule because of this. We were just cleaning this up. I can't foresee anything in the future that will stop us from doing this because we have to go out and hold a public hearing. We're not going to do that.

Rep. Wrangham: So you foresee starting to promulgate from this place forward and will necessitate this change.

Mr. Ressler: I think if you tell us to do so, we sure will. Currently, today agencies don't have to comply. For all of our services, with the exception of network services, they can get their applications done someplace else, their hosting services, whatever. They don't have to buy from us.

Rep. Wrangham: This bill doesn't change what you are doing, promulgating rules or setting standards. I guess I don't follow.

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Mr. Ressler: We feel that Chapter 54-59 authorizes us to take the responsibility to create policies, standards and guidelines. We have just felt that those are not rules under that definition. Rep. Klemin: When you look at the section of administrative code that is being amended by this bill, which is subsection 11 of 28-32-01, that's the definition of the word "rule". This definition is almost a page long, but almost all of that definition is what a "rule" is not. In fact, there are 11 exceptions to the definition of rule. I am presuming that that is the reason that you have not logged the claims that you've done to date with ITD, its standards, practices, so forth weren't considered rules because they fall into one of these already existing exceptions contained in the definition of rule itself. What purpose would be served by putting in another broad exception that's specific to everything that ITD does.

Mr. Ressler: From what you are saying, it probably does.

Rep. Klemin: I am assuming it doesn't, because you have apparently adopted a lots of standards, policies, and guidelines in the last several years, without going through this process, so it must have fallen into one of these exceptions without going through this process.

Mr. Ressler: Prior to 1999, we were under the auspices of OMB, and it did take probably two years before the attorney called and said, "hey, did you guys know you that your department was put over into the exemption status. That is how this all started.

Rep. Klemin: The section on regulatory analysis rule, the rule has the impact on the regulated community, and if it doesn't regulate the community, of course, it's not private business necessarily. Regulated community in your case might be government education. If a proposed rule that has an impact on the regulated community in excess of \$50,000, it needs regulatory

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analysis. So by making a blanket exception from the definition of rule, then you would also have a blanket exception from the requirements for a regulatory analysis.

Mr. Ressler: I didn't know that.

Rep. Klemin: Are there any circumstances under which ITD would compete with private enterprise, private businesses in providing services to government and education.

Mr. Ressler: Any time a state agency purchases a service such as web development, that company they can buy that from, we do compete with private businesses that provide that service. But agencies have the ability to buy from those private sector people for IT services.

Rep. Klemin: Not only are you competing with private enterprise, if what you're doing has a regulatory effect of \$50,000 or more, we don't even need to go through the analysis to determine what the effect of that competition is, right.

Rep. Grande: A comment I keep hearing is, this is only regulating agencies, and not affecting statewide, but I guess I question that, I believe it does effect people statewide, because our agencies are across the entire state, and the fact that it goes into political subdivisions, because of this application, it directly affects every region in our state. How is it that there should be an exception here.

Mr. Ressler: I would agree with your statement. I think you need to look back at what we're establishing here, the standards that really pertain to this agency. When you look at things like, are they ODC compliant, I don't think it restricts any of the private sector businesses from competing with us. It gives us direction on how to provide a service to those agencies.

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Rep. Grande: Then, but it is affecting it directly, whether its on the technical side or not. It's the broad aspect. Its the intervention that they don't have an input to, there is no input, it doesn't have a direction, doesn't have a desire to be compliant to that.

Mr. Ressler: I think that is where the enterprise architecture comes into place.

Rep. Grande: In 1043, you came in front of us asking for no committee, we put that committee in and put legislators on it, because again, you were on a different bill, yet this bill where you don't want administrative rules, you were also on another bill saying we don't even want committee oversight. I'm seeing a bit of a problem here.

Mr. Ressler: We didn't feel the need for this to be in the Century Code. We need input from the other agencies. The way that the repealed language that was in the original 1043, we held one meeting, it provided us with information for the network, but it had membership from people who knew network applications.

Rep. Maragos: This bill came forward because somebody in the Attorney General's office said that you were an agency, and subject to review of the administrative rules committee, is that correct?

Mr. Ressler: That is correct.

Rep. Maragos: Basically, we have to decide based on your testimony whether or not you need the exemption.

Mr. Ressler: Yes.

Rep. Maragos: Hypothetically, if we passed this bill as it is, could you craft a rule that said all state agencies have to go through your office in order to do certain things and could not go out on the open market.

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Mr. Ressler: I don't know.

Rep. Maragos: What if in the rule you say, if you do not come through us, you will suffer these penalties. Because your rule takes the force of law immediately.

Mr. Ressler: I don't know.

Chairman DeKrey: Thank you. Further testimony in support? Testimony in opposition?

Rick Clayburgh, Tax Commissioner: ITD serves the state well, we have good communication between ITD and others. It does serve its customers very well. We have done such things as provide document management, electronic data management, we scan tax returns, store tax returns, etc. with ITD. It helps us keep our costs down in a way that other agencies can come on board and do electronic document management themselves. I'm very pleased with our relationship with ITD. We do not fear retaliation from ITD about comments because of the relationship that we have. My understanding, whether it's limited or broad knowledge of administrative rules, I'm concerned when any agency wants to withdraw itself from the administrative rules practices act. When you think about the fact that we in the Tax Department, and other state agencies, are providing services to our customer base, and a rule is promulgated without oversight, or without an ability to provide feedback to it, from ITD, where we are their customers, they provide services to us, so that we can provide services to our customers. If a rule is promulgated without input from us, and it affects us, I'm concerned about a potential about where would someone go for relief. I did not testify in the Senate on this bill, it caught me a little off guard. It wasn't until after the Senate had passed the bill, that the bill came to my attention. I think you are probably seeing more individuals that may comment to that. Really my concern is that as we're working, especially working under tight budgets, if we have a situation that we have

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to utilize a third party, and the rules that promulgated it under certain applications, we could not use a third party, it puts us in a position that we may not be able to finish the project within that biennium. We may not be able to stay within costs within our budget constraints to be able to finish the project. Again, I make that comment, not knowing the direction that ITD may go in those areas, but only from the standpoint that I think we as agencies need to have the ability to have our issues heard.

Rep. Maragos: Would you have a problem if we amended it to give them emergency rule-making authority so it expedited their needs, but still they were under the review process and subject to all the administrative rules of due process, would you be opposed to the bill.

Commissioner Clayburgh: Probably not. But if they put policies or rules into place that are specific to how we do something that will be utilized on the mainframe, or utilized within our network system, that makes all the sense in the world. I don't think that is necessarily the concern. My concern runs to our flexibility and the possibility of using a third party. Our web site was developed through a third party. We have now just re-engineered and redesigned our web site with ITD, and we are very satisfied with it. But because of budgetary constraints, ITD does have limited resources, just as we do. If there is a situation that we want to make changes and we're now prohibited from using a third party for example on the use of web site applications, for whatever reason, I don't know why they would do that, but if that occurred, and now we're in a situation that because of their limited resources and ours, we can't go out anywhere to get the work done. That is the part I am more concerned with. I don't know why they would need to make a promulgated rule under emergency situation for that type of rule, and

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I don't mean to be doing "what if" scenarios. But that is my concern, that would impact how we administer our system.

Rep. Maragos: Does the Tax Department have emergency rule-making authority.

Commissioner Clayburgh: We haven't promulgated a rule in about 4 years in the tax department. We try not to promulgate rules unless we need to. We are in the process of doing it with the Alcohol Tax Administration. We're promulgating some rules and working with that agency.

Rep. Klemin: On that subject of emergency rules, ITD hasn't adopted any rules in the past four years, and now all of a sudden if they were to adopt a rule, they would all be considered emergency rules. That doesn't track well either. I'm certain that there might be a case where they might need to adopt emergency rules, but certainly everything couldn't be an emergency could it.

Commissioner Clayburgh: I would have to look at the definition of what an emergency could be in the statute. ITD is a totally different entity than it was under OMB. ITD is involved as the needs of the state have created it to be involved. It has been and continues to grow to be a very good service provider to the state agencies. I don't know what type of emergency situation may come up, but I could see it in cases in some type of technology terrorism, that requires all state agencies have to use certain guidelines to make sure that we don't have corrupting problems. To me, that might be an emergency. I don't think utilizing a third party vendor would necessarily be an emergency. I don't know.

Rep. Klemin: It seems to me that there might be an occasion where any agency might have a need for emergency rules. Certainly everything you do couldn't be considered an emergency.

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Commissioner Clayburgh: I don't stand up here in fear of retaliation, we work very well with ITD. This is more of a general issue as well. As a former legislator, but also someone who administers an agency, we take very seriously the Administrative Practices Act and I think anytime you exempt someone from that, you as a legislative body, do need to take a careful review. I believe you are all doing that now.

Chairman DeKrey: Thank you. Further testimony in opposition to SB 2039.

Patrick Finken, CEO, Inet Technologies: Opposed (see attached testimony).

Rep. Maragos: Does your company work in other states, besides North Dakota.

Mr. Finken: Yes, in Montana, authorized to work with state government agencies. Montana has chosen, rather than build infrastructure within state government, they've identified IT firms to do certain kinds of work and then outsource the work to private enterprise firms, like our own.

Rep. Maragos: So their technology is set up a little different than North Dakota. They wouldn't have to serve their needs the same way the state does because of the structure of our ITD.

Mr. Finken: Montana chose to provide basic services, and outsource much of the work that can be done in the private sector.

Chairman DeKrey: Thank you. Further testimony in opposition.

Illona Jeffcoat-Sacco, Director, Public Utilities Division, Public Service Commission:
Opposed (see attached testimony).

Chairman DeKrey: Thank you. Further testimony in opposition? We will close the hearing.
(Reopened later in the afternoon session)

Chairman DeKrey: What are the committee's wishes in regard to SB 2039.

Page 18
House Judiciary Committee
Bill/Resolution Number SB 2039
Hearing Date 2-26-03

Rep. Klemin: I move a Do Not Pass.

Rep. Boehning: Seconded.

12 YES 0 NO 1 ABSENT DO NOT PASS

CARRIER: Rep. Klemin

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Date: 2/26/03
Roll Call Vote #: |

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2039

House Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass

Motion Made By Rep. Klemin Seconded By Rep. Boehning

| Representatives | Yes | No | Representatives | Yes | No |
|-----------------------|-----|----|-----------------|-----|----|
| Chairman DeKrey | ✓ | | Rep. Delmore | ✓ | |
| Vice Chairman Maragos | ✓ | | Rep. Eckre | ✓ | |
| Rep. Bernstein | ✓ | | Rep. Onstad | AB | |
| Rep. Boehning | ✓ | | | | |
| Rep. Galvin | ✓ | | | | |
| Rep. Grande | ✓ | | | | |
| Rep. Kingsbury | ✓ | | | | |
| Rep. Klemin | ✓ | | | | |
| Rep. Kretschmar | ✓ | | | | |
| Rep. Wrangham | ✓ | | | | |
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Total (Yes) 12 No 0

Absent 1

Floor Assignment Rep. Klemin

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

REPORT OF STANDING COMMITTEE (410)
February 26, 2003 2:04 p.m.

Module No: HR-34-3531
Carrier: Klemm
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2039: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO NOT PASS
(12 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2039 was placed on the
Fourteenth order on the calendar.

(2) DESK, (3) COMM

Page No. 1

HR-34-3531

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2003 TESTIMONY

SB 2039

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Date

S.B. 2039

Presented by: Illona A. Jeffcoat-Sacco
Director, Public Utilities Division
Public Service Commission

Before: House Judiciary Committee
Honorable Duane DeKrey, Chairman

Date: 26 February 2003

TESTIMONY

Mr. Chairman and committee members, I am Illona Jeffcoat-Sacco, Director of the Public Service Commission's Public Utility Division. The Public Utilities Division administers the Commission's jurisdiction over telephone, gas and electric public utilities in North Dakota. I appear today on behalf of the Commission to oppose SB 2039.

The Commission is very concerned with SB 2039 because the bill would remove the decision making process of the Information Technology Department from the protections provided to interested parties and the public in the Administrative Agencies Practices Act. We believe there is need for public input and oversight of ITD's rulemaking process because the rules ITD promulgates affect agencies, industry and the public.

We have similar concerns that the protections Chapter 28-32 provides to those involved in administrative proceedings will not apply to anyone involved in a proceeding before ITD. It is important that

ITD's rules, decisions and practices be subject to the same standards and review processes that govern all other agencies, and that ITD's processes provide for input from interested parties and the public.

This completes my testimony. I will be happy to answer any questions you may have.

Sal Costa Rickford
Operator's Signature

10/15/03
Date

SB 2039 Testimony
House Judiciary Committee
By: Mike J. Ressler, Deputy CIO
Information Technology Department
February 26, 2003

Good morning Mr. Chairman and members of the committee. My name is Mike Ressler and I am the Deputy CIO with Information Technology Department.

ITD worked with the interim Legislative IT Committee in crafting this language and we support this bill. Senate Bill 2039 does not exempt ITD from the Administrative Agencies Practices Act, but states that information technology standards, policies and guidelines created by ITD are not considered rules. CC 54-59 gives ITD the responsibility and the authority to create such standards and policies. If ITD would ever promulgate rules, we will be required to follow the procedures of this Act.

Before ITD became a department, we were a division of the Office of Management and Budget. During this time our standards and policies were exempt from this Act and through oversight, the exemption was not carried forward when the legislation was changed in 1999.

ITD provides services to government and education. We do not provide direct services to the public and feel there would not be little value, if any, in holding public meetings to gather citizen input prior to establishing information technology standards and policies.

Currently we have existing an enterprise architecture process whereby agency input is gathered in the creation of IT standards and policies. Domain teams are made up of agency personnel (approximately 80 agency staff participate on various teams) with expertise in the technology being reviewed. They provide recommendations for the creation of standards to an architecture review board consisting of 11 agency's IT Directors. After approved by this group or if there is disagreement, an Executive Advisory Committee chaired by Curt Wolfe, the State CIO, and representatives from 15 agency heads have the final decision making authority.

The House Government and Veteran's Affairs Committee has added an amendment to HB 1043, ITD's legislation bill, to have the above committee codified in statute. They have also recommended we add 2 legislators and 1 citizen from the private sector as representatives on the Executive Advisory Committee. We support this recommendation.

If an agency disagrees with a standard or policy they can request a waiver from the State CIO. If denied, their next recourse is to testify in front of the interim Legislative IT Committee who meets quarterly throughout the interim.

This concludes my testimony Mr. Chairman. I would be happy to answer any questions you may have.

Thank you.

CHAPTER 54-59
INFORMATION TECHNOLOGY DEPARTMENT

54-59-01. Definitions. As used in this chapter:

1. "Agency" or "entity" does not include any agricultural commodity promotion group or any occupational or professional board.
2. "Department" means the information technology department.
3. "Information technology" means the use of hardware, software, services, and supporting infrastructure to manage and deliver information using voice, data, and video.
4. "Network services" means the equipment, software, and services necessary to transmit voice, data, or video.

54-59-02. Information technology department - Responsibility. The information technology department is established with the responsibility for all wide area network services planning, selection, and implementation for all state agencies, including institutions under the control of the board of higher education, counties, cities, and school districts in this state. With respect to a county, city, or school district, wide area network services are those services necessary to transmit voice, data, or video outside the county, city, or school district. In exercising its powers and duties, the department is responsible for computer support services, host software development, statewide communications services, standards for providing information to other state agencies and the public through the Internet, technology planning, process redesign, and quality assurance.

54-59-03. Chief information officer of the state. The governor shall appoint the chief information officer of the state. The governor shall appoint the chief information officer on the basis of education, experience, and other qualifications in information technology and administration. The position of chief information officer is not a classified position. The chief information officer serves at the pleasure of the governor. The governor shall set the salary of the chief information officer within the limits of legislative appropriations.

54-59-04. Duties of chief information officer. The chief information officer shall:

1. Administer the department.
2. Employ any personnel determined to be necessary to carry out the responsibilities of the department and duties as prescribed by law.
3. Fix the salaries of all employees within the department, within the limits of legislative appropriation. All personnel within the department are entitled to actual and necessary travel expenses at the same rate as for other employees of the state.

54-59-05. Powers and duties of department. The department:

1. Shall provide, supervise, and regulate information technology of all executive branch state entities, excluding the institutions under the control of the board of higher education.
2. Shall provide network services in a way that ensures the network requirements of a single entity do not adversely affect the functionality of the whole network, facilitates open communications with the citizens of the state, minimizes the state's investment in human resources, accommodates an ever-increasing amount of traffic, supports rapid detection and resolution of problems, protects the network infrastructure from damage and security breaches, provides for the aggregation of data, voice, video,

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and multimedia into a statewide transport mechanism or backbone, and provides for the network support for the entity to carry out its mission.

3. May review and approve additional network services that are not provided by the department.
4. May purchase, finance the purchase, or lease equipment or software or replace, including by trade or resale, equipment or software as may be necessary to carry out this chapter. An agreement to finance the purchase of software, equipment, or implementation services may not exceed a period of three years. The department shall submit any intended financing proposal for the purchase of software, equipment, or implementation services under this subsection, which is in excess of one million dollars, to the budget section of the legislative council before executing a financing agreement. If the budget section does not approve the execution of a financing agreement, the department may not proceed with the proposed financing arrangement. The department may finance the purchase of software, equipment, or implementation services only to the extent the purchase amount does not exceed the amount appropriated to the department during that biennium for equipment. Each executive branch agency or institution, except the institutions under the control of the board of higher education, shall submit to the department, in accordance with guidelines established by the department, a written request for the lease, purchase, or other contractual acquisition of information technology. The department shall review requests for conformance with the requesting entity's information technology plan and compliance with statewide policies and standards. If the request is not in conformance or compliance, the department may disapprove the request or require justification for the departure from the plan or statewide policy or standard.
5. Shall provide information technology, including assistance and advisory service, to the executive, legislative, and judicial branches. If the department is unable to fulfill a request for service from the legislative or judicial branch, the information technology may be procured by the legislative or judicial branch within the limits of legislative appropriations.
6. May request information on or review information technology, applications, system development projects, and application development projects of executive branch agencies.
7. Shall study emerging technology and evaluate its impact on the state's system of information technology.
8. Shall develop guidelines for reports to be provided by each executive branch agency, institution, or department, the institutions under the control of the board of higher education, and agencies of the judicial and legislative branches on information technology in those entities.
9. Shall review the information technology management of executive branch agencies or institutions, including institutions under the control of the board of higher education as provided in section 54-59-13.
10. Shall perform all other duties necessary to carry out this chapter.

54-59-06. Business plan. The department shall develop and maintain a business plan. The business plan must:

1. Define the department's overall organization, mission, and delivery of services.
2. Define the department's short-term and long-term goals and objectives based on customer needs.

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3. Outline the strategies and activities necessary to meet the goals and objectives of the department while improving the efficiency of the department and improving service to customers.
4. Define rates and funding mechanisms necessary to finance the proposed activities of the department.
5. Define a method for evaluating progress toward the goals outlined in the business plan.
6. Determine the specific strategies and processes to ensure that agencies share information, systems, and the statewide network.
7. Address the processes that will be put in place to ensure that the department exercises its powers and duties with minimal delay, cost, and procedural burden to an entity receiving services from the department; to ensure that the department provides prompt, high-quality services to an entity receiving services from the department; to ensure that an entity receiving services from the department is aware of the technology available and to ensure training on its use; and to foster information technology innovation by state entities.

54-59-07. State information technology advisory committee. The state information technology advisory committee consists of the chief information officer or the officer's designee, who is a nonvoting member; the director of the department of commerce division of economic development and finance or the director's designee; the commissioner of higher education or the commissioner's designee; the chairman of the information technology council of North Dakota or a designee; the director of the North Dakota workforce development council or a designee; the chairman of the educational technology council or a designee; and eight members appointed by the governor. The appointees of the governor serve at the pleasure of the governor. The governor shall designate the chairman of the committee. The department shall provide staff services to the committee. Except for the commissioner of higher education and the representatives of state agencies who receive compensation for their duties as state officers or employees, members of the committee are entitled to be compensated for time spent in attendance at meetings of the committee and for other travel as approved by the chairman of the committee at the rate of sixty-two dollars and fifty cents per day and are entitled to reimbursement for their actual and necessary expenses incurred in the same manner as other state officials. The compensation and expenses are to be paid from appropriations for the department. The committee shall advise the department regarding statewide information technology planning, including providing electronic government services for citizens and businesses, developing technology infrastructure to support economic development and workforce training, and developing other statewide information technology initiatives and policy.

54-59-08. Required use of wide area network services. Each state agency and institution that desires access to wide area network services and each county, city, and school district that desires access to wide area network services to transmit voice, data, or video outside that county, city, or school district shall obtain those services from the department. The chief information officer may exempt from the application of this section a county, city, or school district that demonstrates its current wide area network services are more cost-effective for or more appropriate for the specific needs of that county, city, or school district than wide area network services available from the department. The chief information officer shall exempt from the application of this section a county, city, or school district that is under contract to receive wide area network services from an entity other than the department, for the term of that contract, but that political subdivision may not extend or renew that contract beyond July 31, 2001.

54-59-09. Information technology standards. Based on information from state agencies and institutions, the department shall develop statewide information technology policies, standards, and guidelines. Unless an exemption is granted by the department, each executive branch state agency and institution, excluding the institutions under the control of the board of higher education with respect to academic and research uses of information technology,

shall comply with the policies and standards developed by the department. Unless an exemption is granted by the department, each entity receiving wide area network services provided by the department shall comply with the policies and standards developed by the department with respect to access to or use of wide area network services.

54-59-10. Information technology coordinators. Each agency or institution shall appoint an information technology coordinator. The coordinator shall maintain liaison with the department and assist the department in areas related to making the most economical use of information technology.

54-59-11. Information technology plans. Each executive branch state agency or institution, including the institutions under the control of the board of higher education, shall prepare an information technology plan, subject to approval by the department. The plan must be submitted to the department by March fifteenth of each even-numbered year. The plan must be prepared based on guidelines developed by the department; must provide the information technology goals, objectives, and activities of the entity for the current biennium and the next two bienniums; and must include information regarding the information technology assets owned, leased, or employed by the entity. Each entity required to file a plan shall provide interim updates to its plan if major information technology changes occur which affect its plan. The department shall review each entity's plan for compliance with statewide information technology policies and standards and may require an entity to change its plan to comply with statewide policies or standards or to resolve conflicting directions among plans. Agencies of the judicial and legislative branches shall file their information technology plans with the department by March fifteenth of each even-numbered year. Each state entity shall prepare its budget request for the next biennium based on its information technology plan. The agency's budget request and the governor's budget recommendation must include supporting information describing in detail how the information technology plan relates to the budget request and recommendation. Any budget adjustment by the budget office must include the corresponding change to the plan. Based on the plans, the department shall prepare a statewide information technology plan and distribute copies of that plan to members of the legislative assembly as requested by the legislative council or its designee. The statewide information technology plan must be developed with emphasis on long-term strategic goals and objectives.

54-59-12. Coordination of activities - Reports. The department shall cooperate with each state entity providing access to any computer data base or electronically filed or stored information under subsection 4 of section 44-04-18 to assist in providing economical, efficient, and compatible access. The chief information officer shall conduct conferences and meetings with political subdivisions to review and coordinate information technology. The chief information officer and the commissioner of the board of higher education shall meet at least twice each year to plan and coordinate their information technology. The chief information officer and commissioner shall consider areas in which joint or coordinated information technology may result in more efficient and effective state government operations. Upon request, the chief information officer shall report to the legislative council or its designated committee regarding the coordination of services with political subdivisions, and the chief information officer and commissioner shall report to the legislative council or its designated committee regarding their findings and recommendations.

54-59-13. Compliance reviews. The department shall review the information technology management of executive branch state agencies and institutions, including the institutions under the control of the board of higher education, as determined by the chief information officer. The review must include an evaluation of the entity's planning effectiveness, conformance to its information technology plan, compliance with statewide policies and standards, asset quality, and training methods, and for an entity that contracts for information technology services, an analysis of the entity's contract management system and the contractor's compliance with contract provisions. If an agency or institution is found not to be in conformance to its plan or in compliance with statewide policies and standards and does not agree to come into conformance or compliance, the department shall report the issue to the legislative council.

54-59-14. Information technology operating account. The department shall establish a state information technology operating account in the state treasury to be used, in accordance with legislative appropriation, for procuring and maintaining information technology, network services, and central microfilm unit equipment and supplies, and for providing information technology, network services, and central microfilm unit services to state entities and network services to users of the state network. Unless exempted by law, each agency or institution provided with information technology or network services shall pay to the department the charges as determined by the department. The department shall deposit the amounts received in the information technology operating account or the information technology development account, as appropriate.

54-59-15. Acceptance of funds. The department may accept federal or other funds which must be deposited in the information technology operating account and which may be spent subject to legislative appropriation. The department may apply for any public or private grants available for the improvement of information technology.

54-59-16. Confidentiality. The department may receive from various agencies and various agencies may provide to the department any information from the agencies necessary to effect the purposes of this chapter without regard to the confidential nature of the information. Each agency shall notify the department regarding the confidential nature of any information submitted to the department. The department is subject to the same restrictions and penalties regarding the dissemination of this information as the entity involved. Except for a request for access authorized by section 54-10-22.1 or a request to access information collected to carry out section 54-59-09, 54-59-11, or 54-59-13, the department shall refer a request for access to or inspection of information provided by an agency to that agency for response. Referral to the agency satisfies any responsibility of the department to provide that information under open records requirements. Upon court order, the department shall provide access to or inspection of this information in accordance with restrictions of that entity involved governing dissemination of that information.

54-59-17. Educational technology council - Meetings - Compensation.

1. The educational technology council is responsible for coordinating educational technology initiatives for elementary and secondary education.
2. The educational technology council consists of:
 - a. The chief information officer.
 - b. The superintendent of public instruction or the superintendent's designee.
 - c. The commissioner of higher education or the commissioner's designee.
 - d. A representative appointed by the state board for vocational and technical education.
 - e. A representative appointed by the governor from a list of three nominees submitted by the North Dakota association of technology leaders.
 - f. A representative appointed by the governor from a list of three nominees submitted by the North Dakota council of educational leaders.
 - g. A representative appointed by the governor from a list of three nominees submitted by the North Dakota school boards association.
 - h. A representative appointed by the governor from a list of three nominees submitted by the North Dakota association of special education directors.

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- i. Two representatives of school districts, one of which has an enrollment in kindergarten through grade twelve of fewer than four hundred, appointed by the governor.
 - j. The director of technology for the department of public instruction.
 - k. A representative appointed by the governor from a list of three nominees submitted by the state association of non public schools.
- 3. The council shall select a chairman from among its members.
 - 4. The term of office for the members appointed by the governor is four years.
 - 5. The members of the educational technology council appointed by the governor are entitled to receive as compensation sixty-two dollars and fifty cents per day and to reimbursement of expenses as provided by law for state officers while attending meetings of the council.

54-59-18. North Dakota educational technology council - Powers and duties. The educational technology council shall:

- 1. Coordinate the use of technology and the development of technology systems to enhance educational opportunities for elementary and secondary education.
- 2. Cooperate with state agencies and other organizations to develop statewide educational technology systems.
- 3. Adopt bylaws for the conduct of its affairs.
- 4. Publish the informational material it deems necessary.
- 5. Conduct a continuing study to assess the needs, resources, and facilities that are available or which may be required to establish educational technology systems throughout the state.
- 6. Solicit and receive moneys from public and private sources and expend the moneys for educational technology.
- 7. Appoint a technology director who shall serve at the will of the council.
- 8. Hire the director of the division of independent study.

54-59-19. Information technology department annual report. The department shall prepare and present an annual report to the information technology committee. In addition to the presentation of the annual report to the information technology committee, the department shall present a summary of the annual report to the budget section and to the legislative audit and fiscal review committee. The report must contain:

- 1. A list of major projects started, ongoing, and completed during the year including related budgeted and actual costs and the estimated implementation date for each project as well as the actual implementation date for completed projects.
- 2. A list of all projects for which financing agreements have been executed.
- 3. Information regarding evaluations of cost-benefit analyses for completed projects.
- 4. A comparison of the department's rates charged for services compared to rates charged for comparable services in other states and in the private sector.

5. Information regarding the information technology plans including the department's plan review process, the number of plans reviewed, and the number of plans approved.
6. A description of the benefits to the state resulting from its investment in information technology.

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**TESTIMONY OF PATRICK FINKEN
CEO, iNET TECHNOLOGIES, BISMARCK
SENATE BILL 2039
HOUSE JUDICIARY COMMITTEE
FEBRUARY 26, 2003**

Good morning, Mr. Chairman and members of the committee. I am Patrick Finken, owner of iNet Technologies. iNet is a North Dakota-based Web development firm with offices in Bismarck, Minot and Fargo. We have clients across the United States.

I am here to speak in opposition to Senate Bill 2039 – a very brief bill that appears innocuous on the surface, but has the potential to significantly impact private sector information technology companies like mine.

This bill would exempt the Information Technology Department from the state's Administrative Agencies Practice Act. In the Senate it was referred to as a "housekeeping" measure and passed easily. However, since its passage, we have begun to understand its far-reaching implications and potentially significant ramifications for those of us in private industry.

First, if this bill passes, ITD could force all state government agencies to follow information technology rules imposed by ITD. I'm not against some commonality and ITD having control over the state's information technology infrastructure; however, exempting them from the Administrative Agencies Practices Act provides no recourse regarding unnecessary or unduly onerous rules or regulations ITD might impose on state agencies.

Imagine if you will...

That ITD could dictate who provides IT services to state agencies.

That ITD could require state agencies to use their services and prohibit use of private sector companies.

That ITD could charge other agencies whatever they want for their services because they have no competition.

That ITD could implement any policy with impunity.

Again, if this legislation passes, private sector companies and state agencies would be left little recourse or remedy.

Not that I am saying that ITD would impose these types of regulation, but they are already moving state contracts from the private sector into the public sector. ITD is already underbidding private sector companies for state contracts, despite the fact that ITD has an unfair competitive advantage because it is publicly supported through tax dollars.

Passing this legislation has the potential to even further erode the ability of private sector companies like mine to fairly compete for the state of North Dakota's business and could also erode the development of the information technology industry within the state.

So I leave you with this thought:

If ITD's policies and regulations are sound, why do they fear providing not only state agencies, but also private businesses like mine, with a method for recourse?

This legislation is not in the best interest of state agencies, private enterprise or the people of North Dakota. I urge you to kill Senate Bill 2039.

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