MINUTES

MONTANA SENATE
57th LEGISLATURE - REGULAR SESSION
FREE CONFERENCE COMMITTEE ON ENERGY POLICY
HOUSE BILLS 474 AND 632
SENATE BILL 398

Call to Order: By **CHAIRMAN WALTER MCNUTT**, on April 18, 2001 at 8:35 A.M., in Room 137 Capitol.

ROLL CALL

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

Members Excused: None.

Members Absent: None.

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

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

Committee Business Summary:
Hearing(s) & Date(s) Posted:
Executive Action: HB 632
SB 398
HB 474

Note: This meeting was split into two sessions; the first one went from 8:35 a.m. to 10:55 a.m., and the second one from 1:00 p.m. to 1:50 p.m.

HB 632

CHAIRMAN WALTER MCNUTT introduced **Amendment #HB063219.ate, EXHIBIT(frs87sb0474a01)** and asked **VICE CHAIRMAN DOUG MOOD** to explain it.

Motion: VICE CHAIRMAN MOOD MOVED THAT AMENDMENT #HB063219.ATE BE ADOPTED.

Discussion:

VICE CHAIRMAN MOOD explained that these amendments eliminated new language on pages 8 and 9, so as not to weaken the PSC's case as had been discussed; it also struck language saying once a company opted in, they could not opt out again. Item #5 inserted biomass, also as per previous discussion. He went on to explain that the 8% rate of return provision was eliminated because it was not needed as well as new language on page 14, lines 28 through 30.

CHAIRMAN MCNUTT asked him to go over page 11, lines 21 through 23. **VICE CHAIRMAN MOOD** explained that the whole section would remain as it was after the new language was stricken.

Vote: Motion carried with **three Representatives** and **two Senators voting aye, Sen. Ryan** arrived late at the meeting.

Todd Everts commented that **SEN. DON RYAN** might not be able to make the meeting, but had requested two sets of amendments; it was decided to discuss them in his absence because of time constraints. **Mr. Everts** introduced **Amendment #HB063218.ate, EXHIBIT(frs87sb0474a02)**, which specified that the just and reasonable rate proceedings applied to exempt wholesale generators located within the state.

VICE CHAIRMAN MOOD asked what distinction was being made here. **Mr. Everts** replied that the generation of electricity supply could potentially include any other entities than just the exempt wholesaler of energy. **VICE CHAIRMAN MOOD** wondered if that meant any facility producing electricity, and **Mr. Everts** reminded him this was qualified by a public utility which had filed a transition plan.

Motion: Sen. Ellis MOVED THAT AMENDMENT #HB063218.ATE BE ADOPTED.

Discussion:

REP. ROY BROWN stated he was not clear about the purpose of this amendment, and asked if this was specific to PPL Montana. **Mr. Everts** commented that it was if PPL Montana was the only exempt wholesale generator. **Greg Petesch** explained that it was consistent with the assertion of jurisdiction over a wholly integrated public utility. **REP. BROWN** suggested to wait with taking action until **SEN. RYAN** could explain his reasoning.

SEN. ALVIN ELLIS withdrew his motion.

Mr. Everts introduced **Amendment #HB63220.ate, EXHIBIT(frs87sb0474a03),** which struck original language and put a condition on implementing lifeline, interim, or permanent rates, saying they could only be implemented if those rates were fully reflected in the electricity supply cost.

CHAIRMAN MCNUTT advised to study these and wait until **SEN. RYAN** could join them.

SB 398

Mr. Everts introduced **Amendment #SB039806.ate, EXHIBIT(frs87sb0474a04),** requested by **SEN. ELLIS,** and explained that the primary change was to be found in item #1. He commented that the purpose of SB 398 was to allow the operation of certain temporary power generation units to occur under certain conditions without an air quality permit. These amendments basically struck all of Section 12 (a) on page 4 and reinserted some language which he read to the committee, saying that the conditions in the remainder of the bill still applied, meaning ambient air quality standards could not be violated.

CHAIRMAN MCNUTT asked if someone from the industry wanted to comment on this.

Tom Ebzery, Governor's Advisory Council, stated this was one of the recommendations made by that committee because they felt temporary portable generation needed to be brought online to alleviate shortage problems. **SEN. KEN MILLER** had decided to break it down and allow for construction to begin without a permit for a unit producing 10 megawatts or less. He said there was some doubt whether someone would start construction without assurance of being able to operate, but he felt that these amendments would achieve what the Council had envisioned. He also stated that **SEN. MILLER** had agreed to these amendments.

Motion: Sen. Ellis MOVED THAT AMENDMENT #SB039806.ATE BE ADOPTED.

Discussion:

Donald Quander, Montana Large Customer Group, stated that they had helped work on SB 398, and felt this amendment restored the original intent which had broad bipartisan support in both Chambers. He argued that while they had sympathized with the objective of accommodating and expediting the permitting of larger units, they had some concerns about the size of the units which might be operated without a permit in place, and appreciated the sponsor's distinction between unit sizes. He felt, though, that a 125 megawatt unit might be oversized.

REP. TOM DELL referred to a section that stated: "at least 50% of the electrical energy produced by the temporary power generation unit must be used in or offered for sale in Montana at prices that do not exceed 6 cents per kilowatt hour", and asked why this was stricken. **Tom Ebzery** claimed that there were some questions with regards to constitutionality, in terms of requiring a specific amount to be used in the state; and secondly, if a better rate was offered, a customer might not be able to buy down the cost. **REP. DELL** asked if he could conceivably build a 50 megawatt generator and sell power to Wyoming. **Mr. Ebzery** replied it was conceivable, but cautioned that these portable generators represented a significant capital investment of at least $100 per megawatt hour, and he thought going out of state was unlikely. **REP. DELL** was concerned that this could be abused and capitalized on because it allowed for flexibility with regards to air quality standards, and asked to have his concerns assuaged. **Mr. Ebzery** claimed this would be a very expensive way to capitalize on the system, knowing that the ambient air quality standards had to be met and having to go through the whole permitting process. **REP. DELL** charged that there was no constitutional barrier to giving a person who wanted to sell to Wyoming a fair chance to do just that. **Mr. Ebzery** reminded him of the two criteria; in the case of the 10 megawatt unit, he thought it likely that the permit would be issued; for a larger unit, it would be more risky to go through the permitting process, and it would probably have to be located in a rural area.

Vote: Motion carried with **two Representatives** and **two Senators voting aye; Rep. Dell voted no**, and **Sen. Ryan** was not present.

HB 632

CHAIRMAN MCNUTT told the committee that some time ago, he had asked the Consumer Council to do a profile on HB 632, and asked if **Bob Nelson** was in the audience.

{Tape : 1; Side : B}

Bob Nelson, Consumer Council, claimed he did not know the current status of HB 632, and his remarks would have to be generic. He stated their concern was with the negative impact returning customers would have on the remaining customers' rates, saying they would like to see some protection applying to the existing customers. As he read the bill, there would be two categories of returning customers, those who could return under the lifelines rates and those who could return by electing default supply service, with the lifeline rate customers being served at 150% of applicable rates; he presumed the others would be served at 100% of the default rates and had to agree to permanent service in return. The Council had some concerns with the cost recovery provisions; he mentioned leaving subsection (8) in the bill, because he believed 69-8-211 to be important to the commission's assertion of authority to control the rates charged by the generators.

CHAIRMAN MCNUTT informed him that the amendments proposed this morning struck the entire Section, and subsection (8)was now out of the bill.

VICE CHAIRMAN MOOD had a difficult time hearing what **Bob Nelson** had said about two classes of customers, and asked him to repeat it. **Mr. Nelson** referred to the provisions on page 9, lines 14 to 18 and repeated what he had said before, adding that it did not say what the rate would be, and he had presumed it would be the default supply rate. **VICE CHAIRMAN MOOD** informed him that Subsection (6) had been stricken earlier in its entirety.

REP. ROY BROWN asked whether subsection (8) on page 13 was also struck. **VICE CHAIRMAN MOOD** explained that by taking out that section it left it as it was in current law.

HB 474

Greg Petesch, Legislative Branch, introduced **Amendment #HB047402.agp, EXHIBIT(frs87sb0474a05)** saying because it amended an amendment adopted yesterday, the change was shown in bold text under subsection (5); it allowed the Department of Administration to recover the cost of administering the consumer electricity support program from the consumer electricity support account. This mechanism had been requested by the DOA.

Motion: Chairman McNutt MOVED THAT AMENDMENT #HB047402.ATE BE ADOPTED.
Vote: Motion carried with **three Representatives** and **two Senators voting aye.**

CHAIRMAN MCNUTT introduced **Amendment #HB047406.agp, EXHIBIT(frs87sb0474a06)** which he had requested in an attempt to protect the default supplier.

Mr. Petesch stated that some of the concepts in these amendments were similar to the amendments requested by **REP. DELL,** and they were now melded into the right bill. He pointed out that the major change was that these amendments designated a customer's distribution service supplier as the default supplier; it also repealed some language dealing with default supply licensing of various entities because it was no longer necessary. The definition of electricity supply cost on page 2 of the amendments remained the same; the transition period ended on July 1, 2007 to conform with amendments made to SB 19; item #8 specifically provided that the distribution services provider had an ongoing, regulated default supply obligation beyond the end of the transition period. Amendment #9, subsection 4 (a) was identical to a previous amendment dealing with procedures for choosing the default supplier, and the remainder dealt with the option for opting in and out of default supply, securing an orderly procedure for this process, including prior notification of the default supplier, and the stipulation of the five year contract. He went on to say that item #11 dealt with the duties of the default supplier, such as procuring the portfolio, commission approval of contracts with a 15 day time frame instead of the 30, as well as the two options with regards to either pre-approval of contracts or procuring supply without the commission review and then having the contracts subject the commission's prudency analysis as discussed earlier. The mechanism with regards to the full cost recovery had to be adopted by the commission before March 30, 2002, and the repealed sections dealt with the buying cooperative being licensed as a default supplier, and the licensing and license revocation sections since the default supplier was now named.

VICE CHAIRMAN MOOD asked if his last comment referred to page 8 of the amendments. **Mr. Petesch** replied what was stricken on page 8 dealt with customer choice and was stricken because it was in conflict with the new language regarding opting in and out.

CHAIRMAN MCNUTT called on a representative from MPC or NorthWestern to comment on these amendments.

Pat Corcoran, MPC, proclaimed that both MPC and NorthWestern supported these amendments as presented. He felt they had come a long way since SB 243, and they felt comfortable with these provisions.

CHAIRMAN MCNUTT stated that **Mike Hanson, NorthWestern,** had expressed some concern about their generation and what portion of it was going to be used to pay down those asset costs, that maybe this language might require all of the money to flow back into the rates. He asked **John Hines** to comment on this.

John Hines, Northwest Power Planning Council, referred to Section 4(a) on page 9 of the amendments which stated that the commission shall use an electrical cost mechanism that ensured all electricity supply costs approved by the commission shall be recoverable in rates, and said that those costs are defined on page 2. In his opinion, this said that any revenue which occurred because of sales not to the default supplier customer base should be netted back against the costs of providing the default supplier. He offered that "sale of surplus electricity" could be further defined to accommodate NorthWestern's needs.

Dennis Lopach, NorthWestern Corp., asserted that **Mike Hanson's** concern was with the last sentence of subsection (12) on page 2, that it could be construed to include sales by the entity that will own the natural gas generators which will be separate from the entity housing the default supplier. He would like it to read "revenue from the sale of surplus electricity by the default supplier must be deducted from the included costs".

Patrick Judge, MEIC, stated that if the committee specified that the distribution utility act in the role of default supplier and that the small customer buying cooperative would not be allowed to function in that capacity, he urged to look at section 35-19-104 which limited the small customer cooperative to act only in the capacity of a default supplier, and strike that section to be consistent with the other changes. **Mr. Petesch** replied that this section had been amended and allowed them to act as an aggregator and if they both passed, they would be allowed to be a supplier other than the default supplier, or the aggregator of green power.

Mike Uda, Ash Grove Cement Co., charged that there were three reasons why these amendments should not be adopted. He stated first off that the drafters of HB 632 had worked very hard to make sure that the language in SB 390 was preserved so as to not interfere with the commission's jurisdiction. In statute right now was a provision saying that the default supplier had to be held whole. Assuming there would be litigation and the question arose whether these amendments were consistent with what HB 632 wanted to achieve, he would say that MPC and NorthWestern would face a similar uphill battle because if they had believed all along that they had the right to full cost recovery, why the need for all these amendments. Thus, from their standpoint, these

amendments should not be adopted. Secondly, the language in the cost recovery mechanism was inconsistent with current law and the affirmation of commission jurisdiction. The third point was that there was a huge difference between saying that the default supplier had to assume some risk for bad decisions, and bankruptcy. He admitted it was a balancing act, having the default supplier assume some risk but not all the risk, but that exactly this was done by the PSC, on a daily basis, making all kinds of decision regarding utilities, allocating risk between shareholders and ratepayers. He alluded to **SEN. ELLIS'** concern that in the trading business, sometimes we do not have 15 or 30 days to make a deal, and nobody was saying that we are insulated from any risk because of a bad deal. He felt that having only 15 days for an important decision about what costs the customers should be paying put the commission in a difficult position, having to determine what was just and reasonable in such a short amount of time. Moreover, "just and reasonable" was not defined in statute; what statute did attempt to do was to balance the interests of ratepayers and shareholders. In closing, he said that these amendments may be tying the hands of the commission and putting consumers at great risk.

CHAIRMAN MCNUTT stated that he had worked on both the TAC committee and the Consumer Council, and had been told repeatedly if someone went out for a contract for a block of power and the offers came back, one was not given a perpetuity to make a decision; most of them needed to be made in fifteen days or less. In this regard, he did not understand why that language would impair the PSC, with this being industry practice regarding the length of time most offers were on the table.

{Tape : 2; Side : A}
Mike Uda felt this was an excellent question with regards to the contracts, but the real question was whether, after having only fifteen days, the decision became unchallengeable, and whether the commission should be put in that position. He felt the utilities wanted to be protected from a decision they may have made, giving the commission fifteen days to determine whether or not it was suitably protective of ratepayers. He charged that they could enter into those contracts now; what they did not have now was protection from liability in the event they made a bad decision, and that was what this attempted to accomplish.

Donald Quander, Montana Large Customer Group, surmised that if the intent was to ensure no customers larger than one megawatt would return to the system, the amendments certainly accomplished that goal. He understood that the decision to opt in beginning July 1, 2002 had to be made within the next few months, and the

customer had to agree to stay for the entire five year period, subject to the 10% of the total load being phased out at the end. He referred to 3(b) and (c) on page 9, saying he agreed with **Mr. Uda** that this was inconsistent with a meaningful commission review because it did not allow time for third parties to comment or even for the commission to give it adequate consideration. He felt it was an empty exercise to ask the commission to require to approve or reject a contract within fifteen days; if they rejected it, they had to explain the basis, and if they approved, the last sentence in (8) on page 14 came into play which said "Approved electricity supply costs are considered to be just and reasonable rates". This meant that the supplier had an opportunity to enter into a contract, and then may elect to submit this for pre-approval by the commission or not; if they choose to submit it, the commission must accept or reject within fifteen days, and if approved, it would be presumed to be just and reasonable and not subject to challenge later, as **Mr. Uda** had described. He felt this was a policy choice, but he wanted to elaborate on two longstanding touchstones of utility law; one was just and reasonable rates which not only protected the customer but also allowed a reasonable rate of return for the utility, and the second was the traditional prudence review. These had come about because traditionally, utilities had urged that these were business decisions for them to make, and that they could not be delayed by commission approval or reaction; he concurred, saying this was a fast moving market and decisions needed to be made promptly. He believed utilities were able to do this under current law, and to the extent that this bill reinforced this concept, there was no harm done. He stressed, though, as had **Mr. Uda**, that the consequence of this had changed. Traditionally, a company made a business decision, submitted it to the commission and established that it was prudent; subsequently, they were entitled to recover that cost as well as earn a reasonable return. Now this bill required pre-approval which has been the holy grail of the utilities for 75 years; it is the "hold harmless" provision which meant they could get the commission to immediately pre-approve their costs so they would not be at risk. This has never been the case anywhere, and he cautioned that the committee should not be fooled by the idea that calling a utility the default supplier changed this, traditional utilities were default suppliers by definition; they were obligated to go out and get supply for their customers. Some of them owned generation, others did not and had always been in the market buying for their customers, and there was no special new risk associated with this activity. In closing, he charged that the default supplier should not be more at risk than other utilities were but neither should they be less at risk, neither should they have no stake at the table. He feared that this bill went too far in not simply assuring a right they already had, namely

reasonable cost recovery, but in fact guaranteeing something no one had ever been granted. He recommended that the committee rely on the language in 3(d) on page 9 which reflected the prudence test which was law; prudence review meant that a utility's decision could not be second-guessed but that only the facts that were known or should reasonably have been known would be considered, and this protected the utility under current law.

He apologized for the length of his comments but due to the seriousness of the amendments, he felt he needed to address these issues.

Holly Franz, AsiMI, focused on item #9 on page 7, which was the long version dealing with the way large customers could opt in and opt out, and recommended that the committee consider the short version. She thought it appropriate that the commission established a reasonable process where someone could opt in but did not have to stay in for the whole five years; she referred to testimony with regards to LP's five year contract which excluded each third quarter, and said that under this bill, they could not opt in for a quarter each year. She felt that as long as it did not cost anyone else anything, LP or anyone should have that option. She also objected to the requirement that notice be given within 60 days, even if a company's supply contract did not expire for two more years, and that they had to enter into a five year contract with the default supplier.

REP. BROWN argued that a lot of these amendments dealt with the default supplier recovering the full cost, even though this was already in statute, referring to 69-8-210, and asked for an explanation why all these amendments were needed.

Dennis Lopach, NorthWestern, stated that he was correct, existing law did provide for full cost recovery. He felt, though, that putting a concept into practice could be a time consuming and uncertain process; the power being exercised by the PSC was legislative power, and he believed that if one intended for a result, it was appropriate to use the language accomplished that goal; these amendments accomplished the result intended in existing law, and this provided some certainty for the default supplier and its financing entities that presumably the intent was to keep them whole, where they could borrow money at a reasonable cost. Absent this legislation, this result would be uncertain.

REP. BROWN asked **Mr. Petesch** if he agreed that current law was sufficient, or was all this additional language necessary. **Mr. Petesch** answered this was a difficult question; he felt that current law specified full cost recovery but did not specify what

full cost recovery meant, and therein lay the crux of the debate. The PSC assured the utility that the methodology spelled out in the law was what they used, but the default supplier was not convinced that absent the additional language, the result would be the same and therefore, they were seeking additional statutory assurance. **REP. BROWN** referred back to Subsection (8) on page 14 and asked how this allowed public input into what was a just and reasonable rate, given the fifteen day time frame the PSC had. **Mr. Lopach** felt there was ample time, once the PSC knew an RFP was in process, for it to provide an opportunity for public input before it made a decision. In looking at the last sentence in Subsection (8), he felt it was not necessary in the context of the overall amendments.

REP. DELL wondered what would compel the default supplier to obtain the best deal for his customers when all his costs were covered and there was no inherent risk. He repeated that the answers he had been given previously dealt with the importance of a customer base and economic health but in light of these amendments which took away all risk, he needed to ask again. **Bob Nelson, Consumer Council,** felt a response should come from MPC and NorthWestern. He recalled **Mr. Hanson's** response and it made sense to him that they did have some interest in the economy because it could have an impact on their business. He concurred with **Mr. Quander** that the traditional commission regulation such as the prudence review and the absence of pre-approval were intended to invoke some kind of cost discipline on incurrence of cost by regulating utilities, and claimed that these amendments significantly weakened that cost discipline.

David Hoffman, PSC, felt it was time the commission weighed in on some of these comments, and stressed that the commission's position was in agreement with the comments made by **Mr. Uda** and **Mr. Quander** with regards to these amendments. They created an internal inconsistency in Chapter 8 by establishing a new type of review which was very limited and based on the approval or rejection of the portfolio of contracts; this abrogated the commission's typical regulatory method to determine a rate based on cost of production, and the commission had to rely on the existing language in Chapter 8 to assert their authority, and in particular the language in 210 as **REP. BROWN** had pointed out. The PSC agreed that cost recovery was contained in Section 210, and that it was adequate. He understood NorthWestern's concern that they would want to leave here knowing they will obtain full cost recovery for the price of the contracts they may enter into, and he stressed that the commission's position has been consistent that it had an obligation not only to the consumer but the utility as well through this balancing process in regulating rates, to preserve the financial integrity of the utility. He

charged that it was not the commission's intent to push the utilities to the verge of bankruptcy, but they were concerned that the language in these amendments created this inconsistency which in effect made their position in asserting statutory authority moot. In closing, he informed the committee that the commission's economist, **Will Rosquist**, was also available to answer further questions.

CHAIRMAN MCNUTT asked the members to take a look at both the long and the short versions of the opt in/opt out amendments and compare them.

{Tape : 2; Side : B}
He reminded that committee that the short version was **Amendment #HB047405.agp**, introduced the previous day, and said for those who had **Amendment #HB074706.ate**, item #9 on page 7, it would retain 4 (a)and strike the remainder of the section.

SEN. ELLIS wanted to know the rationale for the additional language in the long version; he felt it set up a very detailed procedure for the commission.

Pat Corcoran, MPC stated that the short version merely allowed the PSC the discretion to establish the requirements for all customers coming in and leaving; the long version had specific language relating to the large industrial customers because there was some concern due to the size of the loads for those large customers and the contract commitments the default supplier had to make in advance on their behalf; the portfolio had to be managed in such a way as not to put the rest of the customers at risk with the total cost remaining if the large customers left. He felt, though, that there were relevant provisions in the short versions as well.

CHAIRMAN MCNUTT stated that this set some very stringent criteria with regards to opting in and opting out, and again referred to LP's unique situations, asking how they would accommodate that. **Mr. Corcoran** assured him they were not opposed to the shorter version, knowing that situations like LP's did exist.

SEN. ELLIS asked **Will Rosquist** to comment on this comparison. **Will Rosquist, PSC**, admitted he had not seen either version of the amendments. **SEN. ELLIS** stated that the short version was Subsection (4) of the long version, and the long version was the complete amendment, item #9 on page 7. **Mr. Rosquist** asserted that the commission had not had a chance to meet on this, so he would be offering his own comments. Consistent with the commission's desire was to rather have more flexibility than less

in implementing the statute, and he was sure the commission would be very comfortable in having the short version, allowing them to set the terms on conditions under which customers would be able to return by giving those customers flexibility while also recognizing the concerns of the default supplier. **SEN. ELLIS** agreed with him.

REP. DELL felt there was consensus to substitute the shorter version for the long version even though he was still wrestling with the issue, thinking that giving the PSC too much discretion would create problems in the long run.

CHAIRMAN MCNUTT argued that the committee had proposed this to set some guidelines to get things done. His concern was that the PSC had maintained all along that they had the authority but it appeared that in certain situations, it was not getting done, and he wanted assurance from them that they could accomplish what they set out to do. He asked **Will Rosquist** to comment on this.

Mr. Rosquist stated it would be appropriate to give the PSC a deadline to ensure things got done. **CHAIRMAN MCNUTT** asked if they were given ten days, could they get it done in that time. **Mr. Rosquist** claimed that was a bit short, with which **CHAIRMAN MCNUTT** agreed.

VICE CHAIRMAN MOOD asked to segregate some of these items so they could be voted on separately, especially this particular section. **CHAIRMAN MCNUTT** concurred, suggesting to separate item #9 and strike (b).

Motion: Sen. McNutt MOVED THAT SECTION (9) BE SEGREGATED AND (B) AND THE REST OF THE SECTION BE STRICKEN.
Vote: Motion carried with **three Representatives** and **two Senators voting aye.**

REP. BROWN felt it would be appropriate that these procedures be available by the effective date of the bill which was July 1, 2001.

In response to **CHAIRMAN MCNUTT's** question, **Greg Petesch** stated this could be accommodated, making this subsection effective on passage and approval and require the rules to be in place no later than July 1, 2001.

Motion: Sen. McNutt MOVED THAT THE CONCEPTUAL AMENDMENT BE ADOPTED.
Vote: Motion carried with three **Representatives** and **two Senators voting aye.**

REP. BROWN reminded the committee of their discussion with regards to the last sentence of Section (8) on page 14 and asked to have it struck.

Motion: Sen. McNutt MOVED TO STRIKE THE LAST SENTENCE OF Subsection (8) on page 14.

Discussion:

SEN. ELLIS thought this was a protection clause and asked for the rationale behind this request. **REP. BROWN** explained he was concerned because it talked about approved electric supply cost without giving the public or any third parties the opportunity to have any input as to whether they felt them to be just and reasonable.

SEN. ELLIS felt that the environment the PSC worked in was one of garnering comment, and if this was stricken, it would create a vulnerability for the PSC, making them reluctant to take action.

REP. BROWN asked someone from the PSC to speak to this. **David Hoffman, PSC,** agreed with **REP. BROWN's** assessment. He said both **Mr. Uda** and **Mr. Quander** had touched on this when they said it created a presumption that the pre-approval of the contract was in fact a just and reasonable rate, and could adversely affect a potential later challenge.

SEN. ELLIS asked him to assume that a company came to the PSC with a contract and it was approved, and someone successfully challenged it; would that not leave the default supplier hanging. **Mr. Hoffman** answered that it could but maintained this language shifted the burden to make it difficult to challenge.

SEN. ELLIS agreed, and **Mr. Hoffman** told him that was why the PSC opposed it.

CHAIRMAN MCNUTT asked if there was a rate hearing and the commission approved the rate, the underlying factor was that they were deemed just and reasonable once the decision was made. **Mr. Hoffman** commented that the process involved an analysis of a lot of information in order to arrive at a rate, and it could be looked at conceptually as pre-approval because they considered the rate first. Based on what these contracts may contain, if they did not have a good reason to reject them and could not articulate that reason in a defensible way, they would have to accept the contracts, which created the presumption that those rates were just and reasonable.

CHAIRMAN MCNUTT wondered if the PSC looked only at the electrical component of the default supply, what else would they be considering besides these rates. **Mr. Hoffman** replied that under the service provided, there were other regulatory aspects entering into it, such as the quality of service. Their attempt in asserting their authority was to continue, through the transition period of July 1, 2004, to regulate that component of the rates which they called the retail generation which is electricity generated by those assets that have not yet been separated from the rate base and which have been purchased by PPL Montana. **CHAIRMAN MCNUTT** ascertained that the commodity the default supplier handled was electrons and had nothing to do with transmission, distribution, or service; they were going to buy electricity and sell electricity, and he asked what other things they were involved in. **Mr. Hoffman** deferred that question to **Mr. Rosquist.**

{Tape : 3; Side : A}
CHAIRMAN MCNUTT repeated his question, saying the committee had to make a decision on whether or not to strike that last sentence in Subsection (8). **Will Rosquist** answered that their concern was not with the just and reasonable standard, it was being able to adequately determine whether the actions of the default supplier were prudent. This was done through rate proceedings where they provided affected parties with due process and gave the commission input on their actions. The crux of their concern was the impact of that statement as it related to the ability to provide sufficient due process for the prudence review.

SEN. ELLIS related this to his cattle trading business, saying a lot of homework went into their decisions, the bids were of very short duration, and sometimes, outside circumstances could affect the market so dramatically that they would have to make a quick decision on whether to accept or reject those bids. Going back to the issue at hand, he objected to the idea that someone could come in after a decision had been made and challenge it, when the default supplier had been approved by the commission, creating a situation where it was almost impossible to act. **Mr. Rosquist** pointed out there were some differences between the two businesses, with the default supply function being a monopoly, and that was why the commission existed. He conceded that it was up to the legislature to determine whether or not they wanted the default supplier overseen by the PSC.

SEN. ELLIS concurred that the default supplier was a monopoly, but stated their monopoly lay in providing the service; that service involved the infrastructure which delivered the product, the metering of that product and various other aspects of getting that product, which they not necessarily produced themselves, to

the customer. Moreover, the price of this product was much more volatile, having increased a hundredfold at the end of last year from what it had been in the beginning. He felt this issue had to be addressed quickly, and that this sentence was necessary.

Donald Quander went back to his concern, stressing that the existing, traditional prudence review did not allow the commission to secondguess a business decision that had been made based on information that only became available after the decision was made, that would be very unfair; what the prudence review involved was the commission looking at the information that was available to the business at the time they made the decision. He agreed that it would be unfair to demand, after the fact, that they should have anticipated changes in the market. The idea was to respect a business decision that had been made, and not hindsight.

SEN. ELLIS wondered why a determination by the PSC should then be subject to further contest. **Mr. Quander** explained that once the PSC had made the determination that a decision was prudent, it was presumed to be just and reasonable, and a third party challenging this in court had to bear the burden of proving that the commission acted arbitrarily. He felt that the difficulty was not with the contested sentence, but with putting it together with the requirement that the determination be done in fifteen days. There was a potential risk that they might not have all the information to make the approval, but once it was made, it was deemed to be just and reasonable.

VICE CHAIRMAN MOOD surmised that the just and reasonable standard would be applied by the commission if they were setting the rate themselves; on the other hand, the prudence review was what they applied when a rate was proposed to them. To him this meant that in one instance, the commission was making the decision and in the other instance, they were merely passing on a contract. **Mr. Hoffman** agreed with this assessment as well as with **Mr. Quander's** statement. He stressed that elimination of this sentence would not affect the commission's standard of review when it set rates; what it did was change the standard of review in looking back on a contract which had been entered into, eliminating the prudence review. Currently, the contract price was deemed just and reasonable because the commission had fifteen days to look at it and approve it.

VICE CHAIRMAN MOOD wondered, with that sentence in the bill, were they not making the assumption that a profit margin, for instance, was reasonable when this did not fall under the consideration of prudence when looking at a contract. **Mr. Hoffman** stated this touched on the concept of pre-approved rates

because the contract price would be the leading factor in determining rates; he added that there were other factors to consider over and above the price of the contract, and the "just and reasonable" standard needed to be applied to those as well.

Mike Hanson, NorthWestern, referred to the various roles of the default supplier, MPC. He said that being the delivery company was one role, namely that of maintaining reliability and directly serving the customers. Another role was being defined now, namely that of the default supplier, and this was an intermediary procuring power on behalf of consumers who did not choose to procure for themselves in this volatile market. He repeated that this was not a role his company had sought but would accept. He argued that as default supplier, they had created a role which included participation by the commission and the Consumer Council. He hoped these would participate on a pro-active basis, and stressed again that this was a volatile market and decisions needed to be made quickly. He asked the committee to determine whether the default supplier could operate in the current market environment as the middleman and finance his purchases without these amendments; he thought it would be difficult and perhaps impossible.

SEN. ELLIS wanted to suggest different language because he had concerns about striking the sentence altogether; he felt that anything which delayed the decision to act on a contract would add to the costs. He was concerned about jeopardizing the decision and creating a hesitancy, not only on the part of the PSC but on the part of the default supplier as well.

REP. BROWN went back to the senator's cattle business, speculating that he had an agent buying the cattle for him, and had to make a quick decision; it turned out later that not only did he pay too high a price but he had also sold him his own cattle; it was easy to see where there could be a conflict. He stressed he was not applying this to the situation at hand because he knew that both MPC and NorthWestern were good and reputable companies, but cautioned there was a fine line here between giving them carte blanche, that they were not held accountable for anything they did because "approved electric supply costs are considered to be just and reasonable". He stressed that it also applied to more than just electrons because of the definition of electric supply costs, and charged that if that sentence was left in, we would be leaving them completely harmless for anything they did which should have been done differently. He stated that we needed to give the PSC the discretion of allowing the public or a consumer to say that a decision was not prudent, and the utility should have to bear some of the responsibility for their actions. He wanted to remove the above sentence for that reason.

REP. DELL suggested to vote on this motion since it seemed everyone had made their decision.

Vote: Motion carries with **three Representatives** and **two Senators voting aye; Sen. Ellis voted no** and **Sen. Ryan voted aye by proxy.**

With that, the meeting was adjourned until 1 p.m.

{Tape : 3; Side : B}
CHAIRMAN MCNUTT called the meeting to order at 1:05 p.m., and invited questions from the committee on a previously discussed **Amendment #HB047406.ate,** Exhibit (6).

Motion: Rep. Dell moved THAT AMENDMENT #HB047406.ATE BE ADOPTED.
Vote: Motion carries with **two Representatives** and **three Senators moving aye; Vice Chairman Mood voted no.**

Motion: Rep. Brown MOVED THAT AMENDMENT #HB047410.ATE, EXHIBIT(frs87sb0474a07), BE ADOPTED.

Discussion:

REP. BROWN reiterated that HB 474 created an opportunity for new energy projects, and item #1 changed the limitation from 250 megawatts to 450; item #2 defined "Montana industry" as one located in the state and having consumed more than 5 megawatts on average during the last 12 months. He claimed the main reason for these amendments was to add these companies in with the default supplier and other qualified facilities, and it encouraged development of new generation. He felt that most contracts discussed here were short-term, and thought if someone went out and built a large facility, they would want some long-term rates to secure their investment. He invited people in the audience to speak to this, knowing that some represented coal-fired plants could be affected by this.

Todd Everts stated that he did well explaining his amendments, and added that sections (1) through (5) of HB 474 set up a program through the Montana In-State Investment Act for the Board of Investments to provide low-interest loans. These amendments created an incentive to facilitate up to 450 megawatts, and by including the term "Montana industry", it created the ability of an entity to collateralize that loan, either through the sale to the default supplier or a Montana industry as defined.

SEN. ELLIS wondered how long this allowed the default supplier to contract for this power. **REP. BROWN** explained he had the option to contract for as long as he wanted; it seemed, though, that most of the ones they had been considering ran anywhere from four

to seven years. He felt that with these amendments, they could contract directly with a Montana industry for a twenty-year contract. **SEN. ELLIS** conceded this made a lot of sense, especially in light of the fact that most new generation would be coal-fired which did take a larger investment, and he felt the only way to ease the current crisis was with new generation coming online.

Owen Orendorff, Pres., Billings Generation and Gen. Council, Rosebud Energy, stated he had been involved in building the two significant coal-fired plants in the state and felt this program would be well-received and would create many new jobs; he felt that they could get rates under 5 cents per kilowatt and explained that what drove the rate was the amortization of the loan, saying a four to seven year period was not long enough to secure a loan, but that a twenty year loan would provide not only reasonably priced power but also economic development in eastern Montana.

Vote: Motion carries with **three Representatives** and **three Senators voting aye; Sen. Ryan voted aye by proxy.**

CHAIRMAN MCNUTT wanted to address the conceptual amendment, **#HB047408.agp, EXHIBIT(frs87sb0474a08). Greg Petesch** explained that it funded the consumer electricity support program which had already been adopted by the committee, by allocating up to $100 million each year from the money generated by the excess revenue tax imposed in SB 512 to the account created by this program. 80% of the money was to be used to promote price stability, and the remainder was earmarked to assist in recruiting new employers with at least 100 employees, for USB funding, and for low-interest loans for new transmission and generation facilities. He went on to say that since the account and the program were administered by the Department of Administration, and some, like the USB program, have been traditionally administered by the PSC, this legislation directed the DOA to consult with the PSC and the Consumer Council in adopting the rules. He added that the account was statutorily appropriated to the department, and in conjunction with **CHAIRMAN MCNUTT's** amendment, allowing them to recover their cost, would give them the appropriation and allowed implementation of this program.

Motion: REP. DELL MOVED THAT AMENDMENT #HB047408.ATE BE ADOPTED.
Vote: Motion carries with **three Representatives** and **three Senators voting aye; Sen Ryan voted aye by proxy.**

Motion: Sen. Ellis MOVED THAT THE AMENDMENTS AS DISCUSSED BE ADOPTED.

Vote: **Motion carries** with **three Representatives** and **three Senators voting aye; Sen. Ryan voted aye by proxy.**

CHAIRMAN MCNUTT did not want to report the acceptance of the conference report yet because their might be some coordination with the conference committee on energy tax issues.
Todd Everts added that they had to wait and see how SB 512 was structured before they took action on HB 645.

HB 632

CHAIRMAN MCNUTT asked **Bob Nelson** to comment on the previously introduced amendments **#HB063218** and **#HB063220,** requested by **SEN. RYAN. Mr. Nelson** referred to **#HB063220** and surmised the intent was to address the concern with protecting the existing customers from the cost imposed by returning customers, especially in the lifeline rate area. He was not sure, though, that it fully accomplished that, pointing to the phrase "as those costs are incurred"; he suggested substituting language saying: "to serve those customers" which would more fully provide this protection. He stated he did not know what the intention was with **Amendment #HB063218.ate** but he was concerned that it would make the regulatory authority of the commission subject to question.

SEN. DON RYAN explained that if the PSC set a hypothetical supply rate for the distributor which was well below the actual cost of power from the generator, serious financial problems would result. **Amendment #HB063218.ate** changed the bill to read "shall immediately commence a proceeding to provide just and reasonable rates for exempt wholesale generators located within the state of Montana that supply electricity to all customers of a public utility that has filed a transition plan". He went on to read from a prepared statement given to him by NorthWestern "this puts the focus squarely on the generator who purchased MPC's assets; this firm is the only exempt generator to supply power to the default supply customers. The amendment protects the customers of the default supplier by ensuring that under-recovery of supply costs will not happen". He stated this was the explanation given to him, and if the committee wanted further comments, they should ask **Dennis Lopach** to expound on this.

Mr. Lopach stated that they wanted to avoid the mismatch of cost and rates if the PSC was to utilize its recently announced action to set supply cost at some level other than those they were actually paying.

VICE CHAIRMAN MOOD asked if any other members of the audience would like to respond.

Mike Uda, Ash Grove Cement, reminded the committee that this language was the same MPC and NorthWestern had wanted earlier in HB 632, and it had been approved by the House Energy Committee. He felt that it was not as ambiguous as stated, but did question the commission's authority as had been pointed out by **Mr. Nelson.** He also questioned what the legislative intent would be and how it would interact with the commission's assertion of jurisdiction. He pointed out that the commission did not regulate generation anyway; what they did regulate was electric supply service. They did not have broad jurisdiction to reach out to every generator in the state, what they did have was to set electric supply rates for retail customers. In closing, he said this amendment added more confusion and was a bad idea.

Will Rosquist, PSC, repeated that the commission had not met on this and he could not convey their position, but he thought they would have a problem with it for many of the reasons **Mr. Uda** mentioned. The commission had not asserted that it would regulate an exempt wholesale generator; all they have said was that certain assets that were sold to PPL Montana were still in the regulated rate base, and because of that, they retained some authority.

{Tape : 4; Side : A}

Motion: Sen. Ryan MOVED THAT AMENDMENT #HB063218.ATE BE ADOPTED.

Discussion:

CHAIRMAN MCNUTT asked him if he thought this would have an effect on the PSC's jurisdiction over regulation. **SEN. RYAN** replied that this was the question they had dealt with concerning all the amendments; they were trying to pass a law and create something that would work for Montana from this day forward. If a mistake had been made in the past, and he felt that there had been, they should correct it and go forward, to do what was fair in the future. He wanted to be sure we did not create a California situation, and wondered if maybe they needed a different vehicle, and abandon HB 632.

SEN. ELLIS agreed with **Mr. Uda** to a certain extent. He was not sure if this changed anything.

REP. DELL wondered, since the commission did not regulate wholesale supply, why would the committee have to reiterate something that was already in statute. **Mr. Petesch** explained

that the commission's assertion of jurisdiction was based on the premise that PPL Montana as the successor in interest became a public utility; and because the transition plan had not yet been approved, they retained jurisdiction over the public utility which was the generating asset. The generating asset had received a wholesale generator's license from FERC and he felt that the PSC's position was that this was irrelevant.

CHAIRMAN MCNUTT asked if they had gotten an answer as to whether this was specifying PPL Montana; he felt he just heard that it was. He posed the question if that was what they wanted to do in light of what the PSC was trying to establish.

SEN. RYAN stated he was no lawyer, but if the PSC was trying to reassert its control over PPL Montana and considered them to be a utility, this would strengthen that language. **CHAIRMAN MCNUTT** observed that he had asked that question of **Bob Anderson** who stated they were holding MPC responsible and were not looking at the generation facility. Now, he was hearing a different take on this, and this was one of the problems he had encountered during this committee's work, namely that they were getting different answers to the same questions from the PSC; in light of this, he was not sure whether this was a good amendment or not.

VICE CHAIRMAN MOOD argued he could not see what this amendment added to the bill, that, in fact, it distracted from it. He felt that current language allowed the PSC to do what he would like them to do.

REP. DELL called for the question.

Vote: Motion to adopt Amendment #HB063218.ate failed with **three Representatives** and **two Senators voting no; Sen. Ryan voted aye.**

Mr. Petesch stated that as long as the members' attention was focused on this provision, he had a technical amendment for page 13, line 29, namely to strike the word "all" in front of "customers", with the rationale being that if the generation asset was not supplying all customers, then the entity could assert that jurisdiction could not be exercised because not every customer was receiving supply from that source.

Motion: REP. DELL MOVED THAT THE CONCEPTUAL AMENDMENT BE ADOPTED.
Vote: Motion carries with **three Representatives** and **three Senators voting aye.**

CHAIRMAN MCNUTT advised that there was one other amendment, namely **#HB063220.ate**, Exhibit (3).

SEN. RYAN charged that this was the most important amendment, dealing with the lifeline rates and the cost recovery thereof. He wanted to make sure there would be cost recovery so the default supplier would not have to buy high and sell low; he did not want the default supplier to be the bank while waiting for cost recovery and saw a danger for that in HB 632.

CHAIRMAN MCNUTT repeated the recommendation made by **Bob Nelson** while **SEN. RYAN** was absent, which was to strike "as those costs are incurred" and insert "to serve those customers". He asked **Bob Nelson** to explain this again. **Mr. Nelson** felt this was consistent with the intention of the amendment in that it protected other customers and the default supplier as well from the costs which might be imposed by returning customers. He said it was open to interpretation that the current buy-back could be averaged into other costs.

CHAIRMAN MCNUTT asked **Mr. Lopach** to respond to this as well, in the interest of fairness. **Mr. Lopach** stated that he was fine with that change.

Substitute Motion: Sen. McNutt MOVED THAT THIS CHANGE BE ADOPTED.
Vote: Motion carries with **three Representatives** and **three Senators voting aye.**

Motion: Sen. Ryan MOVED THAT AMENDMENT #HB063220.ATE BE ADOPTED.
Vote: Motion carries with **three Representatives** and **three Senators voting aye.**

SEN. ELLIS commented that he had visited with **Mr. Petesch** about coordinating these bills, and he said he would do that.

Motion: Sen. Ellis MOVED THAT THE CONFERENCE COMMITTEE REPORT ON HB 632 BE ADOPTED.
Vote: Motion carries with **three Representatives** and **three Senators voting aye.**

CHAIRMAN MCNUTT advised until information was available on the status of SB 512, they would have to hold off on HB 645. **Mr. Petesch** stated they had to coordinate all these amendments into the bills, and then determine if and were conflicts existed, and then the committee would determine which way they wanted them resolved.

The meeting was adjourned until 8 a.m. of the following morning.

ADJOURNMENT

Adjournment: 1:50 P.M.

_____
SEN. WALTER MCNUTT, Chairman

_____
MARION MOOD, Secretary

DM/MM

EXHIBIT(frs87sb0474aad)