MINUTES

MONTANA SENATE
57th LEGISLATURE - REGULAR SESSION
FREE CONFERENCE ENERGY TAX COMMITTEE ON SENATE BILLS 505, 506, 508, 512, and HOUSE BILLS 600, & 646

Call to Order: By **CHAIRMAN MACK COLE,** on April 17, 2001 at 8:30 A.M., in Room 172 Capitol.

ROLL CALL

Members Present:
Sen. Mack Cole, Chairman (R)
Rep. Bob Story, Chairman (R)
Sen. Bob DePratu (R)
Rep. Ronald Devlin (R)
Rep. Gary Forrester (D)
Sen. Mike Halligan (D)

Members Excused: None.

Members Absent: None.

Staff Present: Lynette Brown, Committee Secretary
Stephen Maly, Legislative Branch
Jeff Martin, Legislative Branch

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

Committee Business Summary:
Hearing(s) & Date(s) Posted: Energy Tax- SB 512. SB 505, SB 506, SB 508,, HB 600, HB 646
4/17/2001
Executive Action: SB 512, HB 600, SB 506

SB 512

Jeff Martin, legislative services, explained **amendment SB051204.ajm EXHIBIT(frs86sb0512a01).** He said amendment #2 was basically re-written to change from basing the tax on the price per megawatt to the price of per kilowatt hour sold for the ease of calculation. He said the other significant feature was the

acceleration of the rate schedule. It would now be a graduated tax system, similar to the method used to calculate individual income taxes. **Mr. Martin** told the committee the definitions were included for: (1)"arms length transaction", (2)"sale" and (3) "sales price". The proceeds would be deposited in the general fund and allocated to the Public Service Commission for the various programs contained in the bill as drafted. He said amendment #3 removed all of the exemptions except for new generation and generation from the federal facility. **Mr. Martin** stated the rationale for striking all of the other exemptions was fewer exemptions included, the fewer attacks on the legislation. He said amendments #5 & 6 removed the language related to the PSC and what they were directed to do with the revenue. Amendment #9 extended the termination date. He said one amendment not yet included was having the trigger for this tax to terminate on an earlier date based on some measurable determinate criteria. He added the committee needed to look at something that would be measurable and easily determined.

Motion: **SEN. DEPRATU** moved that **AMENDMENT SB051204.AJM BE ADOPTED.**

Discussion:

SEN. MIKE HALLIGAN stated he wanted to segregate amendment #3 which was the exemption section. He requested testimonies from the various people in the room concerning the justification for exempting particular categories. He wanted to allow for some rational basis for the exemptions. **SEN. HALLIGAN** requested someone to speak about Subsection 2 of amendment #3.

Donald Quander, Montana Large Customer Group, explained the rationale for exemption #2. He said page 2, line 22, of the current bill provided an exemption for electrical energy produced from an electrical generation facility owned or leased by a person if at least 50% of the electrical energy generated as used by the person in the person's business, even if the person sold a portion of the electric energy produced to another entity. **Mr. Quander** told the committee this did not relate to new generation, which was addressed in Subsection 1. Instead, it related to existing co-generation and temporary generation facilities that were presently out there. He said some of the co-generation, such as the Smurfit/Stone Containers Facility, had operated a steam co-generated facility as a supply for about 10 megawatts of the 60 they used for many years. He stated others had already installed temporary generation prior to the date of this bill. The intention was as long as that was used primarily for self-generation and for those facilities, it would defeat the purpose of much that was being done here to place a tax on that, then

turn around and provide assistance to those same facilities on affordable rates. He added it made sense to exempt self-generation from this tax because it was not a commercial venture, as such. **Mr. Quander** stated the exception presently included was 50%. He said he understood there was some discussion on this issue on April 16 to synchronize this with some other bill that might be changed to 70%. He stated this would assure this was primarily being done for the purpose of that facility's use. There was a real usefulness in the flexibility of being able to sell and balance small amounts of power as long as it was clear they were not engaged in a commercial venture; rather, they were actually sustaining the facility. **Mr. Quander** stated there was a solid rationale for saying it would be counterproductive to tax self-generation the business was using for its own purposes or using, in the case of small sales, to offset the cost for its operations.

REP. ROBERT STORY asked **Donald Quander** if he had read the amendments. **Mr. Quander** replied he had.

REP. STORY asked **Donald Quander** if he understood the power produced by those facilities and consumed in the facility was not subject to the tax. **Mr. Quander** answered that was his understanding, as long as that facility used at least the percentage stated (currently the bill stated 50%, but with the amendment, it would be 70%).

REP. STORY told **Donald Quander** his interpretation was until an "arms length sale" was reached, they would not be subject to the tax; therefore, anything used internally would not be subjected to the tax. **Mr. Quander** responded if the language was fully embraced that way, and he understood it may be, he had not had the opportunity to go through and be completely satisfied that sub-generation in all its forms might be covered by that. He said, in some cases, a facility may actually own, install and have the co-generation equipment as part of their equipment. In the case of temporary generation, much of the equipment was presently leased. **Mr. Quander** stated that was one reason exemption #2 referred to "leased arrangements". He said perhaps this reference to "arms length transaction" would catch both the ownership and leasing arrangements on temporary generators, however, he was not confident of that. Therefore, he thought there was some value to this amendment.

REP. STORY asked **Donald Quander** if anybody was actually selling this power back out on the grid. **Mr. Quander** replied that depended on load fluctuations. He said the power generated tended to be "chunky"; in other words, it was a continuous flow. If at some point during a load shift period, they could re-market

some portion of that back under your contract with the people who were supplying you. He added that was, in effect, a sale. He explained that was called "balancing" and had been done for many years. Under traditional energy contracts that existed prior to the current arrangement, typically a contract for an industrial facility would be for a maximum demand of a certain number of megawatts. He said they would schedule that power for use, however, it was quite common to use a little more or a little less depending on the variety of operating conditions. In the case where they used a little less than scheduled, he said, that was typically re-marketed, usually by the supplier it was purchased from. **Mr. Quander** stated sometimes they would keep the money, sometimes they would split the money for re-marketing, depending on the contract. He added small portions were regularly re-marketed for balancing purposed on the loads to match the schedules of use. He said, in some cases, companies, under the contracts, have sold pieces of what they were entitled to. This was done to help offset the costs, he stated. He said he was not aware that any of the temporary generators were currently doing that. He knew of one instance of someone that was proposing to expand up to 30 megawatts of self-generation to in the form of three 10 megawatt units. **Mr. Quander** said they needed 27 and if they reached that point, they would like to re-market the excess three megawatts when available and use that to offset their pricing.

REP. STORY told **Donald Quander** he had received the impression that many of these systems were not allowed to be wired up in the system in a manner allowing them to push the electricity back out. **REP. STORY** said the tariff rates made it uneconomical to do it anyway. **Mr. Quander** responded that had been a problem in the past. He said, initially, it was an engineering problem to some degree. In fact, the net metering ability of these situations for industrials had the metering and other connections to do it. He said there had been a reluctance on behalf of the traditional utilities, in the past, to take any power back in. In fairness, he said, they didn't want to do it for a long period of time. He said they found many reasons not to interconnect and allow the megawatts to be pushed back into the system. He said, he understood they were trying to develop some guidelines and be more accommodating because he thought they all recognized more megawatts could be introduced into the system as a part of this process. He added that would be a positive aspect. **Mr. Quander** stated there had been more accommodation. He added the Public Service Commission may have to address the tariffs to make sure it happened as it should.

REP. STORY asked **Donald Quander** if, in the end, would anybody be able to sell anything out in the time contemplated in this bill.

Mr. Quander responded he thought so. He said he understood much of that had already been worked out. He thought the technical side had been largely worked out. It was not a major technical challenge, he added. He said there may be some small metering equipment that needed to be installed, with those changes taking weeks to accomplish, not months.

REP. STORY told **Donald Quander** the Department of Revenue said this would not work because it would create a dual problem. **REP. STORY** added even the major generators consumed a certain portion of power inside to run their operations. He said an arbitrary number of 50% or 70% was picked to meet the needs of **Mr. Quander's** people. **REP. STORY** asked if that weakened this, since every generator used some internal power and they were not getting exempted. **Mr. Quander** replied he was not sure they were not being exempted from that, in some measure. He said it was typically known as "parasitic load". He explained, to the extent that they were using power that was never signed, transferred or conveyed to anyone else; it was literally used for running their operation. Traditionally, that had not counted against any of those companies. Typically, if it stayed inside and was not sold outside the company, he didn't think it ever entered into the transaction stream to be taxed. **Mr. Quander** stated he thought this would be consistent with that. He also thought there would not be any discrimination, as such. Each of these exemptions had a different rationale; he said some had a stronger rationale than others. He said the more cumulative exemptions, more issues would be raised. The state was given much discretion in assigning tax categories and which categories they would tax and not tax as a matter of law. He said there should be a concern unless there was a distinct rationale for treating someone differently. He stated they could discriminate on the basis of new generation versus existing generation. He added they could also discriminate between self-generation and generation that was being marketed.

REP. STORY asked **Donald Quander** if his rationale was to sell it out to make things work financially. **Mr. Quander** responded that was a fair point if the people were engaging in commercial transactions on an ongoing basis. He added that was not what was happening; the FERC issued a special order for the first time in which the normal filing requirements for the EWG status and market base tariffs were waived for four of the major facilities. Those were normally required to get some of the power; however, since this was a time of emergency, the filing requirements were waived to enable them to get as much power into the grid as possible. In this way, they wanted to encourage facilities that put in self-generation to run them as efficiently as possible which included any excess megawatts being put back into the grid

and not going to waste. **Mr. Quander** stated if that power could be used again for the purpose of managing the cost of that facility and keeping it in business as opposed to profit streaming, then that should be encouraged.

Motion/Vote: SEN. COLE moved that **EVERYTHING EXCEPT #3 & #4 OF AMENDMENT SB051204.AJM BE ADOPTED. Motion carried unanimously.**

SEN. HALLIGAN discussed amendment #2. He said if **REP. STORY's** "arms-length transaction" language was broader and would deal with the situation without having to include this section, he would be amenable to that. **SEN. HALLIGAN** stated he wanted to make the bill as clean as possible. He said he would like to remove that section and rely on "arms length transaction". He asked if that reached far enough because then the groups could be allowed to use whatever percentage they needed and if they did sell some power out on an arms-length transaction, that would be taxed under the definitional section of the bill. He asked **Jeff Martin** if he was interpreting that correctly. **Mr. Martin** replied he believed that was correct.

Kurt Alme, Director of Department of Revenue, responded he had the same understanding as **SEN. HALLIGAN** with the arms-length transaction. The arms-length transaction requirement would capture that power which was sold; sold to a party with an adverse economic interest. He added the power used internally, then, would not be picked up under the tax of the arms-length transaction definition.

REP. STORY asked **Kurt Alme** about **Mr. Quander's** comment about if the company was simply leasing the facility. He asked how much management of that system would they need to have in order to not qualify as an arms-length transaction. **Mr. Alme** responded the department had not addressed that issue yet and would need time to consider that.

SEN. BOB DEPRATU asked **Kurt Alme** would be comfortable with removing this Section 2. **Mr. Alme** replied, yes. He added it was a policy decision whether or not any excess capacity was needed; whether they needed to allow an untaxed sale of excess capacity in order to properly encourage these types of generation facilities would be the question. He said he understood it was a small issue at this point. With the new generation facility exception, it would capture most new generation coming on line in the co-generation area.

{Tape : 1; Side : B; Approx. Time Counter : 0}

SEN. HALLIGAN asked **Donald Quander** if the lease issue would get to the detail of marketing excess power. **SEN. HALLIGAN** said he believed the lease would simply be for the generator. **Mr. Quander** replied that was probably correct, adding that he was saying it with the same cautions heard in earlier testimony. He stated that was one concern that came to him. He said, otherwise, he thought the description just heard was correct; it was really a policy decision for the committee on the other piece of it, which dealt with if someone had a unit that would generate 10 megawatts and they typically used 7 megawatts, did they wish to tax it if they sold the additional megawatts at a higher price and used that to offset the original price and, therefore, lower the price. **Mr. Quander** reiterated that was a policy call. He told the committee this was not referring to a lot of power in the overall system.

Motion/Vote: SEN. HALLIGAN moved to **STRIKE SUB-SECTION 2 OF PAGE 2, LINES 22-24 FROM THE BILL BE ADOPTED. Motion carried unanimously.**

SEN. HALLIGAN told the committee they had heard some justifications about why this section should stay in the bill, but to make the bill as clean and as constitutional as possible, he recommended the removal.

SEN. COLE asked the committee to look at exemption 3 of the bill. He said, as he understood, it was electrical generation sold from an electrical generation that had a generation capacity of less than 30. He said it had originally been 60, then had been changed down to 30. **Amendment SB051205.asm EXHIBIT(frs86sb0512a02)** would remove the 30 and replace it with the original 60.

Beth Baker, Montana Dakota Utilities Co., stated MDU operated a single integrated electric system which provided electric service to the far eastern part of Montana as well as several other states. She said they had 24,000 customers in Montana. She added their integrated system was small compared to the Montana Power Company System that served most of western and central Montana. **Ms. Baker** stated the stored peak electric load on the entire MDU system, including the reserve obligation, was only 484 megawatts. MDU owned generating resources that put produce a peak of 482 megawatts of power. She said MDU had three generation facilities in Montana. **Ms. Baker** told the committee, as the bill was originally drafted, MDU generation facilities in Montana would have been exempt. However, with the 30 megawatt limit, they were not longer exempt. When the Electric Industry Restructuring and Customer Choice Act was adopted in 1997, the legislature recognized it would unrealistic to deregulate or

restructure only 25% of what was a single integrated system. She said the act specified MDU did not have to restructure in Montana until restructuring was implemented in the state of its primary service territory, which was North Dakota. **Ms. Baker** stated that exemption had been carried over in this legislature in SB 269, which had already been signed by the Governor. MDU was part of the mid-continent power pool and was required to maintain generation capacity of 15% more than its expected peak load. During periods of when that full generation capacity was not required to serve MDU customers, she said, energy could be sold within the map pool to other utility providers. **Ms. Baker** told the committee those sales were regulated by the Federal Regulatory Commission with the revenues of those sales included in the total cost of service that was reviewed by the Montana Public Service Commission. Revenue from the pool sales was available to help offset the costs of providing service to MDU customers. She said the ability to make those pool sales was the primary reason why MDU had not had a general electric rate increase since 1986. **Ms. Baker** explained keeping the exemption for MDU in SB 512 would help to ensure the regulated rates of MDU customers would not be adversely impacted by an impact to deal with escalating power prices, in a different power grid, by deregulated utility companies. She said they believe this was consistent with the Electric Industry Restructuring Act and would keep MDU within the traditional regulatory framework and would hold its ratepayers harmless from the impacts of deregulation in which MDU was not involved. **Ms. Baker** stated, most importantly, this was not excess revenue generated by the pool sales when it was, in effect, being returned to the rate payers. She understood there was concern about restoring the 60 megawatt limit. She told the committee she did have an alternative amendment **EXHIBIT(frs86sb0512a03)** that would refer back to Section 69-8-201(4), which was the MDU exemption in the Restructuring Act.

SEN. COLE asked, if this amendment was adopted, would it take care of all generators that were less than 60 megawatts because there were a couple other generators in Montana that would have problems if the limit went below 60. **Beth Baker** explained the amendment would not be limited to MDU.

REP. RONALD DEVLIN told **Beth Baker** the amendment the committee had just passed included some new language concerning "arms-length transaction". He asked if the situation **Ms. Baker** had just described where some of the excess power, above their 15% they had to maintain, which was sold into the regulated pool, would she consider that an arms-length transaction. **Ms. Baker** replied it could be considered an arms-length transaction because, presently, they were market based sales. She said they

did generate a market price and they were sold on a wholesale level from one utility company to another. She said she was not comfortable that the language in the bill with that amendment would exclude the pool sales.

SEN. HALLIGAN asked **Donald Quander** to address going from 60 to 30 and possibly changing from 30 back to 60. **Mr. Quander** replied there were two main reasons: (1)In addressing the 60/30 megawatts, he strongly recommended retaining an exemption for small facilities. He said they wanted to encourage distributed small generation facilities. He stated the economics were very different for those. (2)**Mr. Quander** also recommended staying at 30 because if the limit was 60, you will have exempted a very large part of what you set out to tax. **Mr. Quander** said roughly 225 megawatts was generated from dams of larger than 60 megawatts; 200 megawatts was generated from dams between 60 and 30 megawatts; 52 megawatts was generated from dams below 30 megawatts. He said it was one things to exempt 52 megawatts out of a total load at 475, but it you exempt 250 out of a total load of 475, a very large portion had been removed. **Mr. Quander** explained he had some reservations about the exemption, generally, because he felt if there was larger wholesale into the market sale, it would be better to have it subject to the tax. He added the alternative provided by **Beth Baker** was potentially viable. He said that was a rational basis, the policy decision in 1997, to exempt such facilities from the transition at this time in the restructuring. **Mr. Quander** stated if the committee chose to include an exemption to cover the situation MDU was describing, he recommended to do it in that form, rather than going up to 60 megawatts. He wanted to retain an exemption for very small facilities.

Owen Orndorff, President of BGI, said if #4 stayed in, BGI would be covered in the exemption. He said BGI was a qualified facility, signed a contract with Montana Power in 1991, and did not engage in open market sales. He said its power was presently about $.035, with a raise in the winter which would be subject to tax. **Mr. Orndorff** told the committee the tax would probably bankrupt the project. He said it would be a disaster for the employees, the plant, and all the environmental benefits the plant had brought to Billings.

SEN. COLE asked **Kurt Alme** to comment. **Mr. Alme** told the committee the department's concern was if there was a rational basis for this. He added of all the exemptions included, this gave the department the most concern as to whether there was a rational basis for exempting based on the amount of electricity produces.

REP. STORY asked **Director Kurt Alme** if the rational basis could be because if the plants get down to such a small basis that it wouldn't be worth the effort to chase them around. **Kurt Alme** said, from the department's point of view, that was a rational basis. Cost effectiveness was also a rational basis.

SEN. COLE asked **Kurt Alme** if he had looked at the MDU amendment. **Mr. Alme** answered he had seen if before. **Kurt Alme** asked **Jeff Martin** if this amendment referred to a public facility that was regulated. **Mr. Martin** replied that was correct. It referred to the exemption from restructuring the legislature enacted in 1997 which **Mr. Quander** said applied to MDU and Black Foot. **Mr. Alme** said he could see how they could argue on a rational basis that power being sold at a price set in a regulated industry, at a certain amount, by the Public Service Commissioner, could, in itself, by definition be reasonable and not required to be subject to excess revenue. However, for power generated by companies that was not sold into a regulated market, he was not sure that argument would hold up.

REP. GARY FORRESTER told **Kurt Alme** he had concerns with the MDU amendment, in as much as they were going to sell some power into an unregulated market. He said they had a 15% capacity they could sell. He agreed they should be subject to the tax on the power sold into the power pool. **REP. FORRESTER** said he thought we should want to tax that power. He asked, if everyone else was going to be taxed on the issues discussed, why wouldn't they want to tax that power sold from that power pool (the mid-American power pool). **REP. FORRESTER** reiterated the excess power should be subject to tax. **Kurt Alme** agreed.

SEN. HALLIGAN told the committee he wanted to deal with the 60/30 issue before deciding on the amendment presented by **Beth Baker.** He added he thought it should be placed back at 60, with the justification described in some of the testimony. **SEN. HALLIGAN** stated he wanted to encourage the generation of small or on-site facilities. He proposed the amendment, changing from 30 to 60.

Stephen Maly explained there had been an amendment included the previous day which made the change from 30 to 60.

REP. FORRESTER asked **SEN. HALLIGAN** if they changed from 30 to 60, would the figure stated by **Donald Quander**, of around 280 megawatts not being subject to tax, weaken the position of Montana to impose the taxes. **SEN. HALLIGAN** answered he just wanted to get a discussion about the rational basis. **SEN. HALLIGAN** stated he was inclined to stay at 30, but if they did, he wanted to make sure if staying at 30, as opposed to going to

60, the committee understood exactly what they were doing and why. He said he realized 200 megawatts, potentially under 30, would not be subject to tax. **SEN. HALLIGAN** added that would weaken the position of the bill.

REP. STORY told the committee he opposed the amendment. He stated they should probably be going the other way if including a size exemption, getting it down to some smaller number which would free up some of the smaller qualified facilities and some of the supplemental generation that might come on if the number was smaller; rather than raising the number so large and allowing so many of the facilities to escape. He said the BGI problem needed to be dealt with different types of exemptions other than the size exemption. **REP. STORY** stated MDU should be able to put the power from their Montana plants into their regulated system, moving it internally.

Motion/Vote: SEN. HALLIGAN moved that **MOVE FROM 30 TO 60 BE ADOPTED. Motion failed 3-3 with Forrester, Cole, and Halligan voting aye.**

SEN. COLE told the committee they would not deal with #4 of Section 2, qualifying the small power production.

SEN. HALLIGAN stated he thought there was ample justification for keeping the qualifying small power production facilities as an exemption in the bill.

REP. STORY asked what was included in that definition. He asked if it was a limited group of facilities now.

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Jeff Martin explained the definition was taken from the exemption of Class 12, property referring to qualifying facilities.

REP. STORY asked if everything included would be like the BGI and some of the smaller hydro plants, whereas, everything built from now on would fall under the new exemption anyway. He asked if it was a know quantity of facilities then. **Stephen Maly** replied, yes, there was a list of qualifying facilities in the state that had contracted with Montana Power.

SEN. COLE asked **Stephen Maly** if those people would be recognized as long as this was kept in the bill. **Mr. Maly** answered that was correct.

REP. STORY asked what the rational basis was for keeping them in. **SEN. HALLIGAN** responded they were experimental facilities, using

new technology, which would be justification for including some of that conduct.

SEN. HALLIGAN asked for someone to comment on why qualifying small power production facilities was unique. **Owen Orndorff** explained qualifying facilities were the creation of congress, designed to use renewable resources, waste products. He said BGI used the Exon by-product, coke, waste limestone from a sugar quarry; he said, in short, they used garbage or unusable material to produce power. He said it was that concept that congress had to encourage generation, new resources, from waste products, that brought about what was presently known as a qualifying facility. He said, typically, a long term contract was needed in order to build one of these facilities. **Mr. Orndorff** stated BGI's contract(1) goes to the year 2028, (2)had fixed rates, and (3)the debt structure was spread out over that period of time. He reiterated when he said if this tax would apply to BGI, the project would fail. He added the creditors had long-term, 20 year loans issued by the Board of Investments which were not guaranteed by the state; they were tax-exempt bonds. **Mr. Orndorff** stated BGI was presently marginally profitable. He added it should be successful as the years go by. He said, in reality, they were not capturing windfall profits because they were all into fixed rates. He explained they did not sell into the market.

SEN. COLE asked **Owen Orndorff** if they were using experimental methods with coal that might not otherwise be available. **Mr. Orndorff** explained the project in Rosebud County used high sulphur waste coal which had a small percentage of sulphur and a very high percentage of ash. He said for their plant, that material would have been pitched back into the mine and would otherwise have been unusable. **Mr. Orndorff** stated that project was financed with a long-term contract with the rates set in 1983.

SEN. COLE asked **Owen Orndorff** if they used a different system in the boilers at Coalstrip. **Mr. Orndorff** replied they had a completely different set-up in both plants than the Montana Power Plants. He said they had a circulating fluidized bed boiler, using a boiler system with very low emissions.

REP. STORY asked **Owen Orndorff** if all of the facilities that would fall under #4 exemption had long term contracts. **Mr. Orndorff** replied he only knew of his two facilities. He suspected they did, but could not speak for them.

REP. STORY asked **Owen Orndorff** if, in his long term contract, what were they getting paid for that electricity, per kilowatt

hour, in the out years. **Mr. Orndorff** responded, in the out years, $2024 at Coalstrip; after the year 2005, there was a formula clause that depended on the actual cost to the rate payer to build a combustion turban. He said that formula was in the contract. He stated BGI had two tiers of power, adding seasonal factors to both tiers of power.

REP. STORY asked anyone could testify as to whether the rest of the qualifying facilities had contracts. **Owen Orndorff** answered the rest must have contracts because the list came from Montana Power.

REP. STORY asked if there was a more rational basis for exemption by exempting anything presently on contract as opposed to basing the exemption on size. **Owen Orndorff** answered, given the public policy of encouraging qualifying facilities under the Public Utility Regulatory Policy, that definition would probably be enough rationale basis for exempting qualifying facilities.

SEN. COLE said, unless there was opposition from any committee members, they would now go on to exemption #5.

Tom Ebzery, Puget Sound Energy, Avista, Portland General Electric and PacifiCorp, stated the amendment seen on page 2 and 3 was submitted by **REP. FORRESTER.** He explained the rationale provided by **REP. FORRESTER** in the committee had been that these were fully integrated, regulated utilities selling into authorized service territories; the commissions in those various states described "just and reasonable rates". He said the make them subject to an excess profits tax seemed to make very little sense. **Mr. Ebzery** stated **SEN. HALLIGAN** and others had attempted to tighten this up further to make sure if there was selling outside of the regulated territory, that could be subject to the tax. The issue would possibly be solved under **amendment SB051204.ajm** **EXHIBIT(frs86sb0512a04)**, he said. He explained this amendment would make it clear they were exempting tariffed rates from those commissions.

Motion: **SEN. HALLIGAN** moved that **AMENDMENT SB051204.AJM BE ADOPTED.**

Jeff Martin told the committee the amendment also included state Public Service Commission or similar state agency having jurisdiction over the tariff. **Tom Ebzery** responded that would be fine.

SEN. HALLIGAN asked **Beth Baker** if this language addressed her issue. **Ms. Baker** explained this language would address MDU's

concern for two reasons: (1)because of the word "retail" and (2) because the regulation of those sales was by the Federal Energy Regulatory Commission and not directly by the Public Service Commission. However, the revenues went into the total cost of service regulated by their commission, she added. She said this language would not cover MDU's pool sales.

SEN. COLE asked **Kurt Alme** if he would comment on **Beth Baker's** amendment and if he had looked at **amendment SB051205.ajm. Mr. Alme** responded what the committee was talking about and the difference between the two amendments was whether or not this tax was going to apply to electricity that was not sold into the regulated market. **Amendment SB051205.ajm** would allow that to be taxed. **Mr. Alme** said **Beth Baker** was proposing for MDU to not be taxed on that excess. **Mr. Alme** stated the issue, then, was to decide if there was a rational basis to exempt, from taxation, that additional margin of electricity MDU would be selling. **Mr. Alme** said, as he understood, the profit from the sale of that electricity was built into the rate that MDU turned around and charged to their customers. He said he was still digesting how that would play out into what they were accomplishing with an excess profits tax, but it began to give a rational basis for why it shouldn't be subjected to a traditional excess profits tax because the company would not benefit from the tax; it could be built back into the rate, allowing lower rates to be charged to the regulated customers. **Mr. Alme** said there was a question as to who the regulated customers were; who was benefitting and who was not.

REP. STORY asked **Tom Ebzery** if he was saying the tariff rates going west were higher than the 4.5 and the tax might hook him. **Mr. Ebzery** answered, in some instances, when you add all of the various taxes, the cost and the transmission, they may be over the 4.5 and subject to that in that case.

REP. STORY asked **Tom Ebzery** if all the power going out of those generators were going into a regulated system. **Mr. Ebzery** replied all of the power, except for 70 megawatts, were going to Washington, Oregon, Idaho and regulated through the utility commissions.

REP. STORY asked **Tom Ebzery** if the other 70 megawatts was moved into a regulated state, would the amount above 4.5 be exempt also. **Mr. Ebzery** replied they were still subject to a long term contract.

Motion/Vote: SEN. HALLIGAN moved that **AMENDMENT SB051205.AJM BE ADOPTED. Motion carried unanimously.**

SEN. HALLIGAN told the committee the MDU amendment would take the excess profits and put them back to the ratepayers which was the basis for the bill. He requested some discussion of whether that formed a rational basis that allowed for the exemption to occur or if it would weaken the bill to place the MDU amendment on.

Motion: REP. DEVLIN moved that **THE BETH BAKER AMENDMENT BE ADOPTED.**

SEN. HALLIGAN asked **Donald Quander** if this would be consistent to the purpose of the bill. **Mr. Quander** replied it did, to some measure, detract from the bill to the extent it potentially exempted the sales that were made at wholesale at higher prices. However, he said, they were talking about a relatively modest amount of power and also about it being a part of a different transmission system. **Mr. Quander** stated there may be a legitimate question as to whether that power, at this time, could be made available in the Montana market. He stated his impression was there was a rational basis for the distinction, that may be defensible, but he did think it was more of a policy decision for the committee.

SEN. HALLIGAN told **Donald Quander** they had added some language at the end which referred to this exemption and to the extent that power was used to go back to the rate pay for the sale; the revenue from the sale of that power was used to keep rates from increasing in the jurisdiction covered by the utility. **Mr. Quander** explained that would be more consistent to what was voted on, for example, in **Mr. Ebzery's** amendment, which said if it was being sold at a state retail regulated rate, they wouldn't be concerned about taxing it because they thought there was already some control there. He added it may be difficult to add that in because he understood **Beth Baker** said it was a wholesale sale into a pool within there. **Mr. Ebzery** stated, ultimately, the benefits they got from selling into there, they were able to return into their whole structure which allowed them to charge less for other parts of their services in transmission and distribution. He explained that was true as it would be for any bundle utility; that was not the same as saying they didn't sell it at wholesale and make a nice profit on it. He said there was a trade-off there. He felt there was a rational basis. **Mr. Quander** said **Beth Baker** would be better able to explain the mechanics of whether it would be possible to qualify that further.

SEN. COLE asked **Donald Quander** if there might be some change, and clarified it was not a large block of power. **Mr. Quander** said he understood **Beth Baker** to say it would be modest sales being made into this pool in more of a balancing fashion.

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Donald Quander asked for **Beth Baker** to answer if it was possible to shift between units at some point.

SEN. COLE asked **Beth Baker** to comment on **Mr. Quander's** request. **Ms. Baker** addressed the ability to sell back and forth across the grid. She said that could not happen because of the Miles City Direct Current Inter-tie; MDU did not have any capacity at that inter-tie and no firm transmission path that would allow it to either sell firm power into the MPC grid or buy power back from that. **Ms. Baker** told the committee it was mostly a question of capacity and all the capacity was used up right now. She said in terms of quantity of sales, it was an average which depended on the season. She said the figures she had showed MDU tended to have surplus capacity of between 60-70 megawatts at the most during the winter months with a deficit during the summer which would be balanced out. Over the year, she said, the average would be about 35-40 megawatts. **Ms. Baker** addressed the issue of adding language. She said it could be possible; she added it could be stated "the revenues from which are accounted for in regulated tariffs approved by a state utility commission" or something close to that. She said it may complicate the amendment, however.

REP. STORY asked **Beth Baker** if the pool was operated by the utilities or was it operated by government organizations. **Ms. Baker** responded it was not a government organization; it was regulated by the Federal Energy Regulatory Commission. She added the pool was operated by the member utilities.

REP. STORY told **Beth Baker** the other energy committee was sending out some kind of pooling arrangement in Montana and if this committee worked into some exemption of power that was going into some kind of pool, it might be good for her to work with the other bill. **Ms. Baker** replied she thought it was a different kind of pool addressed in the other committee.

SEN. DEPRATU asked **Beth Baker** how she would feel about expanding the definition. **Ms. Baker** replied she was willing to work on it so make sure the exemption was not too broad.

Stephen Maly asked **Beth Baker** if the phrase "earnings from which are applied to maintain or reduce rates charged to customers in the public utilities service territory" would work. **Ms. Baker** responded it would be better to use language to include regulated rates included in the state utility commission's consideration of regulated rates.

REP. STORY stated the word "reduced" would not work because you may not actually be reducing.

SEN. COLE said the committee would discuss exemption #7 on line 4. **SEN. COLE** recommended that exemption remain in the bill.

REP. STORY told the committee they needed to look into the issue of generation facilities owned by government entities that were not federal, such as tribes. He asked if they needed to deal with that issue. He didn't know if they would be able to tax them.

SEN. COLE told **Kurt Alme** any of these properties owned by a tribe as trust property were owned by the United States government for and on behalf of the tribes, so it may fall in there anyway because of that. **Mr. Alme** answered, to his knowledge, there were no current existing generation facilities on tribal lands. He added if any were created, they would fall under the new generation exemption.

SEN. COLE told **Kurt Alme** Kerr Dam was on tribal lands, leased from the tribe by PPL. **Mr. Alme** said they would need to take a look at that issue.

SEN. COLE said he thought it was covered because it said "agency of the United States government" and the tribe was such when they were a trust entity.

SEN. COLE told the committee they were: removing #2; #3 would stay at 30; #4 would stay in, as is; #5 would be amended; and #7 would remain.

REP. STORY stated he wanted to discuss #3 again. He said there was a definition of a generation facility in another bill. He asked how that would work together with this bill. **Stephen Maly** replied there was no single binding definition of generation facility, but it could be restricted to a single facility.

REP. STORY told the committee he had a problem with leaving the limit at 30. He wanted to take the 30 down to 15.

Motion: **REP. STORY** moved to **REDUCE THE 30 TO 15 BE ADOPTED.**

REP. FORRESTER said if it was taken down to 15, that would hit Cenex, Conoco and Exon. If those companies did get power back on the grid, they would be taxed. He stated he would oppose that amendment.

REP. STORY said perhaps they should exempt the size of the sale instead of a blanket exemption. He said the smaller generators were exempt under qualifying facilities already. He added the only thing exempted under the 30 megawatt issue was some hydro plants.

SEN. DEPRATU asked the committee if it would work to say up to 10% of that surplus power could be exempt from the generators that were 30 megawatts or less.

REP. STORY said they were not talking about a lot of power, but this would run into the same situation he had talked about with MDU, having companies owning facilities that were taxed and not taxed. He asked how they would split out the portion being taxed from the portion not being taxed. He didn't know who had the mechanisms to track all of that and added the auditing costs would be high.

REP. STORY told **Kurt Alme** he had wanted to lower the exemption rate from 30 to 15 because the auditing work associated with this would be a nightmare otherwise. **Mr. Alme** responded it would be more difficult if the Department of Revenue would be required to break out some facilities and not other facilities. He added they would then get into tracing issues. He explained the companies would have the flexibility, then, to avoid the tax by tracing from which facility they were doing which sales.

REP. STORY repeated his motion to reduce the 30 to 15.

REP. FORRESTER stated he thought that was a bad motion and that they should leave the limit right where it was. He said this was the first they had heard of it and to encourage the people who put in smaller electric generation, they would be doing what they had done all along. **REP. FORRESTER** said he did not like this bill at all. He said when you encourage someone, on one hand, by giving them a tax break to put the generation in, and now you were going to make them subject to tax on the other side. He told the committee those two did not work together. He hoped they could leave the limit at 30.

Vote: TO LOWER FROM 30 MEGAWATTS TO 15 BE ADOPTED. Motion failed 1-5, with **REP. STORY** voting aye.

Jeff Martin told the committee the Department of Revenue was not clear what generation capacity meant in Subsection 3 and had suggested inserting "name plate capacity" so it would be clear what kind of generation capacity referred to.

SEN. COLE asked **Jeff Martin** if that wording could be placed in the amendment. **Mr. Martin** responded he could, if the committee approved it.

Donald Quander told the committee there was some benefit with being more specific. He suggested they might want to consider "net generation" which had been determined, for various reasons, as opposed to "name plate" which took out the parasitic load to the extent a facility was using power itself. On the other hand, he added, if looking for overall consistency, they could use "name plate". He recommended using one or the other for specification and clarifying purposes.

Motion/Vote: REP. STORY moved that **USING "NET GENERATION" BE ADOPTED. Motion carried unanimously.**

Stephen Maly explained the suggested language on the MDU amendment would be leaving the amendment as it read and inserting the phrase "the revenues from which are considered by a state utility commission or similar state agency in approving regulated retailed rates."

REP. FORRESTER asked if that would cause the Department of Revenue to go back into the state of North Dakota because they had understood the power could be put back into the grid and sold out. **Beth Baker** responded these were records which would be available to the Department of Revenue from the PSC because these revenues were reported to the PSC, included in the total cost analysis when the rates were set. **REP. FORRESTER** said he was referring to if they sold their excess power and could find a way around this to avoid the tax in language.

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Gene Walborn, Department of Revenue, replied they did not know, at this time, exactly how they would prove that or how the tracking would work. He added that was something they would need to determine.

REP. FORRESTER stated this amendment did not address that issue.

REP. FORRESTER asked **Dan Dodds, Department of Revenue,** to comment. **Mr. Dodds** explained the distinction made with this amendment was between sales made by the utility with the revenue from those sales being accounted for when that utility went back in for rates and sales that might be made by an unregulated affiliate of the utility into the open market or if the utility was allowed to go into the open market and make unregulated sales. He said the difference with this amendment was the

exemption of the first sales where the revenue from those was tracked by the Public Service Commission in the rate-making process. **Mr. Dodds** said this would not exempt sales that were outside of that rate-making process. He said the Department of Revenue would have to depend on the utility's filings with the various utility commissions on what sales they had made.

REP. FORRESTER asked if this would be tough. **Dan Dodds** replied they did not know how they would do it yet.

Stephen Maly told the committee North Dakota had not undertaken restructuring of any kind yet. He added we were not in the same environment here as they were there since their state was regulated.

Motion/Vote: **SEN. COLE** moved that the **BAKER AMENDMENT AS AMENDED BE ADOPTED. Motion failed 4-2**, with **Forrester and Halligan** voting no.

The committee took a break and agreed to meet again at 2:00p.m.

SEN. COLE called the committee to order at 2:00.

SEN. COLE told the committee they would continue to deal with SB 512. He said there was a new amendment SB051204.ajm **EXHIBIT(frs86sb0512a05)**. **Jeff Martin** explained the amendment clarified "arms-length sale".

SEN. DEPRATU asked if Section 1 of the amendment could also include that this applied to existing contracts to allow for changing prices in the future.

REP. FORRESTER said he would like to know the rationale behind this amendment. **SEN. DEPRATU** explained there was a company, Flathead Electric, where this was going to happen to them.

REP. FORRESTER asked **SEN. DEPRATU** if Flathead Electric was going to be taken out of the equation. **SEN. DEPRATU** responded yes.

REP. FORRESTER asked **SEN. DEPRATU** what the intent of his amendment was. **SEN. DEPRATU** explained if the company supplying the electricity raised the prices up the excess pricing, they would be taxed.

REP. FORRESTER asked **SEN. DEPRATU** if his amendment was for the sole benefit of Flathead Electric. **SEN. DEPRATU** replied that was correct.

REP. FORRESTER asked **SEN. DEPRATU** why he would want that company to be taxed now; was it because it was a contract they had now with this company. **SEN. DEPRATU** responded it was a contract they had now with an outside company and on October 1, the fixed rate price would go away. He added the company selling them the 70 megawatts would be able to charge whatever the market was.

REP. FORRESTER asked **SEN. DEPRATU** if they just went to market then. **SEN. DEPRATU** said that was correct.

Tom Ebzery, PacifiCore, explained **SEN. DEPRATU** was referring to a 70 megawatt power contract that was voluntarily entered into, mutually, by Flathead Electric for a term 3-1-99 through Sept. 30, 2006 with the price being certain right now. He said both parties had agreed that on October 1, 2001, they would be indexed to Dow Jones Mid Columbia. He explained that was the way the advocate of the amendment wanted that; it now appeared he now wanted to come back and apply this to this contract and to make sure that if any money came from that in the form of excess profit would somehow accrue back to him and his customers. **Mr. Ebzery** explained they had watched this go on and PacifiCore had attempted to talk to the advocate over a period of time. **Mr. Ebzery** stated he had a letter about the four options that were possible for him to get over this incident, including swapping those megawatts with Deseret, and as recently as this morning, there was still a willingness to do that. He said, apparently, the advocate of this amendment would prefer to put an amendment in and work it through the legislative process rather than through negotiation.

Warren McConky, Flathead Electric, explained they had an eight year term contract which was a fixed price contract for the first three years. On October 1, it would go to Mid Columbia indexed price, market priced contract. He said when they signed the contract, they felt the Mid Columbia would be a fairness indicator as an adjuster for the remaining five years of that contract. The Mid Columbia index had changed its character completely as of June, 2000. **Mr. McConky** stated instead of being a fairness indicator, it was now a short-term spot market indicator and the prices would go from a fixed price contract of about $24 to a market index priced contract of about $340. He said they considered that extreme, with it being way over a 1000% increase. He reiterated that was extremely alarming to them. He explained they were continuing to work with PacifiCore, attempting to get it swapped, still intended to do that, and there was no guarantee. **Mr. McConky** stated this was a business transaction which included at least three parties, other than themselves. He added complex business transactions fall apart at the last minutes; they had made applications to Deseret GNT,

contingent upon a successful swap of the power with PacifiCore. He said that was the transaction that was trying to come together. If, in fact, that did not happen and the price did go from $24 to $340, there would be devastation on the economy in the Flathead. He added this was for 70 megawatts of power which would mean the price would go from about $14 million a year to over $200 million a year for that block of power.

REP. FORRESTER told **Warren McConky** it was his understanding, from **Mr. Ebzery's** testimony, they had a contract that called for just that. **REP. FORRESTER** asked **Mr. McConky** if he was asking for the legislature to come in, basically break the contract by imposing different conditions, such as the excess profits tax, in hopes that would be their hammer to force them to the table to bring the cost of electricity down. **REP. FORRESTER** said they had a contract now and they wanted this to bring their contractually agreed upon price down. **Mr. McConky** submitted the point that the conditions of that adjuster had changed so dramatically in the last year that it was no longer a reliable index to have the pricing mechanism of this large of a contract applied to. He added, yes, they were looking for a way to get this renegotiated to an acceptable price.

REP. FORRESTER asked **Warren McConky** if the committee added this amendment, would he use this to negotiate. **REP. FORRESTER** said, it appeared to him, when he signed a 5-year contract for buying an automobile, the contract was not negotiated until you were done. He said **Mr. McConky** had negotiated a price and it was unfortunate the market conditions had done what they had done; he added Montana Power really didn't care because they were using that market price the same as anyone was using market price. **REP. FORRESTER** said he had talked to him about this issue before. **REP. FORRESTER** stated he was very reluctant to step in on a contractually agreed upon set of conditions and have the legislature step in. He added he was not sure the legislature should go where **Mr. McConky** wanted them to go. **Mr. McConky** replied his reading of the bill was that this did apply because of the way it was worded. He was asking for clarification. **Mr. McConky** said they understood it applied to a changing price that went beyond the threshold of the bill. He said the whole concept of this excess profits tax was to deal with prices that had gone well beyond the cost of production and created excess profits. He added the price of production had not changed this 1000%, so the profits would be escalating in that direction. He reiterated their economy could not survive that. **Mr. McConky** explained in the utility business, you did not have the option to shut down because of the obligation to serve the customers and an obligation to pass on these costs to the customers.

REP. STORY asked **Kurt Alme** if the language could be interpreted to apply to existing contracts. **Mr. Alme** said he did. He explained his initial reading was it would apply to pre-existing contracts to the portion of the delivery that occurred after the effective date. He added it could use some clarification one way or the other on whether or not it was going to apply to pre-existing contracts, not just the one that was discussed. He was unaware if there were other existing contracts in which this would apply.

REP. STORY asked **Kurt Alme** if he anticipated if this language was applied to an existing contract, someone would probably go to court on it. **Mr. Alme** replied, yes, but he was not sure if they would be successful. He added even though the contract had been in place, the tax was not something built into the contract. Since it was something outside of the contract, he was not sure they would prevail.

REP. STORY asked **Kurt Alme** if they tried to clarify this and still tried to apply it to an existing contract, did he anticipate someone would go to court because they were basically changing the terms of the contract. **Mr. Alme** responded the contract was between the two parties, and since they were simply applying a tax, he was not sure it would be any different than raising the income tax on a contract where the income they were going to receive from the contract was pre-existing and depended partly upon what they expected the income tax rates to be. **Mr. Alme** explained tax rates were in the provision of the government and they were subject to change at all times. He added the likely of success of that kind of challenge would probably be minimal.

SEN. HALLIGAN agreed with **Kurt Alme** in that laws were passed all the time, whether incentives, income taxes, and a variety of others, that impaired or affected contracts. He said it was not an ex-post-facto issue. Parties had to deal with the issue of the tax being imposed; it was an outside issue that did not impair the contract. He added it was not part of the parties negotiating. **SEN. HALLIGAN** explained the bill was intended to be as broad as possible to make sure they were covering everybody and treating everyone the same, whether they had a contract or not.

SEN. FORRESTER asked **SEN. HALLIGAN** since they had just about written out co-ops in this bill, with Flathead Electric being a co-op; if they were going to return a portion of the excess profits and co-ops were written out, would he explain how the people in Flathead Electric would benefit. **SEN. HALLIGAN** said

they would have to potentially deal with that clarification issue or deal with the co-op issue as well.

REP. FORRESTER told **SEN. HALLIGAN** they could not deal with just **SEN. DEPRATU's** amendment. **SEN. HALLIGAN** agreed. **REP. FORRESTER** told **SEN. HALLIGAN** they then would need to have another amendment saying if there was an excess profits tax imposed on co-ops' earnings or the company selling the co-op, then there would be a mechanism to give it back to the co-ops. He added, suddenly they were broadening the bill greatly because if Basin Electric came into eastern Montana, then it would apply to them as well. He stated co-ops did not want to be included, on one hand, but on the other hand, they did want to be included. He asked where he wanted to be. **SEN. HALLIGAN** replied if they were under the cap and were not taxed because of the cap, there may be no need for an exemption.

REP. FORRESTER asked **SEN. HALLIGAN** what would be an amendment for a mechanism to return the excess profits under this bill and would the co-ops also be willing to be included in USB charges as well. **SEN. HALLIGAN** replied there currently were.

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SEN. DEPRATU told the committee he would like to see an amendment for clarification saying it wasn't included. As far as the mechanism for returning the funds, he acknowledged there had to be some thought put into that. He had not prepared for that at this point, he added.

REP. FORRESTER asked **SEN. DEPRATU** if part of the amendment he requested would be that co-ops would also be willing to participate in providing assistance for employers with more than 100 employees. He said they would not just be included in the excess profits portion; if they were going to be included, they would be included just as the other electricities were. **SEN. DEPRATU** answered his intention with the amendment was to address that specific situation in the Flathead.

He added, with the likelihood of that power jumping that much, it would conceivably put 3,000 people out of work in the Flathead, due to three main companies in that area which would have to shut down. He stated that, in itself, from an economic standpoint, would start a downward spiral in the state that would be hard to recover from.

REP. FORRESTER told **SEN. DEPRATU** it was his understanding that it was currently contractually agreed upon that the power would go to the Mid Columbia index and the price would still go up to the

$345 on October 1. He asked, with this bill, how long would it be before they started returning the money. **REP. FORRESTER** added it looked like Flathead Electric would be forced to go to the $345 figure, regardless, then they would have to wait for a return. He said if there was a lawsuit, the state would hold the tax until the lawsuit was settled. He asked if it could be a year before they received the money which would mean the Flathead could still be devastated. **SEN. DEPRATU** responded that was very possible, but it could also change things to where it wouldn't happen that way.

SEN. COLE asked **Kurt Alme** to comment on this discussion. **Mr. Alme** said in relation to exemptions, he understood the actions of this morning kept the exemptions for the co-ops in, but he did not think that would impact what they were presently talking about because the tax was applied to the sellers of the electricity and not the purchasers.

REP. STORY said this bill would never deal with the distribution; it would only deal with the tax. He would like to see where they would put the amendment in to clarify this applied to existing contracts.

SEN. COLE asked **Jeff Martin** where he would suggest inserting the amendment. **Jeff Martin** suggested to put it in the applicability section.

SEN. HALLIGAN proposed an amendment to change the applicability clause on Page 9, New Section 16 to have it apply to existing contracts for the sale of electrical energy.

Jeff Martin asked **Kurt Alme** if the proposed amendment was clear enough. **Mr. Alme** replied it would be necessary to specify delivery, with delivery after the effective date of the act.

Jeff Martin explained the existing applicability applied to electrical energy produced and sold after May 31, 2001. He stated it would not hurt to include **Mr. Alme's** statements related to those contracts.

Motion: **SEN. HALLIGAN** moved that an **AMENDMENT TO CHANGE THE APPLICABILITY CLAUSE ON PAGE 9, NEW SECTION 16 TO HAVE THIS ACT APPLY TO ELECTRICAL ENERGY SOLD UNDER AN EXISTING CONTRACT OR EXISTING CONTRACTS AND DELIVERED AFTER JUNE 30, 2001, AND TO ANY CONTRACT OCCURRING AFTER JUNE 30, 2001 BE ADOPTED.**

SEN. DEPRATU agreed with the amendment.

Vote: SEN. HALLIGAN's AMENDMENT TO CHANGE THE APPLICABILITY CLAUSE BE ADOPTED. Motion carried 5-1 with REP. FORRESTER voting no.

Jeff Martin explained **amendment SB051204.ajm.** He stated the wording was changed in New Section 1, Subsection 2 about how the tax was imposed. Subsection 3 revised the definition of "arms-length sale" while Subsection C changed the word "transaction" to "sale". This amendment also included the balance of the amendments presented during the morning meeting.

SEN. DEPRATU asked if the Department of Revenue was comfortable with the applicability date for the beginning of this bill to become effective. **Jeff Martin** explained he had an amendment that would deal with that issue.

Motion: SEN. DEPRATU moved that **SB051204.AJM BE ADOPTED.**

REP. STORY stated he wanted to comment on the MDU exemption. He told the committee he understood their concern, but he thought a problem would be created in the bill with that exemption. He requested the committee reconsider their actions on the MDU amendment. **Jeff Martin** responded it was amendment #6.

SEN. COLE said that amendment took care of what they were looking at doing.

REP. DEVLIN stated it was his understanding when they adopted that amendment, that the thought behind it was that since then, in the original SB 390, there was an exemption because they were in part of a different territory in a regulated arena and that was why they referenced Section 69-8-201, Subsection 4. His understanding of the comments from that morning was that this had pretty good grounds to leave that in and that was why they went ahead and adopted this amendment.

REP. STORY told the committee he could not see a rational basis for treating the MDU generation differently than the VISTA and PORTLAND, to name a few, because they were all selling into regulated systems. He added that to make a specific exemption for MDU, for the power they were selling into the market, even though it was a small amount, would create a problem down the road if you had to go back and apply it to the other generators. He said for the small benefit it provided, the risks were greater. He added he hoped the committee would remove that one.

Motion/Vote: REP. STORY moved to **RECONSIDER ACTION ON AMENDMENT #6 BE ADOPTED. Motion carried 4-2 with Devlin and Cole voting no.**

Motion/Vote: **REP. STORY** moved to **STRIKE AMENDMENT #6 BE ADOPTED. Motion carried 4-2 with Devlin and Cole voting no.**

Motion/Vote: **SEN. DEPRATU** moved that **AMENDMENT SB051204.AJM BE ADOPTED AS AMENDED. Motion carried 5-1 with Forrester voting no.**

Motion: **SEN. DEPRATU** moved that **AMENDMENT SB051207.AJM EXHIBIT(frs86sb0512a06)BE ADOPTED.**

Jeff Martin explained amendment #3 should say insert June 30 instead of July 1.

Vote: Motion that **AMENDMENT SB051207.AJM BE ADOPTED. Motion carried 5-1 with Forrester voting no.**

Kurt Alme, Director of Department of Revenue, suggested some sort alternative mechanism to sunset this tax, other than letting the effective date lapse at the end of five years and turning attention to Section 17, he said there was some discussion about whether the mechanism that could be in place which would be constitutional which would allow the tax to sunset soon should there be reasonable and stable prices returned to the energy sector. He suggested, in Section 17, the language regarding stable and reasonable in that clause allowing the termination of anything other than reaching December 31, 2004,or the different termination date that had just now been amended into the bill, could raise constitutional questions in the proper delegation of authority to the Public Service Commission from the legislature. He suggested the committee consider addressing that issue.

Motion: **SEN. HALLIGAN** moved that **ON PAGE 9, SECTION 17, OF THE BILL, TO STRIKE ALL LANGUAGE EXCEPT FOR THE TERMINATION DATE OF JULY 1, 2005 BE ADOPTED.**

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REP. STORY asked **Kurt Alme** if the tax collections would be a monthly collection. **Mr. Alme** replied Section 3, Subsection 1, discussed that issue. **Mr. Alme** understood they would have 30 days, effectively, from the end, and would be collected monthly.

REP. STORY asked **Kurt Alme** if they still had to keep those sections to collect the money for the month when they terminated the act or did they need to terminate the tax on the first of July and terminate the rest of the act at a later date before they would be able to collect the money. **Mr. Alme** answered **REP. STORY's** suggestion made sense to him.

REP. STORY asked **Jeff Martin** if they should include that. **Mr. Martin** replied he was not sure, but it seemed to him the collection would still be due as the law existed on June 30.

REP. STORY told **Kurt Alme** when they tried to do the last audit to make sure the money was paid, he didn't want them to have no authority because the law expired the previous month. **Mr. Alme** replied that was a good question and he was not sure how that would play out; therefore, he told the committee some clarification would be in order on that issue.

SEN. HALLIGAN agreed with **Jeff Martin.** He explained whatever the law was in effect at the end of June 30, 2005, was the way they would collect that based on the audit. He said that law should cover that, so he did not think there was a need to clarify that.

SEN. DEPRATU stated they had up to 30 days to pay the tax, but it was still owed.

REP. STORY wanted to raise the question about this issue to make sure they were alright on the issue. **Kurt Alme** responded **REP. STORY's** intent was clear on the record now if that issue were to arise on how to interpret the statute.

Vote: Motion that **AMENDMENT ON SECTION 17 FOR THE JULY 31, 2005 TERMINATION DATE BE ADOPTED carried unanimously.**

Motion: **SEN. HALLIGAN** moved that **SB 512 DO PASS AS AMENDED.**

REP. FORRESTER opposed this bill. He told the committee he had a basic philosophy that went against what the committee was doing with this bill. He was against raising taxes in this manner. He said he had talked to people all across Montana and they could not believe what the state of Montana was doing. He added if the committee wanted to put forth a chilling effect on future business recruitment, then this was the right way to do it. If you don't like economic development in the state, then pass stuff just like this bill, he said. He said he had never seen 90% taxes imposed on anybody. He would imagine, in the next session of the legislature, they would come back after MDU because the customer's bill doubled, MDU's stock price tripled, and he didn't see why they shouldn't come back after them, as well. He strongly stated this was a bad, bad precedent. He thought they were going the wrong way. He stated this was a bad bill yesterday and was a bad bill today.

SEN. HALLIGAN told the committee this was situation where the economic life of this state was hanging in the balance of the energy issue. He said, where you had a situation where you were a net exporter of electricity, you needed to be able to take advantage of that situation where you could help existing customers be able to maintain their businesses. He added not one dime of this tax was going to be paid by Montanans. **SEN. HALLIGAN** stated all the revenue and what it would accomplish would go back to the various utilities that were going to be paying the tax. It was a situation where it was almost a win/win for both parties. They were paying the bill but they were getting their money back and it would help to buy down the rates. This would be a benefit for businesses and homeowners alike.

REP. FORRESTER told **SEN. HALLIGAN** the committee left Section 11 in the bill. He asked **SEN. HALLIGAN** how could he say 100% was going back because it looked to him like they were going to be setting up some sort of agency to assist in the recruiting of employers with 100 employees or more. He asked if that was 100% going back. **SEN. HALLIGAN** replied that section had been stricken from the bill.

Vote: Motion that **SB 512 DO PASS AS AMENDED. Motion carried 5-1 with Forrester voting no.**

HB 600

SEN. COLE told the committee they would now deal with HB 600.

Motion: SEN. DEPRATU moved that **AMENDMENT HB060003.AJM BE ADOPTED EXHIBIT(frs86sb0512a07).**

SEN. DEPRATU explained **amendment HB060003.ajm** added in and clarified it could be owned or leased.

REP. STORY told the committee he liked this bill as it came through the process, however, he was concerned with amendment #4 because of a certain set of operation where they were talking about bringing in many diesel locomotives to use for stationary generation. He stated when they did that, those would become exempt from taxation. The whole time this bill was being developed, he said, it was always assumed it did not have a fiscal note on it because they were basically new generators coming that were not being used. **REP. STORY** explained the concern of the sponsor of this bill was that once you went to this situation, you might be taking much property that was

presently taxed in Montana and making it tax exempt. He added they did not know that for this case because they did not know how many locomotives were setting around not being used. **REP. STORY** said the sponsor had a real concern about any of this property that was presently on the tax roles shifting to non-tax status because of her bill as that was never her intent.

SEN. DEPRATU said it was his understanding these were excess locomotives and that there weren't 50 locomotives sitting around not being used in the state. He said they would not reduce the number of trains they were running through the state because of using these; they would bring them in from an outside source. Therefore, it should not affect the current tax collections based on the number of locomotives operating in the state. The locomotive's purpose would change dramatically from what they were originally built for because it had been experimental, but it appeared it would work. **SEN. DEPRATU** state it could help to get another one of the employers running again. This could also have applications for other companies that had railroad sites.

SEN. HALLIGAN told the committee he had raised that concern on the floor of the Senate. He wondered if the Department of Revenue could answer questions concerning this area. **SEN. HALLIGAN** explained railroads were tax pursuant to the 4 R's Act and there were some concerns there with the rolling stock or whatever method the railroads were currently taxed under. He asked if they were taxed by the unified method. He said he did not necessarily support the use of bringing the locomotives in, but he did not think they should be exempt from taxation. **Dan Dodds, Department of Revenue**, replied they would get someone who could answer that. **SEN. HALLIGAN** responded the committee needed to have an answer to that question.

REP. STORY referred **Jeff Martin** to line 29 of the bill where the exemption referred to machinery and equipment after the date of this act. **REP. STORY** asked if "after the date of this act" apply to all those three or were they actually exempting generation presently sitting in place. **Mr. Martin** answered the amendment would describe "or that are purchased by the person after the effective date of this act" which would refer to equipment that was owned or leased by a person, as of January 1, 2004 because of the retroactive applicability.

SEN. HALLIGAN stated if the committee did that, he felt they needed to have a fiscal note. He added if they were exempting property already on the tax rolls, they would need the fiscal note.

REP. STORY said property that was assessed on January 1 would not be taxed until November, so the department would need to go back and do their assessments and take that into account. He added anything that was not on the rolls as of January 1, 2000 would not show up on the rolls until this year, so it had never been taxed prior to that time. **REP. STORY** explained this was all basic business equipment, so anybody having one of these generators and reported it in the year 2000 was taxed on it in November and would be taxed on it in May. He added this exempted, retroactive to 2001, so anything that came on board after the reporting period in 2000 had never been in the tax system yet; therefore, there was not a fiscal impact because they had never collected any money from it.

SEN. HALLIGAN responded as of February 15 it had not been taxed yet, but had been on the tax rolls. **REP. STORY** agreed.

REP. STORY explained if someone had set up a generator last October, they did not report it until this winter, so consequently, it still had never been taxed.

REP. DEVLIN asked **REP. STORY** when the local government got ready to set up its mill levy and they took into account what was coming on-line as newly taxable, if the committee exempted this back to January 1, would the results affect them in their budgeting process. **REP. STORY** answered, no, because that property would not be taken into account until this July when they set their budget for the following year; he added, as long as the Department of Revenue went back and took it off the rolls so they did not have some phantom property out there.

REP. STORY stated he was concerned about the generators like the ones at Smurfit/Stone which had been there for a while.

REP. FORRESTER replied you would not pull those out because they were non-commercial.

REP. STORY agreed they were non-commercial, and this exemption applied to non-commercial; he assumed they were in place before so should be in some tax rate. He said he would think the one in Conoco that just went in, if they went after January 1, 2000, they were probably exempt also.

SEN. HALLIGAN raised the issue of 80 megawatts. He asked where that came from. **SEN. DEPRATU** replied he had raised that amendment with his reason for doing that was the industrial use of those units. He said, apparently, on the testing of one unit, they determined one locomotive could deliver 1 ½ megawatts, so 50 locomotives output was rounded to 80.

SEN. COLE asked **SEN. DEPRATU** if this was also where he moved it to 70% on line 3 and, if so, why. **SEN. DEPRATU** answered he was not the one that changed that, but the thinking had been if for some reason there a little bit of down time and they were still able to generate, they would still be able to sell some onto the retail market which would help to offset their cost. He added, apparently, the cost on these would be about 6-6 ½ cents.

SEN. HALLIGAN asked if the immediate effective date a problem with respect to rule-making or any issue for the Department of Revenue that was dealt with in the last bill. **Jeff Martin** responded that issue was not raised in the fiscal notes and nobody had talked to him about it.

SEN. HALLIGAN referred to **SEN. DEPRATU's** issue about the locomotives. He said the definition on page 2 of the electrical generation machinery included any combination of physically connected generator or generators; he assumed they could be connected on a rail line. He said if they were not talking about physically connected to a plant, inside the plant such as a co-generation facility normally would be, he did not know if that issue played into his use of the locomotives.

SEN. DEPRATU asked if they meant to remove the wheels to make it a stationary engine.

REP. FORRESTER said the original intent of the sponsor was to keep this for small generators. He said, by going up to 80 megawatts, they had scrapped the original intent of the bill. The sponsor's intent was there was going to be some small business owners that could now generate power; by increasing to 80 megawatts, that was turning this into something major. **REP. FORRESTER** explained the first limit of 30 megawatts had been placed in, but going up to 80 was major. He asked if **SEN. MILLER's** bill would take care of the larger entities. **REP. STORY** replied **SEN. MILLER's** bill was just an air quality permitting bill.

REP. STORY explained if they looked at the fiscal note under assumption 2, the budget office assumed this also applied to some currently owned machinery. He said the committee was thinking this did not apply to currently owned property. **Curt Nichol** replied he would have to ask the Department of Revenue.

Jeff Martin said the question was the committee was not anticipating this would apply to currently owned generators. **REP. STORY** said that was a previous question. **Mr. Martin** replied he had meant to leave that impression.

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Jeff Martin continued by telling the committee if you owned a generator on January 1, your property was exempt for that tax year; if, up until that time, you were leasing generation machinery and equipment and purchased it after the effective of the act, then it would be exempt. If you were leasing property, it was not exempt from taxation.

REP. STORY said it would apply, then, to quite a few generators that were sitting out there. **Mr. Martin** replied that was correct.

REP. STORY said then you have more than a $13,000 fiscal note.

REP. FORRESTER asked what would be the value of excluding a locomotive putting out 1 ½ megawatts. He said he was sure someone would take a hit on that.

REP. STORY said there were a couple of 2 megawatt generators at one of the businesses in the area and those machines were worth close to $1 million apiece.

SEN. HALLIGAN asked **Gene Walborn** if they brought locomotives into the coverage of this bill, did the definition allow for physically connected generators brought in by rail and hooked by rail, would they be exempt from tax under this bill. He asked if there were some rolling stock issues that played into this bill as well. **Mr. Walborn** responded they would consider it as non-operating property; it would not be a part of the railroad. He said, probably through the lease agreement, it would be taxed to whoever that industrial user; it would be their responsibility to pay the tax on it if there was tax due. He added if it was exempted, it would be exempted from taxation under that industrial user, not for the railroad. **Mr. Walborn** explained if the railroad did not use it, you had to assume it was excess property the railroad did not need for its normal operation; it would therefore be treated as non-operating. He said if it was taxable, it would be non-operating in Class 8 at 3%.

SEN. HALLIGAN asked **Gene Walborn** what the normal tax was on an old locomotive. **Mr. Walborn** explained they would need to know the year and the original cost; it would then be trended up to current cost, then depreciate it down to what the life of the equipment was. He said he was assuming they would use rather old locomotives if it was excess property.

SEN. HALLIGAN asked **Gene Walborn** if that would be a general fund hit and not a property tax hit. **Mr. Walborn** replied it would like class A property tax, part local government, part state.

SEN. DEPRATU asked **Gene Walborn** if it would be a few hundred dollars per locomotive or a few thousand dollars. **Mr. Walborn** guessed it would be closer to $1000.

REP. STORY asked **Gene Walborn** if he had done the fiscal note. **Mr. Walborn** said he did not.

REP. STORY asked **Gene Walborn** if all of this exemption would be around $25,000 per year. He added it applied to a lot of generators; however, if there was a $1 million unit, that would produce $12,000 in taxes by itself. **Mr. Walborn** responded that would be close. He added that were older locomotives, though, which may have been worth $1 million before, but were not worth that today.

REP. STORY agreed, and added this applied to the public to things that were out there. **Gene Walborn** agreed.

REP. STORY asked **Gene Walborn** if this bill was retroactive to January 1, 2001. **REP. STORY** stated the committee discussed how that would work; he added it would work on anything assessed January 1 of last would pay the tax; while anything that came on after that, plus whatever was there on January 1 would then be exempt. **Mr. Walborn** replied that was correct.

SEN. HALLIGAN stated **REP. FORRESTER** had brought up the issue of 80 to 30 or whatever it was for small generators. He added **SEN. DEPRATU** wanted to deal with the issue in his area; **SEN. HALLIGAN** added this had been designed for small generators. He asked if there was any interest in the conference committee to lower that more in line with the intent of the bill. He did not know what the air pollution was for 50 locomotives going at the same time.

SEN. DEPRATU assumed they had taken the air issue into consideration.

REP. FORRESTER asked **REP. STORY** if he thought this bill had gone from a relatively insignificant amount of dollars to a rather significant amount of dollars lost to both the local jurisdictions and the state jurisdictions. He said this bill, as currently written with 80 megawatts, could now have substantial impact on local and state governments. **REP. STORY** answered this fiscal note had actually already done that on the 3rd reading

copy of the Senate bill. He said Assumption 5 estimated there would be 50 pieces of equipment this would apply to, with an average value of $100,000. He said if you included all the small generators the sponsor contemplated was maybe not out there yet and added up all the large ones presently in the system, it surprised him the fiscal note was that low. He stated if it cost the state $25,000, it would cost the local governments $75,000.

REP. FORRESTER asked **SEN. COLE** if the committee could get more information concerning the fiscal note. **REP. FORRESTER** agreed with **REP. STORY's** assessment that the fiscal note may not be correct. He added this bill would now include those generators destroyed and the generators contemplated at Conoco. He requested the Department of Revenue to provide an update because it would be helpful for the committee to know if this would cost the state $25,000 and the local government $75,000. **REP. FORRESTER** wanted the correct figures included in the record.

Gene Walborn replied the department could take another look at the figures and assumptions to get a more accurate fiscal note.

REP. FORRESTER told **Gene Walborn** he assumed he would look at the amendment presently in the bill dealing with the 80 megawatts and the issue of the 50 locomotives and the impact.

REP. STORY told **Gene Walborn** the units at MRI would not show up in the fiscal note because they were not there now; the only that showed up in the fiscal note was what was out there right now. He said the generators at Smurfit/Stone may be the only ones in the system; perhaps everything else had come in during the last year and wasn't even in the system.

REP. SYLVIA BOOKOUT-REINICKE, sponsor of the bill, told the committee the original intent of the bill was for the small lumber mills in Sanders County with the main focus being job retention. She said this was not money there were collecting now, so it was not going to be a "hit" on the Department of Revenue.

REP. STORY told **REP. REINICKE** the way the bill was drafted, it exempted all the generators that were presently out there, so some of that money was in the system already. He said they were just trying to figure out how much it was. **REP. STORY** said he understood the generators they would buy from January 1 and later. **REP. REINICKE** explained when the bill was originally drafted, they were not aware that leased equipment still paid the 3% business equipment tax. She added Stone Container had to lay off another 100 people last week. She requested the committee leave the bill as it presently was, at the 80 megawatts.

Motion/Vote: REP. STORY moved that **AMENDMENT HB060003.AJM BE ADOPTED. Motion carried unanimously.**

SB 506

SEN. COLE said the committee would deal with SB 506, beginning with amendments for the bill.

Motion: SEN. HALLIGAN moved that **AMENDMENT SB050605.ASM EXHIBIT(frs86sb0512a08) BE ADOPTED.**

Stephen Maly explained the amendments. He said amendment #2 raised the amount of money the department could spend to administer the revolving load fund. Amendment #3 & #12 were technical fixes to provide consistency. He explained there were several amendments that qualified the type of fuel cell that was to be included. **Mr. Maly** said the most substantive amendments dealt with reducing the credits, the amount of the tax credit allowed to businesses as residences in the various areas. Those reductions were in response to the Department of Revenue and other analysis indicating the fiscal impact could be more than what was intended or desirable. He stated the sections dealing with the revolving load fund were made effective right away on passage and approval. The rest was applicable on July 1. **Mr. Maly** said the net cost had been reduced fairly substantially.

SEN. HALLIGAN asked **SEN. COBB** to comment on the credits. **SEN. COBB** said he was concerned if the Department of Revenue was going to buy off. He said the one causing him the most concern was on page 11, Section 10, which was for credit for energy conserving expenditures.

SEN. COBB asked **Stephen Maly** to explain that section. **Stephen Maly** explained before this amendment, the concern was that someone applying for this credit would get a dollar for dollar credit up to $900. He said the assumption by the Department of Revenue made was that would be a huge incentive for people to spend $900 and turn around and get $900 back. Because of that, it had been substantially reduced to 25% of that person's expenditure up to a limit of $500.

SEN. COBB told the committee the next one was geothermal on page 12. He said the old law allowed the person $250 per year for four years which would total $1000. **SEN. COBB** stated they lowered the $2000 down the $1500.

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SEN. COBB continued on the next page, alternative energy figures were lowered down to $500 instead of the $2000 $750, therefore, there would be a $500 credit for alternative energy. He said they did not take a percentage of the energy conserving expenditure which was going to cost the most money. He asked if the Department of Revenue was still comfortable with those numbers.

Larry Finch, Department of Revenue, told the committee they had worked with **SEN. COBB** on this bill, providing him with information on what they thought the previous credit would do. He said the problem they had in coming up with what the numbers would be was the question of were the numbers going to sufficient enough that the fiscal impact of this bill was going to be agreeable with the going to meet muster with this committee, the budget office, and the rest of the people needed to sign and agree with the bill. **Mr. Finch** explained the question they had when they first looked at this credit was the $900 credit with no percentage applied for an energy conservation investment. He added that statute explained that to be an investment of any piece of equipment, such as an appliance, air conditioner, or window. **Mr. Finch** added that could become quite an expensive credit. They provided information to **SEN. COBB** explaining that could become quite an expensive credit if a very large number of people began to use it. In response to that, the committee received the amendment stating the credit would be 25% of expenditures up to a maximum of $500. **Mr. Finch** said they could not tell exactly how much that would cost yet.

SEN. HALLIGAN told **Larry Finch** the definitional section was not clarified with respect to the refrigerators and the variety of things people could potentially buy. He asked if that definition was left alone. **Larry Finch** replied that was correct.

REP. STORY told **Larry Finch** on page 11, Section 10, the expenditure listed would not include a refrigerator. **REP. STORY** stated he thought it would need to be something like insulation windows. **Larry Finch** responded it would depend on a strict reading of the law and how they would interpret it. **Mr. Finch** added it would depend on if that meant an investment in an energy conservation item that was inside the building or did it have to be in the infrastructure of the building itself.

REP. STORY asked **SEN. COBB** on Section 10 of the bill dealing with energy credit, was it actual work on the building or was it something inside the building. **SEN. COBB** replied he interpreted it as something on the building itself, not putting things in the building. He added the Department of Revenue had a rule-making authority, so they could decide how they were going to interpret

it. **SEN. COBB** reiterated it was his intent for the interpretation to be something on the building itself.

REP. STORY agreed with **SEN. COBB's** interpretation. **SEN. COBB** did not want it to be like Oregon where they received credits for things that went in the building, such as air-conditioners.

SEN. HALLIGAN said that needed to be clarified.

REP. DEVLIN told the committee on amendment 2, where the administrative cost was raised from 5% to 15%, seemed excessive to him. He asked if there was rationale in coming up with that number. **SEN. COBB** replied when the department had 5%, they thought there might only be $148,000, which would leave only $7000 to run this program; however, the department felt they needed at least $14,000 - $21,000 to run the program. **SEN. COBB** explained Human Services programs were often given 15% administrative costs. He said the department expressed 5% was too low, but they would take 10%. After a couple of years, if it gets growing, they would not need 10-15%. **SEN. COBB** said he took the figure from the Human Services figure because he did not know how else to do it.

Motion: **REP. DEVLIN** moved that **CONCEPTUAL AMENDMENT TO CHANGE FROM 15% TO 10% IN #2 OF SB050605.ASM BE ADOPTED.**

SEN. HALLIGAN said he considered that a friendly amendment and would like to include it in the amendments as the committee voted on them.

Vote: **THE MOTION BY REP. DEVLIN TO CHANGE FROM 15% TO 10% BE ADOPTED. Motion carried unanimously.**

SEN. HALLIGAN asked **Larry Finch** if the committee could get some indication, at least orally, of what the fiscal note on the bill was. **Mr. Finch** replied they would look at it.

REP. STORY told **Larry Finch** he would try to have the language clarified so it would only apply to structural things.

ADJOURNMENT

Adjournment: 4:00 A.M.

_____
SEN. MACK COLE, Chairman

_____
LYNETTE BROWN, Secretary

BS/MC/LB

EXHIBIT(frs86sb0512aad)