

December 30, 2005

The Public Service Commission convened in the Commission Hearing Room, State Capitol, Bismarck, North Dakota, on December 30, 2005, 10:00 a.m. Present were Commissioners Clark, Wefald, and Cramer.

Minutes

Mr. Cramer: I move the minutes of December 14 and 20, 2005, be approved.

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

Bills

Mr. Cramer: I move the following bills, as reviewed by the Commission, be approved and paid:

ND Newspaper Association	2,469.37
Liberty Consulting Group	1,008.26
Cellular One	279.18
Lou Ogaard	66.50
Bill Eide	380.06
Leo D. Praus	656.68
Phyllis G. Richter	173.52
JP Robbins	406.25
Rick Fillbrandt	168.50
DOT	16,281.68
OMB	120.00
DOT	24.52
OMB – ups	4.74

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

Case No. PU-05-575  
Public Utilities - Telephone  
Rulemaking  
Admission to Practice

Mr. Cramer: I move the Commission admit attorney Mark J. Ayotte to practice before the Commission in Case No. PU-05-575, Public Service Commission, Public Utilities – Telephone, Rulemaking.

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

Case No. PU-05-597  
Otter Tail Corporation  
Tom Nicolai, Cooperstown, ND  
Public Convenience & Necessity

Mr. Cramer: I move the Commission adopt the Order and issue a Certificate of Public Convenience and Necessity authorizing Otter Tail Power Corporation to extend electric service to Thomas Nicolai for a residential site near Cooperstown, North Dakota, Case No. PU-05-597.

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

Case No. PU-05-603  
Montana-Dakota Utilities Co., a  
Division of MDU  
Dakota Prairie Beef, Scranton, ND  
Public Convenience & Necessity

Mr. Cramer: I move the Commission adopt the Order and issue a Certificate of Public Convenience and Necessity authorizing Montana-Dakota Utilities Co. to extend electric service to Dakota Prairie Beef for a feedlot site near Gascoyne, North Dakota, Case No. PU-05-603.

Mr. Clark: I second the motion.  
Roll Call: All voting "Aye."

Case No. PU-05-619  
Montana-Dakota Utilities Co., a  
Division of MDU  
Gerald & Janice Nitschke, Mandan, ND  
Public Convenience & Necessity

Mr. Cramer: I move the Commission adopt the Order and issue a Certificate of Public Convenience and Necessity authorizing Montana-Dakota Utilities Co. to extend electric service to Gerald & Janice Nitschke for a residential site near Mandan, North Dakota, Case No. PU-05-619.

Mr. Clark: I second the motion.  
Roll Call: All voting "Aye."

Case No. RC-05-644  
Falkirk Mining Company  
Reclamation Extension 24, Permit 40  
Approval

Mr. Cramer: I move the Commission approve Reclamation Extension No. 24 for Surface Coal Mining Permit No. 40, held by the Falkirk Mining Company, to extend the reclamation period on 24.52 acres of reclaimed land at the Falkirk Mine until December 31, 2006.

Mr. Clark: I second the motion.  
Roll Call: All voting "Aye."

Case No. PU-05-325  
North Dakota Telephone Company  
Local Exchange  
Tariff

Mr. Clark: I move the Commission adopt the Findings of Fact, Conclusions of Law and Order approving North Dakota Telephone Company's local exchange tariffs, Case No. PU-05-325.

Mr. Cramer: I second the motion.  
Roll Call: Mr. Clark votes "Aye".

Mrs. Wefald votes "Nay".  
Mr. Cramer votes "Aye".

Commissioner Wefald's  
Dissenting Opinion

Mrs. Wefald: North Dakota Telephone Company did not put enough information on the record to make a determination that the rates proposed are just and reasonable. Therefore, I am voting no.

This is not a rate case involving income, expenses, and rate of return. This is a case regarding rate design. In this case, North Dakota Telephone Company would like to make changes to its rates that they state are revenue neutral to the company. I agree that these rates are revenue neutral to the company, but these rate changes are not cost neutral to groups of customers. For example, the company wishes to raise the rates of all residential customers in both East and West

Commissioner Wefald's  
Dissenting Opinion Cont.

exchanges and substantially lower the rates of all farm home-business customers in the same exchanges.

The Commission has a responsibility to customers to provide just and reasonable rates. In this case, the testimony at the hearing indicated that the company chose to set rates based on their perceptions of "competition" from cellular phone service. For example, James Edward Howard, Jr. stated that the company decided to offer farmers a residential rate, and get rid of a "combination business and residential rate" based on the concept that they were losing farm customers to cellular service, and wanted to keep them on some line based service.

At the present time, North Dakota Telephone Company's rates are under the jurisdiction of the Commission. On September 7, 2005, the Commission issued a "Notice of Hearing." Two issues were listed:

1. Whether the rates and charges proposed by NDTC are just and reasonable.
2. Whether the rules and regulations proposed by NDTC affecting its rates and services are just and reasonable.

Generally, a company offers the Commission a cost of service study, which guides the Commission in making decisions about allocating costs to particular groups of customers. A cost of service study provides important information for the Commission to consider as it determines just and reasonable rates and charges. In this case, no cost of service study was prepared by North Dakota Telephone Company for the Commission to consider.

The changes proposed for different customer classes may be fair, but I do not have enough information on the record to support making these changes. The company has not met its burden of proof in this matter.

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Susan E. Wefald, Commissioner

Case No. PU-05-653  
North Dakota Network Co.  
Designated Eligible Carrier  
Application  
Notice of Opportunity

Mr. Clark: I move the Commission issue a Notice of Opportunity for Hearing and Notice of Informal Hearing in North Dakota Network Co.'s application for designation as an eligible carrier in North Dakota, Case No. PU-05-653.

Mr. Cramer: I second the motion.

Roll Call: All voting "Aye."

Case No. GE-05-663  
Shafer Seed Company  
License No. 243 - Oakes, ND  
Suspension/Revocation

Mr. Clark: I move the Commission issue an order in Case No. GE-05-663 automatically suspending warehouse license number 243 of Shafer Seed Company, Oakes, North Dakota, effective December 27, 2005, for lack of an adequate bond filing.

Mr. Cramer: I second the motion.

Roll Call: All voting "Aye."

Case No. PU-05-279  
Otter Tail Corporation  
Power Purchase/Rule Standard  
Deviation  
Application  
Dismissing Proceeding

Mrs. Wefald: I move the Commission adopt the Order dismissing, without prejudice, Otter Tail Corporation's Power Purchase/Rule Standard Deviation application, Case No. PU-05-279.

Mr. Cramer: I second the motion.

Roll Call: All voting "Aye."

Case No. PU-05-551  
Capital Electric Cooperative Inc. vs  
Montana-Dakota Utilities Co.  
Complaint  
Notice of Rescheduled Hearing

Mrs. Wefald: I move the Commission issue a Notice of Rescheduled Hearing in Case No. PU-05-551 Capital Electric Cooperative, Inc. vs. Montana-Dakota Utilities Co.

Mr. Cramer: I second the motion.

Roll Call: All voting "Aye."

Case No. PU-05-645  
Montana-Dakota Utilities Co., a  
Division of MDU  
January 2006  
Cost of Gas Adj./Natural Gas

Mr. Cramer: I move the Commission approve Montana-Dakota Utilities Co.'s Natural Gas Cost of Gas Adjustment for January 2006, Case No. PU-05-645.

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

Case No. PU-05-646  
Montana-Dakota Utilities Co., a  
Division of MDU  
January 2006  
Cost of Gas Adjustment/Propane

Mr. Cramer: I move the Commission approve Montana-Dakota Utilities Co.'s propane Cost of Gas adjustment for January 2006, Case No. PU-05-646.

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

Testing & Safety Division  
Procedures and Enforcement Guides  
Section II  
Weights & Measures/Metrology  
Guidelines Amendments  
and  
PSC Drug and Alcohol Misuse  
Prevention Policy and Plan  
Revisions

Mrs. Wefald: I move the Commission approve the 2005 amendments to the Testing & Safety Division's Procedures and Enforcement Guides (Section II – Weights & Measures/Metrology); and the related amendments to the Commission's Drug and Alcohol Misuse Prevention Policy and Plan.

**DRUG AND ALCOHOL MISUSE PREVENTION  
POLICY AND PLAN**

**PURPOSE**

This policy outlines the drug and alcohol testing program which applies to all Commission employees who hold a North Dakota Commercial Drivers License (CDL) and actively operate state-owned commercial

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motor vehicles.

#### SECTION I: INTRODUCTION

#### A. DRUG AND ALCOHOL MISUSE PREVENTION POLICY

1. The Public Service Commission has a long-standing commitment to maintain the highest standards for employee safety and health and to help prevent accidents/injuries resulting from the misuse of controlled substances and alcohol by employees who perform "safety-sensitive functions.
2. In addition, the Public Service Commission must comply with all U.S.D.O.T. regulations, applicable to persons currently holding commercial drivers licenses (CDL) and operating "commercial vehicles" on interstate or intrastate roadways, which require affirmative actions to eliminate the impact of the misuse of controlled substances and alcohol in the workplace. The purpose of this Drug and Alcohol Misuse Prevention Policy and Plan is to reduce accidents that result from the misuse of controlled substances and alcohol, thereby reducing fatalities, injuries, and damage to property.
3. **The use or possession of a controlled substance at any time or any place while in the employ of the Public Service Commission is strictly prohibited, unless that substance has been currently prescribed by a licensed physician and meets the requirements set forth in this plan.**
4. **The use or possession of alcoholic beverages while in a State Vehicle or while on duty, including breaks, lunch (paid or unpaid), or as otherwise outlined in this plan is strictly prohibited.**
5. The Drug and Alcohol Misuse Prevention Plan contained herein sets forth the requirements of 49 CFR Part 382 and 40. *Those areas of the Plan that appear in italics reflect the Public Service Commission's independent authority to require additional provisions with regard to the drug and alcohol testing procedures.*

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- B. IMPLEMENTATION OF THE DRUG AND ALCOHOL MISUSE PREVENTION PLAN
1. The Public Service Commission shall implement the U.S.D.O.T.'s Controlled Substances and Alcohol Use and Testing requirements as set forth in 49 CFR Part 382, and the U.S.D.O.T.'s Procedures for Transportation Workplace Drug and Alcohol Testing Program requirements as set forth in 49 CFR Part 40.
  2. The privacy/confidentiality of any covered employee subject to this plan shall be maintained at all times.
  3. Implementation of this Drug and Alcohol Misuse Prevention Plan shall be effective on January 1, 1995.
- C. BACKGROUND
1. The authority for the promulgation of rules by the U.S.D.O.T. was provided for under 49 U.S.C. App. 2717, Section 12020(e)(1) of the Omnibus Transportation Employee Testing Act of 1991.
  2. The catalyst for the Drug and Alcohol Misuse Prevention Plan are the rules established under Title 49 Code of Federal Regulations (CFR) Part 382, which requires Public Service Commission employees who currently hold a commercial drivers license (CDL) issued by the North Dakota Department of Transportation to operate motor vehicles classified as "commercial" on behalf of the Public Service Commission, to test for misuse of controlled substances and alcohol under the following work-related conditions: Pre-employment, Post-accident, Random, Reasonable Suspicion, Return-to Duty, and Follow-Up.
  3. The rules established under Title 49 Code of Federal Regulations (CFR) Part 40, specify procedures which must be followed by the Public Service Commission and its Consortium Contractor when conducting drug and alcohol testing.
- D. PREEMPTIVE PROVISIONS
1. Except as provided for in paragraph D-2. below, 49 CFR Part 382 preempts any

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state or local law, rule, regulation, or order to the extent that: compliance with both the state or local requirement and 49 CFR Part 382 is not possible, because it is an obstacle to the accomplishments and execution of this federal requirement.

2. This Plan shall not be construed to preempt provisions of state criminal law that imposes sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, as it applies to Public Service Commission employees covered under this Plan.
3. Nothing in this Plan shall be construed to affect the authority of the Public Service Commission or the rights of its employees with respect to the possession or use of controlled substances and alcohol, including authority or rights with respect to testing and rehabilitation.

E. DEFINITIONS

1. **“Commission”** means the North Dakota Public Service Commission.
2. **“alcohol”** means the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols such as methyl alcohol and isopropyl alcohol.
3. **“alcohol use”** means the consumption of any beverage, mixture, or preparation, including medication, containing alcohol.
4. **“positive alcohol test”** means a breath alcohol test result that indicates alcohol presence of 0.04 or greater; if an alcohol test indicates alcohol presence of at least 0.02 but less than 0.04, the test will be considered negative, but the driver will be removed from duty for a least 24 hours.
5. **“alcohol confirmation test”** means a second alcohol breath test taken 15 minutes after the first positive alcohol breath test to confirm that first positive test.
6. **“controlled substance” or “drug”** means substances, whether actual or a derivative of: marijuana, cocaine, opiates, amphetamines, or phencyclidine (PCP).
7. **“drug use”** means the consumption or bodily introduction of any mixture or preparation (including medication

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- prescribed by a licensed physician not meeting the requirements of this Plan) that is defined as a controlled substance by this Plan.
8. **“positive drug test”** means an MRO confirmed-positive test result showing an indication of an illegal controlled substance, or an unacceptable level of certain prescribed controlled substances in a driver’s urine specimen.
  9. **“MRO confirmed-positive test”** means that a medical review officer at the certified testing laboratory will confirm a drug test positive by complete examination of all parameters used in the acquisition, identification, transport, storage, testing, and quality control of the specimen in question, including an interview with the driver receiving the positive test.
  10. **“commerce”** means any trade, traffic, or transportation within or between any state of these United States.
  11. **“commercial motor vehicle”** (for Commission use) means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle: 1) has a gross combination weight rating of 26,001 or more pounds inclusive of a towed unit with a gross vehicle weight rating of more than 10,000 pounds; or 2) has a gross vehicle weight rating of 26,001 or more pounds.
  12. **“driver”** means any person holding a commercial drivers license (CDL) who operates a commercial motor vehicle on behalf of the Commission, including full-time, regularly employed weights and measures inspectors, or part-time weights and measures inspectors, or stand-by weights and measures inspectors; or, a person applying for a position in any of the above categories.
  13. **“safety-sensitive function”** means an operation (driving) or maintenance (mechanical) function performed in or on a commercial motor vehicle by a person holding a CDL.

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14. **“performing a safety-sensitive function”** means a driver who is performing, ready to perform, or immediately available to perform a safety-sensitive function.
15. **“consortium”** means an entity, group, or association of employers, contractors, or agencies that provide drug and alcohol testing services, and acts on behalf of the individual employers, contractors, or agencies.
16. **“substance abuse professional” (SAP)** means a licensed physician, licensed or certified psychologist, social worker, employee assistance professional (EAP), or NAADC-certified addiction counselor with knowledge in the diagnosis and clinical treatment of drug and alcohol-related disorders.
17. **“breath alcohol technician” (BAT)** means an individual who instructs and assists persons in the alcohol testing process and operates the EBT.
18. **“collection site technician” (CST)** means an individual who instructs and assists persons in the drug testing process.
19. **“evidential breath testing device” (EBT)** means a device approved by the National Highway Traffic Safety Administration for the evidential measurement testing of breath.
20. **“collection site”** means a place designated by the consortium contractor where drivers present themselves for the purpose of providing drug or alcohol specimens in the form of urine or breath.
21. **“chain of custody”** means a procedure to account for the integrity of a specimen by tracking its handling from the point of origin (collection) to final disposition.
22. **“certified laboratory”** means any testing laboratory certified by the U.S. Department of Health and Human Services (DHHS) to receive, store, and analyze specimens under 49 CFR Part 40.
23. **“medical review officer” (MRO)** means a licensed physician who has knowledge

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of substance abuse disorders and has appropriate medical training to interpret and evaluate laboratory test results generated from a drug testing program.

24. “**accident**” means an incident involving a commercial motor vehicle in which there is a death, or where a Commission driver was cited for a moving traffic violation arising from an accident, even if there was no death resulting from that accident.

F. COMMISSION RESPONSIBILITIES

1. Alan Moch, Director, Testing and Safety Division, shall be designated as the Commission’s Testing Program Manager (TPM). Alan Moch’s telephone number is 328-2413. Kevin Hanson, Assistant Director, Testing and Safety Division, shall be designated as Alan Moch’s alternate, and should be contacted in the event Alan Moch is not otherwise available. (NOTE: IF KEVIN HANSON IS SCHEDULED FOR TESTING AND ALAN MOCH IS NOT AVAILABLE, THEN ILLONA JEFFCOAT-SACCO, COMMISSION EXECUTIVE SECRETARY, SHALL BE THE ALTERNATE.)
2. The TPM shall be responsible for the preparation and maintenance of the Commission’s Drug and Alcohol Misuse Prevention Plan which must comply with the requirements of 49 CFR Parts 382 and 40.
3. The TPM shall also be responsible for providing oversight and evaluation of the Plan; providing guidance and counseling with regard to the administration of the Plan; reviewing all discipline applied under this Plan with the Executive Secretary of the Commission for consistency and conformance to Commission human resource policy and procedure, and in the referral of employees for evaluation and treatment; working with the Program Manager in the payment of consortium vendor fees and positive drug test disciplinary actions; and in the maintenance of test records and annual reports.
4. The TPM, or his alternate, shall be

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- responsible for contacting Commission drivers approximately two hours prior to their scheduled drug and/or alcohol test and ensuring that they report to the designated N.D.D.O.T collection site for testing.
5. *Paul Feyereisen, Manager, State Fleet Services, shall be designated as the Program Manager (PM). Paul Feyereisen's telephone number is 328-2543.*
  6. *The PM shall be responsible for the acquisition of and liaison to the consortium vendor, who provides drug and alcohol collection and testing services and record keeping services according to the provisions under 49 CFR Parts 382 and 40; the PM will coordinate the required drug and alcohol training for supervisors and drivers; the PM is also the State liaison to the U.S.D.O.T.*
  7. *The Consortium Vendor (CV), shall be CareerCare, Box 5505, Bismarck, North Dakota 58506-5505. The Vendor may be contacted at 701-323-8670.*
  8. *The CV shall be responsible for the overall administration of the consortium's drug and alcohol testing program in that the CV shall provide the following: drug and alcohol test scheduling (for all types of required tests), collection sites and personnel, certified laboratory services, MRO services, EAP referral services, secure record keeping services, annual report submittal services, and any other services required to properly administer the State Consortium's drug and alcohol testing program as per 49 CFR Parts 382 and 40.*
  9. *All employee inquiries or complaints shall be made through the Commission via the TPM.*
  10. The individuals responsible for observing the performance and behavior of Commission drivers; for observation and documentation of events suggestive of reasonable suspicion; and for assisting in the determination of post-accident testing, shall be Alan Moch, Director, Testing and

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Safety Division and Kevin Hanson, Assistant Director, Testing and Safety Division.

G. EMPLOYEE NOTIFICATION

1. The Commission shall ensure that each employee to be drug and alcohol tested under this Plan shall be notified and made aware of the requirements of its drug and alcohol testing program.
2. Employee notification shall be made by: providing training for applicable Commission employees during the month of December, 1994, at various locations throughout the State, through the North Dakota Department of Transportation's Alcohol and Drug Testing Training Seminars; providing each applicable Commission employee with a copy of the Commission's Drug and Alcohol Misuse Prevention Policy and Plan by no later than December 31, 1994; and by posting a copy of that Plan on the bulletin board located in the Testing and Safety Division facility at the Capitol Grounds, Bismarck, North Dakota by no later than December 31, 1994
3. In addition, the Commission shall distribute to each applicable employee written educational materials explaining drug and alcohol misuse, how it impacts on an individual's health, work, and personal life, how to detect signs and symptoms of drug or alcohol problems, and EAP referral information.
4. Each employee will be asked to acknowledge the above notification requirement by signing a document stating that they have received and read a copy of the Commission's Drug and Alcohol Misuse Prevention Policy and Plan.
5. Any newly hired Commission employee who is subject to drug and alcohol testing under this Plan shall receive all of the notification requirements under this part.

SECTION II - EMPLOYEE DRUG AND ALCOHOL TESTING PROVISIONS

A. APPLICABILITY

1. Only Commission employees who

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currently hold a CDL, and are actively operating a commercial motor vehicle shall be subject to drug and alcohol testing under the provisions of this Plan.

2. Each Commission employee who, in addition to holding a CDL, is also in a supervisory position, shall attend the minimum required drug and alcohol training as outlined in the "Required Training" section of this Plan.
3. Each Commission employee who supervises employees under paragraph 1 and 2 above, and who is responsible for observing the performance and behavior of those employees while performing safety-sensitive functions for observation and documentation of events suggestive of reasonable suspicion, shall attend the minimum required drug and alcohol training as outlined in the "Required Training" section of this Plan.
4. The following is a list of Commission employees and their titles who are currently subject to drug and alcohol testing under this Plan:
  - Kevin Hanson, Assistant Director,
  - Wayne Grangaard - Eastern Region Heavy-Duty Weights and Measures Inspector
  - J.P. Robbins - Northeastern Region Light-Duty Weights and Measures Inspector
  - Leo Praus - Western Region Light-Duty Weights and Measures Inspector
  - William Eide - Western Region Heavy-Duty Weights and Measures Inspector
5. The following is a list of Commission supervisors and their titles requiring minimum drug and alcohol training under the provisions of this Plan:
  - Alan Moch - Director, Testing and Safety Division
  - Kevin Hanson, Assistant Director, Testing and Safety Division

## B. PROHIBITED ACTIONS

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1. **Alcohol concentration:** No driver shall report for duty or remain on duty while having an alcohol concentration of 0.04 or greater. No supervisor having actual knowledge of the above shall permit the driver to perform or continue to perform any safety-sensitive function.
2. **Alcohol possession and use:** No driver shall operate a commercial motor vehicle or be on duty while possessing or using alcohol. No supervisor having actual knowledge of the above shall permit the driver to perform or continue to perform any safety-sensitive function.
3. **Pre-duty use:** No driver shall perform any safety-sensitive function within 4 hours after using alcohol. No supervisor having actual knowledge of the above shall permit the driver to perform or continue to perform any safety-sensitive function.
4. **Post-accident use:** No driver who, under the provisions of this Plan, is required to take a post-accident test shall use alcohol for eight hours following the accident, or until that driver undergoes a post-accident test, whichever occurs first.
5. **Drug Use**
  - a. No driver shall report for duty or remain on duty if that driver tests positive for drugs. No supervisor having actual knowledge of the above shall permit the driver to perform or continue to perform any safety-sensitive function.
  - b. Notwithstanding subparagraph a) above, a driver may use a controlled substance while on duty when its current use is pursuant to the instructions of a licensed physician who has advised the driver that the substance does not adversely affect the drivers ability to safely operate a commercial motor vehicle.
6. **Drug test results:** No driver shall report for duty or remain on duty if that driver tests positive for drugs. No supervisor having actual knowledge of the above

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shall permit the driver to perform or continue to perform any safety-sensitive function.

7. **Refusal to submit to a drug or alcohol test:** No driver shall refuse to submit to any of the required drug or alcohol tests listed in this Plan. No supervisor shall permit a driver who refuses to submit to such tests to perform or continue to perform any safety-sensitive function.

C. TYPES OF TESTING REQUIRED

1. Pre-Employment Testing
  - a. Prior to final Commission approval of employment, the driver-applicant shall undergo both a drug and alcohol pre-employment test. If either test results in a positive (0.02 or greater, for alcohol and/or an MRO-verified positive for drugs), the driver-applicant will not be approved for Commission employment.
  - b. The driver-applicant shall be exempt from this test provided he or she was drug and alcohol tested under recent previous employment and received no positive test results, as provided for under 49 CFR Part 382.301(b) and (c).
2. **Post-accident testing:** Any Commission driver involved in an accident (as defined in the "definition section" of this Plan), shall be required to undergo a drug and alcohol test as soon thereafter as practicable.
  - a. However, if an alcohol test is not administered within 2 hours of the accident, a record shall be made and maintained stating the reasons why.
  - b. If a drug test is not administered within 32 hours of the accident, a record shall be made and maintained for possible submittal to the Federal Highway Administration stating the reasons why.
  - c. A driver who is subject to this test

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shall remain readily available for such testing, or may be deemed by the Commission to have refused to submit to the test. Nothing in this section shall be construed to require the delay of necessary medical attention for any injured persons following an accident, up to, and including leaving the scene to acquire emergency medical care; or to obtain medical or law enforcement response assistance to the accident.

- d. The results of any drug or alcohol tests administered to drivers by federal, state, or local officials having independent authority over the accident, shall be considered to meet the requirements of this section.
  - e. This section of the Plan shall be considered special post-accident information and procedure, and shall be copied and kept in the various Commission commercial motor vehicles at all times.
3. Random Testing
- a. Unless otherwise published in the Federal Register as per 49 CFR Part 382.385(b) and (c), the minimum annual percentage rate for random alcohol testing shall be 25% of the average number of drivers participating in the State Consortium.
  - b. The minimum annual percentage rate for random drug testing shall be 50% of the average number of drivers participating in the State Consortium.
  - c. The CV shall ensure that the selection of drivers for random testing shall be made by a scientifically valid method, such as a random number table of a computer-based random number generator that is matched with drivers social security numbers,

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- giving each driver an equal chance of being tested each time selections are made.
- d. The CV shall ensure that random tests are unannounced and that the test selection dates are spread reasonably throughout the calendar.
  - e. The Commission shall require each of its drivers who are notified of selection for random testing to proceed to the nearest test collection site immediately, regardless of whether or not the driver is currently on duty and performing a safety-sensitive function.
  - f. **NOTWITHSTANDING SUBPARAGRAPH (e).A DRIVER SHALL ONLY BE TESTED FOR ALCOHOL WHILE THAT DRIVER IS PERFORMING, JUST BEFORE THE DRIVER IS TO PERFORM, OR JUST AFTER THE DRIVER HAS PERFORMED A SAFETY-SENSITIVE FUNCTION.** No Commission driver shall be required to test for drugs or alcohol during sick leave, annual leave, or on their days off.
4. Reasonable Suspicion
- a. A Testing and Safety Division supervisor who has received the required minimum training outlined in this Plan, shall require a driver to submit to drug or alcohol testing when that supervisor has reasonable suspicion that the driver has violated the "Prohibited Action" section of this Plan.
  - b. Reasonable suspicion shall be based upon specific and articulable observations concerning the appearance, behavior, or body odor of the driver, and may also include indications of the chronic effects or withdrawal effects of drugs.
  - c. Drivers who are in possession of

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- alcohol but have not exhibited any of its symptoms of misuse shall not be required to submit to reasonable suspicion testing; *but may be subject to other disciplinary action.*
- d. Alcohol testing is authorized under this section only if observations are made during, just preceding, or just after the period of the work day that the driver is required to be in compliance.
  - e. If an alcohol test is not administered within 2 hours of the requirement in subparagraph d), a record shall be made and maintained stating the reasons why.
  - f. If an alcohol test is not administered within 8 hours of the requirement in subparagraph d), the record under subparagraph e) shall be updated and maintained on file.
  - g. Notwithstanding the absence of a reasonable suspicion test, no driver shall report for duty, or remain on duty under the influence of or impaired by alcohol, nor shall a supervisor permit a driver to perform or continue to perform a safety-sensitive function until either an alcohol test is administered and the results measure less than 0.02; or, until 24 hours have elapsed following the determination that there is reasonable suspicion.
  - h. Except as provided for in subparagraph (g) above, no supervisor shall take action under this section based solely on a driver's behavior and appearance, with respect to alcohol use, in the absence of an alcohol test.
  - i. A written record of any observations made under this section shall be made and signed

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by the supervisor within 24 hours of those observations, or before the test results are released, whichever comes first.

5. Return-to-Duty Testing
  - a. The Commission shall ensure that before a driver returns to duty requiring the performance of a safety-related function after engaging in conduct prohibited under this Plan, whether it be related to drugs or alcohol, the driver undergo a return-to-duty test.
  - b. Return-to-duty alcohol test results must be below 0.02.
  - c. Return-to-duty drug test results must indicate a verified negative.
6. Follow Up Testing
  - a. After a determination by an SAP that a driver is in need of assistance to resolve problems associated with either drug or alcohol misuse, the Commission shall ensure that the driver is subject to unannounced follow-up testing, as directed by the SAP.
  - b. Follow-up testing shall be conducted only during, just before, or just after the subject driver performs a safety-related function.

**D. TEST RESULTS - NOTIFICATION**

1. If a drug test result indicates a positive, then prior to confirming that test as positive, the MRO shall contact the Commission driver directly and interview that driver as to reasons why the test may be positive. Once the MRO confirms the test as positive, the driver shall, at that time, be given the opportunity to have their split-sample sent to an independent DHHS-certified laboratory (at the driver's expense) for a second test. (A split-sample is a urine sample taken from the driver at the collection site, divided into two samples before being forwarded to the laboratory: one at 30 ml to be used for the initial test, and one at 15 ml to be used for confirmation of a positive test.)

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2. If the MRO is unable to make contact with the driver, then within 3 working days, the MRO must contact the TPM (either directly or through the CV), by using any type of communications device. However, the MRO must also submit a written verification of the positive drug test result to the CV containing the following information: name of the individual tested, that the test was conducted in accordance with 49 CFR Part 40, the type of test conducted, the date and location of the specimen collection, the names of the personnel who collected and tested the specimen, the results of the test (positive or negative), if positive - the name of the drug(s) found, a brief statement concerning the details of the MRO's efforts to contact the driver, and the MRO's name.
3. The TPM or the vendor shall in all cases where the MRO fails to make contact with a driver, contact the driver and request that the driver contact the MRO prior to dispatching, or within 24 hours, whichever is earlier.
4. All alcohol test notifications will be given to the driver at the testing site, with the same results forwarded to the TPM by the vendor.
5. Federal law requires that the Commission release the results of any driver tests, any driver referral for evaluation or rehabilitation, and the results of those referrals, to any perspective employer upon written request by that employer. Prior to the release of any testing information, the Commission will obtain the necessary written consent from the driver. In addition, the Commission may choose to obtain the same testing information from any applicant's previous employer and consider that information in the hiring process.

## E. DISCIPLINARY ACTIONS

1. *A driver who receives a MRO-verified positive drug test or uses a prescription drug contrary to a physician's directions while on duty shall be referred to the*

Policy Continued

- Commission's EAP program and terminated immediately.*
2. *A driver who receives an alcohol test result that has a concentration of 0.08 or greater shall be referred to the Commission's EAP program and terminated immediately.*
  3. A driver who receives an alcohol test result that has a concentration at or greater than 0.02 shall not be permitted to perform a safety-sensitive function or continue to perform a safety-sensitive function.
  4. A driver who has violated the rules on alcohol misuse or who refuses to submit to testing shall not be permitted to perform a safety-sensitive function or continue to perform a safety-sensitive function until that driver has:
    - a. Been evaluated by a SAP via the Commission's Employee Assistance Program to determine whether that driver is in need of assistance in resolving problems related to alcohol use.
    - b. Completed any treatment recommended by the SAP.
    - c. Been evaluated by a SAP to ensure that the driver has properly followed the treatment program.
    - d. Undergone a return-to-duty alcohol test with resulting concentration results of less than 0.02.
  5. *The following actions apply to all applicants:*
    - a. *An applicant receiving a MRO-verified positive drug test will not be hired.*
    - b. *An applicant receiving an alcohol concentration test result at 0.02 or more will not be hired.*
    - c. *An applicant who refuses to be drug or alcohol tested will not be hired.*
    - d. *An applicant will be notified by certified mail of the results of the applicant's drug and alcohol tests within 60 days of those tests.*

Policy Continued

6. *The following actions apply to all probationary drivers:
  - a. *A driver must comply with paragraphs 1. through 4. above.*
  - b. *A driver receiving an alcohol concentration test result at 0.04 or more will be referred to the Commission's EAP and terminated immediately**
7. *The following actions apply to all drivers, whether probationary or permanent: a driver who is removed from duty or required to refrain from duty because of an alcohol concentration test result between 0.02 and 0.039 may have the option of taking the required 24 hours off by using annual leave (if available) or leave without pay.*
8. *A driver possessing alcoholic beverages while on duty shall be subject to disciplinary actions as outlined in the Commission's personnel policy guidelines (i.e.: letter of disciplinary action into their personnel file, leave without pay, possible referral to the EAP, etc.).*
9. *A driver possessing controlled substances without a current prescription from a licensed physician shall be referred to the Commission's EAP for evaluation.*
10. *A driver who, after returning to duty following a negative return-to-duty alcohol test, has been placed on follow-up testing by a SAP and then receives an alcohol concentration follow-up test result at or above 0.04, shall be terminated immediately.*
11. *Notwithstanding the above italicized paragraphs, and in order to determine the appropriate disciplinary action against a driver referred to EAP for evaluation. Disciplinary action will be determined by the Executive Secretary of the Commission after considering the following: the severity of the violation, the degree of danger to other Commission employees and the general public, and the history of previous violations.*

Policy Continued

- F. OUT-OF-SERVICE REQUESTS/EAP SELF-REFERRALS/COMPLAINTS.
1. *A driver who is called from an off-duty status for special on-duty status may request removal from service for 24 hours. No disciplinary action will be taken as a result of this request. Such request may be made via telephone or fax to either the Director or Chief Inspector, Testing and Safety Division.*
  2. *A driver may voluntarily elect referral to the Commission's EAP. No disciplinary action will be taken as a result of this request. However, **repeated** work absences due to **repeated** self-referrals may result in unsatisfactory attendance and/or work performance.*
  3. Any Commission driver who has a legitimate complaint about any operation, procedure, or test result conducted under this Plan shall contact the TPM, in writing, within 24 hours of the occurrence of the issue to be resolved. All complaints will be kept in the driver's secure personnel file.
- G. CONFIDENTIALITY.
1. The CV shall ensure that all Commission driver records and information associated with the Commission's Drug and Alcohol Misuse Prevention Program shall be kept confidential, except where release of that information is required by federal law under 49 CFR Part 382.405.
  2. The CV shall ensure that all Commission driver records are kept in locked files in a secure environment; and that communication of any test information via fax machine be kept secure and confidential.
  3. The TPM shall ensure that all test scheduling information be kept confidential, and given only to the driver chosen at the prescribed time of notification.
  4. The TPM shall also ensure that any test information communicated from the CV or Program Manager shall be kept confidential, along with records on reasonable suspicion testing referrals,

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EAP referrals, rehabilitation results, and disciplinary actions taken.

### SECTION III - PLAN ADMINISTRATION

#### A. TRAINING.

1. The Commission, through the CV, shall supply to each of its drivers educational materials explaining the effects of drugs and alcohol use on a driver's health, work performance, and personal life; information on the signs and symptoms of drug or alcohol misuse problems; *and at least 60 minutes training relating the above for both drugs and alcohol.*
2. The Commission shall provide a copy of this Drug and Alcohol Misuse Prevention Plan to each of its drivers (each driver will be required to sign a statement confirming that they have read the Plan and have been given an opportunity to ask questions concerning the Plan).
3. The Commission, through the CV, shall provide a minimum of 60 minutes training in drug misuse and detection for each of its supervisors listed in this Plan, and a minimum of 60 minutes training in alcohol misuse and detection for each of its supervisors listed in this Plan.
4. The Commission, through the CV, shall supply any new driver with educational materials explaining the effects of drugs and alcohol use on a driver's health, work performance, and personal life; information on the signs and symptoms of drug or alcohol misuse problems; *and at least division-level training relating to the above for both drugs and alcohol.*
5. The Commission shall provide a copy of this Drug and Alcohol Misuse Prevention Plan to any new driver (each new driver hired will be required to sign a statement confirming that they have read the Plan and have been given an opportunity to ask questions concerning the Plan).

#### B. VENDOR'S RESPONSIBILITIES.

1. The Consortium Vendor (CV) shall be responsible for the overall administration of the Commission's drug and alcohol testing program in that the CV shall

## Policy Continued

provide the following: drug and alcohol test scheduling (for all types of required tests), collection sites and personnel, certified laboratory services, MRO services, EAP referral services, secure record keeping services, annual report submittal services, and any other services required to properly administer the State Consortium's drug and alcohol testing program as per 49 CFR Parts 382 and 40.

2. The CV shall ensure that all areas of responsibility agreed upon by them with respect to this Drug and Alcohol Misuse Prevention Program shall be operated and maintained in compliance with 49 CFR Parts 382 and 40.
3. The CV shall be responsible for maintaining all records required by 49 CFR Parts 382, Subpart D and Part 40.83 at their place of business (or their contractor's place of business as in the case of a testing laboratory); and shall ensure that information from those records be available to the Commission within 24 hours, if requested by officials of the U.S.D.O.T. responsible for the drug and alcohol testing program.

C. RECORDS RETENTION AND ANNUAL REPORTS.

1. The following is a record retention schedule required by federal law that the CV shall use for all Commission drug and alcohol testing program records:

Retain For Five Years

- Results of driver alcohol tests indicating an alcohol concentration of 0.02 or greater
- Results of controlled-substance verified-positive tests
- Documentation of driver refusals to submit to testing
- Equipment calibration
- Driver evaluation and referral information

Retain For Two Years:

- All records related to the drug and alcohol collection process

Policy Continued

- All Commission supervisory training records required by federal law

Retain For One Year:

- Records of negative and canceled drug test results and alcohol test results with a concentration of less than 0.02

2. By March 15th of each year, the CV shall prepare an annual summary, as per 49 CFR Part 382.403, and submit a copy of that report to the Federal Highway Administration upon request.

OPS Audit Response Letter  
Approval

Mr. Cramer: I move the Commission approve, and President Clark sign the OPS audit response letter, dated December 30, 2005, to be sent to Ivan Huntoon, Director, OPS Central Region.

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

ATTEST

THE COMMISSION ADJOURNED AT 11:35 A.M.

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Executive Secretary

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TONY T. CLARK, PRESIDENT