

MEMORANDUM

TO: Administrative Rules Committee
Senator Tom Fischer, Chairman

FR: Karlene Fine, Executive Director and Secretary

DT: September 11, 2007

RE: Administrative Agencies Practice Act Exemption

The law provides (Chapter 54-17) that the Industrial Commission (which is made up of the Governor, Attorney General and Agriculture Commissioner) shall conduct and manage, on behalf of the State, certain utilities, industries and enterprises and business projects established by state law. Chapter 28-32 provides that the Industrial Commission is exempt as it applies to the following Industrial Commission entities:

- Bank of North Dakota
- North Dakota Housing Finance Agency
- Public Finance Authority
- North Dakota Mill and Elevator Association
- North Dakota Farm Finance Agency
- North Dakota Transmission Authority
- North Dakota Pipeline Authority

Two of these entities were authorized in 1919 when the Industrial Commission was established – Bank of North Dakota and North Dakota Mill and Elevator Association.

The Public Finance Authority (previously known as the Municipal Bond Bank) was established in 1975. The Public Finance Authority was established for the purpose of making loans to political subdivisions.

The Housing Finance Agency was established by initiated measure in 1980. The Housing Finance Agency, in addition to the most well known program for the first-time homebuyer, also administers several other programs such as the Low Income Tax Credit Program and administers federal assistance contracts for low to moderate-income housing units.

The Farm Finance Agency was created in 1997. This Agency provides an alternative financing mechanism for farmers meeting specific federal guidelines to be eligible to finance the purchase of real estate or equipment through the issuance of bonds.

The Transmission Authority was established by the 2005 Legislative Assembly and the Pipeline Authority was established in 2007. Both of these entities were created with the purpose of meeting the challenges facing our transmission and pipeline industries. Included within the law are provisions to provide financing for construction of either transmission lines or pipelines (builder of last resort).

In addition to the above seven entities the Industrial Commission has jurisdiction in regards to the Department of Mineral Resources (Oil and Gas Division and Geological Survey), Lignite Research Program (1987), North Dakota Building Authority (1985), Oil and Gas Research Program (2003), Renewable Energy Program (2007) and Student Loan Trust (1971).

Of all the entities noted above only the Department of Mineral Resources (Oil and Gas Division and Geological Survey) perform regulatory duties—the issuing of drilling permits, establishing of spacing/drilling units, permitting of geophysical exploration, approving of enhanced oil recovery operations, coal exploration, paleontological resources, geothermal, etc. The Department of Mineral Resources as a regulatory agency does follow the rulemaking provisions of NDCC Chapter 28-32 and the adjudicative proceedings of Chapter 28-32.

As noted above the majority of the agencies under the jurisdiction of the Industrial Commission deal with finance – Bank of North Dakota, Housing Finance Agency, Public Finance Authority, North Dakota Building Authority, Farm Finance Agency, Student Loan Trust, Transmission Authority and Pipeline Authority. Three of the programs involve the distribution of special funds for research, development and marketing programs – Lignite Research, Development and Marketing Program; Oil and Gas Research Program and the most recently established Renewable Energy Program. The State Mill is a state entity in the business of buying wheat and milling the grain into valued added wheat products.

In regards to the Commission's regulatory functions, the Commission believes it is appropriate that the decisions the Commission makes are subject to both the rulemaking provisions and the adjudicative proceedings provisions of Chapter 28-32. In regards to the agencies and programs that provide financing opportunities (either through loans, grants or investments) for North Dakota citizens and political subdivisions or is a business or enterprise, the Commission requires an exemption. In administering these programs the Commission must have the flexibility to react to the marketplace – whether that is in the determination of loan rates and loan conditions or the development of programs to meet specific needs – such as a disaster loan program for a community such as Northwood after the recent tornado or Grand Forks after the flood.

Does the Industrial Commission require exemption from the rulemaking provisions of NDCC Chapter 28-32, the adjudicative proceedings provisions of Chapter 28-32, or both?

Yes, the Industrial Commission does require an exemption in regards to its financing/economic development programs in both the rulemaking provisions and in the adjudicative proceedings.

Please explain.

In administering these programs the Commission must have the flexibility to quickly react to the marketplace and changing conditions – whether that is in the determination of loan rates/conditions or the development of programs to meet specific needs. Without the exemptions the entities could not effectively conduct their business and could spend their time in adjudicative proceedings—for instance if an individual was turned down for a loan or a grant or if an agency is bogged down in rulemaking procedures either in amending their rules or when establishing a new program to meet the needs of our citizens.

Does the Industrial Commission make any rules, for the purposes other than internal management, which are of general statewide application and might affect rights or duties of persons outside your agency?

Yes, in regards to the regulatory functions administered by the Department of Mineral Resources.

Please explain.

In regards to the Commission's financial programs policies have been developed by the Commission in how the entities will administer those programs—this includes loan conditions, rates, processes for reviewing applications, etc.

Does the Industrial Commission hold hearings to act on complaints, applications or appeals?

Yes, in regards to the regulatory functions administered by the Department of Mineral Resources.

If so, what rules govern the conduct of the hearing and rights of the parties?

The Commission follows the Administrative Agencies Practices adjudicative proceedings provisions, as supplemented by provisions in chapter 38-08 of the Century Code and Chapter 43-02-03 of the Administrative Code.

Do you believe the exemption for your agency under subsection 2 of NDCC Section 28-32-01 should be continued unchanged, modified or eliminated?

Yes, we believe that the exemption should continue unchanged.

If you have any questions, please contact me at 328-3722 or by e-mail at kfine@nd.gov.

Karlene