MINUTES

MONTANA SENATE
57th LEGISLATURE - REGULAR SESSION
FREE CONFERENCE COMMITTEE ON ENERGY POLICY
SENATE BILLS 19 AND 521

Call to Order: By **CHAIRMAN WALTER MCNUTT**, on April 16, 2001 at 3:00 P.M., in Room 317-A Capitol.

ROLL CALL

Members Present:
Sen. Walter McNutt, Chairman (R)
Rep. Douglas Mood, Vice Chairman (R)
Rep. Roy Brown (R)
Rep. Tom Dell (D)
Sen. Alvin Ellis Jr. (R)
Sen. Don Ryan (D)

Members Excused: None.

Members Absent: None.

Staff Present: Marion Mood, Secretary
Greg Petesch, Legislative Branch
Todd Everts, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing(s) & Date(s) Posted:
Executive Action: SB 19
SB 521

CHAIRMAN WALTER MCNUTT announced that he had asked **John Hines, Northwest Power Planning Council**, to give the committee an overview of short, medium, and long term goals with regards to energy policy.

John Hines opened by saying that the number of energy bills proposed by this legislature needed to be melded together into a comprehensive plan to meet both the Governor's and the

Legislature's vision of the Energy Plan. He submitted **EXHIBIT(frs85sb0019a01)**, a draft of energy plan components, and proposed to walk the committee through it and discuss those bills he thought could be used to implement the plan. The goals he outlined first were affordable electricity and customer protection, and he proceeded to read from Exhibit (1). **Note:** The views and issues he presented in addition to the outline in Exhibit (1) appear here. He defined short-term as being the time between now and July 1, 2002, and said it addressed the needs of those customers currently paying high market prices. Conservation savings could be assigned into the power pool at a rate substantially below current market prices, benefitting large industrials. In the medium-term category, he suggested to build a trigger into SB 512, disallowing implementation of an excess profits tax if there was affordable power; to provide for extension of the USB program for an additional year and a half, and maintain participation by all utilities. In addition to the proposals listed in the draft, he mentioned HB 600 which provided for non-commercial onsite generation. Lastly, he stated he would be available for questions.

CHAIRMAN MCNUTT invited questions from the committee, saying there were 5 bills they would be working with, and these bills would have to be coordinated with the ones in the Energy Tax Committee. He also asked to have amendments requests relayed to the staff in a timely fashion so the final touches could be put on these bills.

REP. TOM DELL referred to rumors about a NorthWestern deal and asked how close it was to becoming reality. **John Hines** deferred the question to **Dennis Lopach, NorthWestern Corp.**, who asked if he meant sale or generation by the deal. **REP. DELL** clarified he meant generation. **Dennis Lopach** explained that the generation project was on track; they had met with the EPA and DEQ, and all that was lacking was certainty because they did not know what kinds of conditions would result from the energy package proposed by this body; he felt his client needed to know what their financial exposure was going to be. **REP. DELL** asked if he felt comfortable with dovetailing pending bills that dealt specifically with facilitating NorthWestern's proposals. **Mr. Lopach** felt that both of the energy committees had to decide if they wanted to require that a certain amount of power be sold in state in order for a new generation facility to qualify for a property tax exemption. He stated that their proposal was to sell 76% in state at cost, and 24% into the market at peak to raise enough revenue to subsidize the rate of 4 to 4 ½ cents to Montana industry. He cautioned that writing 76% into statue might tie their hands because they may have to sell more to get

to the target price for Montana, and he recommended taking these restrictions out of the bill. He liked SB 521 as it was important to put permitting on a fast time track, and said they were interested in HB 632 with determinations to be made with regards to the cost of procuring power and the recovery thereof.

REP. ROY BROWN thought an amendment would be needed to allow the default supplier to also build generation. **CHAIRMAN MCNUTT** agreed with that assessment, and so did **Greg Petesch**.

SEN. ALVIN ELLIS wondered what NorthWestern's cost estimate was for generation, and if they could possibly contract gas to keep the cost stable. **Mr. Lopach** was not sure what the cost assumptions were on gas; he had heard that gas prices had fallen with increased production but though it might be reversed next winter. He felt 4 to 4 ½ cents per kilowatt hour was a good start which could go lower if tax incentives were offered. **SEN. ELLIS** asked if the infrastructure was in place to ensure steady delivery. **Mr. Lopach** replied that some additional compression might have to be added but that the capacity was available.

CHAIRMAN MCNUTT asked what their concerns were with regards to HB 632. **Mr. Lopach** explained that they wanted assurance of full cost recovery for power they had to buy on the market, and they were concerned with the concept of lifeline rates and the uncertainty of who would be financing them if the PSC's initiative to regulate PPL Montana came up short. In his opinion, there was no source of funding for the lifeline rates in HB 632, and they were prepared to offer amendments which included some parts of the failed SB 243.

SEN. DON RYAN asked for comments on whether these proposals would weaken the PSC's case, and how the commission felt about the lifeline rates. **Bob Anderson, PSC,** deferred the first question to **Denise Peterson, Staff Attorney,** who stated that they felt there were some gratuitous provisions in HB 632 such as language defining competitive bid sales. She asserted the commission's intent was not to go after PPL Montana's wholesale generation because the commission regulated rates and service, and not generation as referenced in HB 632; any language along those lines would confuse the arguments the commission was making based on the transition service agreements and the asset purchase agreement. By the same token, she believed there was some obligations through the transition period which were incurred in the bargain in 1997 with regards to MPC's sale of their generation assets. **Bob Anderson** referred to the lifeline rates, saying that if the PSC set a lifeline rate which was below market, the question arose how it was to be funded. He explained there were three choices: one was PPL Montana who was not

inclined to do so and would have a pretty good case in federal court; the second would be MPC which was not a good choice, either, because they had two important functions, one being the distributor and the other was their being the default supplier; both of these functions required the company to have good credit, and if they were required to buy high and sell low, their credit would go bad. The third possible funding source would be other customers, and that would not be good public policy either, because these rates could cost up to $70 million per year if all the industrial customers who had left the system returned (based on a Consumer Council study); if it was imposed on the returning customers alone, the lifeline rate itself would be increased which would defeat the purpose.

VICE CHAIRMAN DOUG MOOD asserted that HB 632 said that the industrial customers were responsible for any additional cost of electricity. **Bob Anderson** agreed but stated the commission did not understand the premise; they were paying their own cost now, and if there was a difference between the market and the lifeline rate, they would have to pay it which would be no savings to them. **VICE CHAIRMAN MOOD** claimed that the crux of the problem was that the generating assets were sold by MPC to PPL Montana, and the question was whether that sale exempted PPL Montana's properties from the conditions in SB 390, saying that under certain circumstances, the transition period could be extended; this in fact allowed the commission to control the price of generation in the state. He asked him if he believed that the sale of their generation assets to PPL Montana has absolved them from having to comply with the wording of SB 390. **Bob Anderson** felt this was a legal question, but stated the commission agreed with this assertion as well as with the provisions in HB 632 with regards to the commission's authority. **VICE CHAIRMAN MOOD** then asked if it was the PSC's position that they continued to have the ability to regulate the generation assets of PPL Montana within the state. **Mr. Anderson** replied that the commission's assertion of authority was not aimed at PPL Montana, and they did not make that conclusion; their jurisdiction was over MPC. He felt their assertion of jurisdiction over PPL Montana would be tough to get through the courts. **VICE CHAIRMAN MOOD** wondered if he thought that PPL Montana knew the conditions in SB 390 when they signed the contract with MPC. **Mr. Anderson** replied that he was sure they studied it as part of their assessment of the deal.

{Tape : 1; Side : B}

CHAIRMAN MCNUTT asked for clarification of his claim that the commission's jurisdiction was over MPC and not PPL Montana; if MPC was forced to adhere to SB 390, where would they get the power from and at what cost, and what effect would all this have

on the company. **Mr. Anderson** admitted they had wrestled with that question when they considered taking the action they had taken; part of the uncertainty was that they were not sure how it was going to play out. If the PSC was successful in its assertion of jurisdiction over MPC, it would be incumbent on MPC to come up with the money and/or the power, meaning they would have to approach PPL Montana under the terms of the buy-back contract which could create a dispute between them, and if MPC was successful, it would become a case with PPL Montana itself. **CHAIRMAN MCNUTT** asked if they were not successful, what would the projected longevity of MPC be. **Mr. Anderson** pointed to the California situation, with one company filing for bankruptcy and another on the brink, saying the commission had no intention of putting MPC in that position because it was not good public policy. **CHAIRMAN MCNUTT** was glad to hear that and asked if he had any suggestions on how to avert or circumvent that situation. **Mr. Anderson** stated that writing relevant legislation was this body's prerogative; they took the position with regards to MPC not because they had any sympathy for the company but because it was a matter of public policy having to do with MPC's ongoing responsibilities.

SEN. RYAN wondered how **Mr. Hines** envisioned the power pool to work, and whether contribution to it was voluntary. **Mr. Hines** explained that the power pool was divided into several different areas; the conservation or demand exchange component was a matching up of willing sellers and buyers, with the PSC setting prices by which people could sell their conserved power into the pool, and setting the rates at which it could be bought, with the stipulation that the buyer bear the full cost. He also mentioned PPL Montana's pledge to offer 20 megawatts which could be assigned to the power pool and allocated based on PSC rules; NorthWestern's proposal had 80 megawatts coming on line in October 2001 with about 75% being available for Montana customers; this could also go to the power pool. BPA had a residential exchange settlement, giving power and dollar benefits to small farm and residential customers. As to the question on how contributions to the power pool would be assigned, he said it would be up to the PSC to structure the allocation mechanism with the stipulation it be done on a non-discriminatory pricing and quantity basis. **SEN. RYAN** thought he understood that the PSC did not want to allocate power from this pool; could the large industrials decide this among themselves. **Mr. Hines** stated that a segment of the industrial customers was trying to come up with a mechanism, knowing that demand would be exceeding supply because initially, there would only be about 20 megawatts available. They did not want to supplant the PSC but to offer advice in the allocation process because they felt they were more knowledgeable about various companies' financial strength. **SEN.**

RYAN wondered if he thought this was only a short-term solution and envisioned the power pool to go away in 2002. **Mr. Hines** answered that the default supplier would have to procure power beginning in July 2002, with everyone paying the same rates, so there would be no incentive to have a power pool.

REP. BROWN felt that PPL Montana had to have reviewed the provisions of SB 390 and realized the risk when they purchased the generation facilities, that the transition period could be extended. He asked for a better answer as to how they would have a good case in that they did not have to abide by the law. **Bob Anderson** presumed that PPL Montana looked at the law and did a risk analysis; his assertion to **VICE CHAIRMAN MOOD** had been based on discussions with liability lawyers who dealt with utilities operating in wholesale markets and who practice in front of FERC. He had posed the question to them as to what extent PPL Montana was preempted by federal law, and the common opinion was that they could prevail in a federal case because they were an independent company operating in a wholesale market, interconnected to the wholesale transmission power grid; and there was a case law supporting the notion that because some of their power was commingled as some of it is sold on the interstate market, and some was dedicated to Montana which would put them beyond the reach of state statute.

REP. DELL asked if the rate moratorium exemption was still on the PSC's list of legislative needs. **Mr. Anderson** said that it was because it provided a softer landing; if the moratorium was lifted and prices raised, the revenue raised could be put in the bank and returned to ratepayers to soften the blow when the rates went up in 2002. The other reason was that it gave customers a price signal; he asserted that in California, customers were shielded from the knowledge of that market and their behavior did not reflect the nature of the market; giving customers this price signal would give them incentives to alter their behavior and make decisions about conservation. **REP. DELL** agreed that this would be a worthwhile consideration.

CHAIRMAN MCNUTT said he had heard that the PSC's consensus was not to move away from the buy-back rate but stay with it. **Mr. Anderson** replied this was news to him.

VICE CHAIRMAN MOOD surmised that the only rational reason for raising rates ahead of time would be if a long-term contract could be entered into with PPL Montana, presumably, where they would be allowed to raise their rates above the 2.25 cents if they guaranteed that price for an extended period of time; he wondered

if there was any dialogue between PPL Montana and the PSC concerning this issue. **Mr. Anderson** replied that **Commissioner Stovall** had been in touch with PPL Montana but he could not divulge the nature of their conversation. **VICE CHAIRMAN MOOD** saw **Jay Stovall** in the room and asked if he would answer the question. **Jay Stovall** said that he had relevant conversations with PPL Montana over the course of a month and a half, albeit in an informal way, and they seemed to be interested in that concept because it was a win-win proposition with them getting some money up front and in return, the PSC could set a rate which would be secured for an extended period of time, until a competitive market developed; at the end of that time period, if prices were to go down, it would shorten the contract. He felt that if such an agreement could be worked out, there would be no need for the pending energy bills.

REP. BROWN asked if he thought it was the opinion of all of the members of the PSC that they did not have a case to control the price of generation. **Jay Stovall** admitted they had different ideas on the extent of their authority and how much standing they would have in a legal challenge; their legal department felt they had a good chance of withstanding a legal challenge.

SEN. RYAN asked how important the extension of the Universal Benefits Charge was in making sure that there was relief for people who could least afford the high rates. **John Hines** stated that the USB program provided low-income relief for consumers and developed and maintained the conservation infrastructure, and he felt that any cost-effective measure they could take to lower the amount of electricity they needed to buy deserved serious consideration.

VICE CHAIRMAN MOOD repeated that the crux of the matter was whether or not PPL Montana continued to be under the PSC's authority. He said it would seem to make sense that they knew exactly what was in SB 390, and it would seem that when they signed the contract to buy those facilities, they had to have been aware of the fact that a real possibility existed that the transition period would be extended; he asked **Mike Uda's** opinion if the state had a case with regards to PPL Montana, that they were indeed under the authority of the PSC. **Mike Uda** stated that he heard whispering about preemption but never heard any proof; he kept hearing that PPL Montana was exempt under federal law, but never heard why. He felt that the source of preemption had to come from the Federal Power Act which made clear that it could not interfere with state retail rate making prerogatives, the reason being that the Federal Power Act was designed to regulate interstate commerce. In 1935, up until the adoption of the Federal Power Act, interstate utilities were exempt from

regulation; the purpose of this Act was that they did get regulated. He stated that what was being argued here was, that by virtue of a sale from one utility to another, even though all the components of the transaction remained in the state, this somehow transformed itself into an interstate transaction. He alluded to **Mr. Anderson's** claim that there was some case law saying the commingling of interstate power with intra-state power affected all of that power with regards to the interstate commerce provision, and charged that this 1972 case did not say that; rather, the Supreme Court's consensus was that they would not second-guess FERC whether this was interstate or intra-state; it sufficed that at some point that power was outside of Florida and commingled, whether it was ultimately intended for retail transactions or not, and he could not see where this would be a source of federal preemption. The second source of federal preemption was the filed rate doctrine. He went on to say that the only tariff on file with FERC was the buy-back agreement; the order said these rates were to serve retail customers until competition developed and gave the PSC continued authority over these rates. He quoted from a brief that said in order for the filed rate doctrine to apply, three criteria had to be met: the rate had to be on file with FERC; FERC had to have agreed to it; and it had to be just and reasonable. He pointed out that in this case, none of the elements were met; the only rate PPL Montana had on file with FERC was that they could not charge more than $22.25 per megawatt hour until July 1, 2002. He explained that the third source of any potential federal preemption was their EWG determination which only exempted them from certain activities regulated by the SEC; if they lost their EWG determination, they would not be allowed to sell power in intra-state commerce. He summarized that the potential commingling was not a factor, there was no filed rate that would protect them, and the EWG determination was a red herring, meaning that there was no source of federal preemption. Lastly, he stated that it was the PSC's belief that they had authority over MPC but not PPL Montana, and if they did not have their jurisdiction over PPL Montana established by July 1, 2002, it would be MPC that would take the hit. Since the commission implied they would not force MPC into bankruptcy, the ones picking up the cost would be the consumers.

{Tape : 2; Side A}
In closing, he charged it was incomprehensible that a prudent utility, upon examination of SB 390, would have plausibly believed that they were off the hook in the event the transition period was extended and a final transition order was not issued. He did not want the state's industries to be put at risk, and advised the committee to get any promises with regards to the power pool in writing so they would have some recourse should these promises not be kept.

Jay Stovall, PSC, wanting to put things into perspective, showed the committee a chart his staff had prepared, showing that if the cost of electricity was increased from the current 2.7 cents to 4 cents, the average monthly increase would be $10.50 per household.

CHAIRMAN MCNUTT announced that the committee would take action on SB 19 and SB 521 on Tuesday, and work on House Bills 632, 474, and 645 throughout the week.

ADJOURNMENT

Adjournment: 4:10 P.M.

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SEN. WALTER MCNUTT, Chairman

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MARION MOOD, Secretary

DM/MM