MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON FINANCE AND CLAIMS

Call to Order: By **CHAIRMAN TOM ZOOK**, on March 18, 2003 at 8:00 A.M., in Room 317 Capitol.

ROLL CALL

Members Present:
Sen. Tom Zook, Chairman (R)
Sen. Bill Tash, Vice Chairman (R)
Sen. Keith Bales (R)
Sen. Gregory D. Barkus (R)
Sen. Edward Butcher (R)
Sen. John Cobb (R)
Sen. Mike Cooney (D)
Sen. John Esp (R)
Sen. Royal Johnson (R)
Sen. Rick Laible (R)
Sen. Bea McCarthy (D)
Sen. Linda Nelson (D)
Sen. Trudi Schmidt (D)
Sen. Debbie Shea (D)
Sen. Corey Stapleton (R)
Sen. Emily Stonington (D)
Sen. Jon Tester (D)
Sen. Joseph (Joe) Tropila (D)

Members Excused: Sen. Bob Keenan (R)

Members Absent: None.

Staff Present: Prudence Gildroy, Committee Secretary
Taryn Purdy, Legislative Branch

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

Committee Business Summary:
Hearing & Date Posted: SB 458, 2/26/2003
Executive Action: HB 60; HB 176; HB 660; HB 624; HB 236; HB 597

EXECUTIVE ACTION ON HB 60

Motion: **SEN. TROPILA moved that HB 60 BE CONCURRED IN.**

Discussion:

SEN. EMILY STONINGTON advised she is very supportive of the School for the Deaf and Blind, but wondered if it was of the same magnitude as the entire Legislative Branch, the Judicial Branch, the school BASE funding program, salaries and schedules, and if it should have the same exemption.

SEN. JOE TROPILA advised it is a twenty-four hour school. Global cuts on an eight hour school are 3%; on a twenty-four hour school its 90%. It is a state institution in the city of Great Falls. They take care of it and try to protect it for the state of Montana.

SEN. BEA MCCARTHY asked if there is any reason it is not covered under the BASE funding program of special ed.

SEN. TROPILA replied it is called a state institution and he didn't know why.

SEN. MCCARTHY said that is her only concern. To her it would fit under the BASE funding part with ANB.

SEN. LINDA NELSON asked if this treats them like any other public school.

SEN. TROPILA indicated they get no local funding; it's all state general fund.

SEN. MCCARTHY asked if the other factor is they are twenty-four hours, whereas the other schools aren't.

SEN. TROPILA advised that is correct.

Vote: **Motion carried 18-1.**

EXECUTIVE ACTION ON HB 176

Motion: **SEN. MCCARTHY moved that HB 176 BE CONCURRED IN.**

Discussion:

SEN. KEITH BALES asked about the Treasure State Endowment Program.

Taryn Purdy, Legislative Fiscal Division, explained it is out of the TSEP regional water fund. Some of it will be used for administrative costs.

SEN. TRUDY SCHMIDT asked if this is different than what was done before.

CHAIRMAN TOM ZOOK advised they haven't taken administrative costs out of this. It saves the general fund.

SEN. NELSON asked if it comes from the interest.

CHAIRMAN ZOOK advised yes.

Vote: Motion carried unanimously.

EXECUTIVE ACTION ON HB 660

Motion/Vote: SEN. MCCARTHY moved that HB 660 BE INDEFINITELY POSTPONED. Motion carried 14-5 with BUTCHER, COONEY, NELSON, SCHMIDT, and STONINGTON voting no.

EXECUTIVE ACTION ON HB 624

Motion: SEN. JOHN COBB moved that HB 624 BE CONCURRED IN.

Discussion:

SEN. JOHN ESP advised the bill needs work if they are to pass it.

Substitute Motion: SEN. ESP made a substitute motion that HB 624 BE INDEFINITELY POSTPONED.

Discussion:

SEN. EMILY STONINGTON advised budget stabilization is needed. She thought there had been discussion about the money going both ways. She thought the bill has some promise.

SEN. BILL TASH advised there was discussion, when the bill was heard, that there are ties to other legislation. He supported the motion to indefinitely postpone.

Vote: Motion carried 10-9 with COBB, COONEY, MCCARTHY, NELSON, SCHMIDT, SHEA, STONINGTON, TESTER, and TROPILA voting no.

EXECUTIVE ACTION ON HB 236

Motion: **SEN. COREY STAPLETON moved that HB 236 BE CONCURRED IN.**

Discussion:

SEN. MIKE COONEY clarified he asked the director of the **Department of Revenue** during the hearing if the department sent this to the bond counsel. The director responded yes, but called the next day saying they had not, in fact, done that. They sent it after he asked the question, the bond counsel looked at it, and there were no concerns. The director apologized for mis-speaking during the meeting.

Vote: **Motion carried unanimously.**

EXECUTIVE ACTION ON HB 597

Motion: **SEN. DEBBIE SHEA moved that HB 597 BE CONCURRED IN.**

Motion: **SEN. SHEA moved HB059701.aem.**

Discussion:

SEN. SHEA advised part of the concern with the bill was the determination of what an emergency is and the complications surrounding an emergency. The amendment inserted language on page 7, line 18.

SEN. GREG BARKUS remarked his concern was problems with rural communities. In the event of an elevator breakdown, the amendment would allow getting people off, but the elevator can't be restarted until a qualified mechanic certifies the elevator is now in good working order. The elevator will be out of service until that time.

SEN. SHEA responded if it was an emergency and they were able to evacuate people, she felt someone qualified should take a look at the elevator.

SEN. BARKUS said if it was just a fuse, the elevator could not be reinstated over the telephone.

SEN. SHEA asked if his concern was if it just needed a fuse.

Darrell Holzen, AFL-CIO, stated there is no community in Montana, especially in hospital environments, that do not already have site agreements with elevator contractors in the state of Montana. Those workers make the circuit on a regular basis. Even in the remote areas, they are rarely unavailable. He thought in a circumstance such as a power outage, there was no

question anyone able to reinitiate the power would certainly be qualified. If there is a serious, life-threatening problem with the elevator, it is taken out of service and public access in not allowed until such time it is repaired by a qualified individual. The bill is about a safety issue.

CHAIRMAN ZOOK advised the question is where in the bill does it say a fuse can be replaced.

Mr. Holzer advised they are way beyond the age of blowing fuses. There are still some old elevators in operation in some public buildings in Montana, so that might be an exception. He didn't think it was the intent of the elevator industry to obstruct something that simplistic.

SEN. NELSON said she didn't care for the bill, but the amendment is fine.

Vote: Motion carried unanimously.

Discussion:

SEN. TASH expressed concerns about remote areas and he did not see specific exemptions in the bill.

SEN. SHEA advised she knows the intent of the bill and is concerned they are not comfortable with that. Her concern is safety and the need for assurance. A power outage is not an issue; the issue is about a major malfunction in an elevator and someone who knows what they're doing coming into fix it.

SEN. NELSON realized the intent of the bill and knows the intent is good. She felt it sets up another level of bureaucracy. She felt in the remote areas, they are already under contract for their elevators and aren't going to do major repairs all by themselves. She thought this might be a hindrance instead of a help.

SEN. BARKUS agreed and felt the liability remains with the conveyance operator. If there is a life-threatening issue, they will not restart the elevator.

Substitute Motion: SEN. BARKUS moved that HB 597 BE INDEFINITELY POSTPONED.

Discussion:

SEN. COBB asked about page 4, line 15-16, where it says a permit is not required for ordinary maintenance. He wondered if they

still have to be licensed. He noted **SEN. SHEA** was looking for the part where an installation permit is not required.

{Tape: 1; Side: B}

Vote: Motion carried 12-7 with COBB, COONEY, MCCARTHY, SCHMIDT, SHEA, TESTER, and TROPILA voting no.

Recess - 9:40 -
Reconvene - 9:26 -

HEARING ON SB 458

Sponsor: **SEN. WALTER MCNUTT, SD 50, Sidney**

Proponents: **John Fitzpatrick, Northwestern Energy**
Don Peoples, CEO, MSE, Inc.
Dan Flynn, IBEW Local 44, Butte
Bob Nelson, Montana Consumer Council
Web Brown, Montana Chamber of Commerce
Bob Pavlovich, IBEW 233, Butte
Ronda Carpenter, Great Falls Area Chamber of Commerce

Opponents: **Alan McGarvey, Attorney**
George Ochinsky, Clark Fork Coalition
Susan Good, representing the plaintiffs in the McGreevey lawsuit
Matt Leow, Montana Public Interest Research Group
Roger Sullivan, McGarvey Law Firm
Wade Dahood, Attorney, Anaconda

Opening Statement by Sponsor:

SEN. WALTER MCNUTT, SD 50, Sidney, opened on the bill stating he wished the bill wasn't here. The situation in Montana is somewhat unique. The places in the system for justice and redress are in courts of law and in the legislature. There was an article in the paper saying the bill mitigates all of the liability for the Milltown Dam and a statement that this turns all of Montana merger law on its head. He suggested the bill has nothing to do with the Milltown Dam. The bill strictly pertains to public utilities that are regulated by the **Public Service Commission.** His interest is in protecting the stockholder of Northwestern and 295,000 ratepayers of the Northwestern Energy. Those ratepayers have no say-so. The stockholders of Northwestern are silenced. Northwestern Company has been enjoined in a class-action lawsuit through the sales of assets by

the old Montana Power Company. Northwestern bought the gas and electricity transmission/distribution company from Montana Power Company. The Montana Power Company then became Touch America. That is the reverse triangular merger that took place. It is alleged that because Northwestern bought that portion of the old Montana Power Company, that they assumed all the liabilities and everything that went with it because they are the successor of the old Montana Power Company. From the filings made by Touch America with the Securities and Exchange Commission, they are the successor to the old Montana Power Company. There will be a lot of litigation costs, and he didn't believe you could put Humpty Dumpty together again. The plaintiffs have said that their goal in this is to recapture the portion of the company that was sold to Northwestern and transfer that back to Touch America and Bob Gannon. Northwestern paid over a billion dollars with debt assumption and cash. He asked who would replace that. If the asset is put back over with the old Montana Power, now Touch America, he contended the 295,000 ratepayers are the only entity that can make any money. Touch America stock value has gone from $70 to less than a buck. Northwestern company stock has gone down. There would be no winner, only losers. If that is done, a bankruptcy may be forced, and it was suggested to him that could be a benefit to the ratepayer. The creditors of Northwestern would be set aside and there would be a more viable company due to bankruptcy. He suggested services would go down and the 295,000 would bear the brunt. He debated a long time before he agreed to carry the bill. The bill says that utility ratepayers and stockholders cannot be required to pay judgments from lawsuits directed against the original company. Section 2 and 3 codifies Section 1. Legal staff said that could be in the bill or not, but he thought it's a good idea to have it there because it's a good roadmap on tracking mergers. He contended there are not enough assets to come close to the $3 billion lawsuit. The travesty is done. The bill is for the legislature to make a policy statement.

Proponents' Testimony:

John Fitzpatrick, Northwestern Energy, advised they asked **SEN. MCNUTT** to carry the bill and that it is good legislation that protects the consumer. It creates statutory language that indicates public utility rates cannot be used to fund judgments brought by shareholders in shareholder lawsuits. It protects the company and allows the ratepayer insurance of a continued supply of natural gas and electrical services at reasonable rates. Whether it gets to bankruptcy or not, there will be costs passed on to consumers. Passage of the legislation will help calm uncertainty and help the economic well-being of the state. He explained the divestiture of the Montana Power Company began in December of 1999 when the electric generation assets of the

company were sold to PPL Montana. **EXHIBIT(fcs57a01)** At the time that transaction took place, there was no shareholder approval of the sale of those assets. Later on, the coal business, the oil and gas business, and the independent power group were all sold off to different companies, and all four transactions took place without shareholder approval. Those sales generated about $1.5 billion dollars in cash that flowed to the Montana Power Company. Some was used to pay state and local taxes, some went back to ratepayers, some was used to purchase stock, and virtually all the rest of it flowed into the subsidiary, Touch America. As the divestiture process took place in the fall of 2001, a shareholder vote was held for the disposition of the remaining assets and to effect a merger between Touch America and Montana Power. At that time, Montana Power was the parent and Touch America was the subsidiary. The shareholder vote was positive and the shareholders agreed to move the companies together, retire preferred stock, and sell the gas and electric transmission and distribution business to Northwestern. The formal merger took place after the **PSC** gave its final approval to the plan in February of 2002. Two days later, Northwestern bought the gas and electric transmission and distribution business from Touch America Holdings. At that time, those assets were contained in a company called Montana Power Limited Liability Company. About $1 billion flowed from Northwestern back to Touch America. When the entire process started off in December of 1999, the share price was about $36 a share. In late March, the company announced its plans to divest itself of the remaining assets of the company to become a telecommunications company. At that time, the price of stock was $64. On May 9th of that year, there was an annual meeting of the board of directors and election of directors in Butte. The stock price at that time was down $44. On September 29th, Northwestern purchased the gas and electric transmission distribution business and eleven months after Northwestern agreed to buy the business, the lawsuit was filed in the district court in Butte. By that point in time, the price of the stock was down to $7. The shareholder vote took place in the fall of 2001 after the lawsuit was filed, and the deals were consummated the following February. There is a party of aggrieved shareholders who have filed a lawsuit; at no time have the shareholders made any efforts to change out the officers and directors of the company. The board of directors that once served Montana Power Company are now Touch America. The shareholders that were with Montana Power are now with Touch America; there has been no effort made whatsoever to change out those directors and officers. They seem to have tenure, notwithstanding the quality of their business decisions, that rivals the Supreme Court. The McGreedy lawsuit was filed eleven months after Northwestern signed the agreement to acquire the gas and electric transmission assets. He referred to a summary of who the plaintiffs and the attorneys are. **EXHIBIT(fcs57a02)** He explained a summary of the

major claims in the McGreedy lawsuit. **EXHIBIT(fcs57a03)** These claims are: that the officers and directors of Montana Power created a scheme to divest the company of its assets without shareholder participation, that they went ahead and did that without shareholder approval in violation of state law, that the people who purchased those assets were privy to this plan and were parties to it. There is an implied conspiracy theory. The directors of the Montana Power Company breached their fiduciary duties. All of the allegations pertain to the conduct and actions of the officers and directors of the Montana Power Company. In the lawsuit itself, which has been amended four times, there are no allegations of wrongdoing by Northwestern. Northwestern is in this because the plaintiff's attorneys decided Northwestern is the sole successor to the Montana Power Company. He emphasized Northwestern received shareholder approval for the transactions it undertook. A big part of the lawsuit is reflected in the handout which talks about who succeeded Montana Power. **EXHIBIT(fcs57a04)** He referred to a handout regarding Touch America. **EXHIBIT(fcs57a05)** Touch America acknowledges in its 2001 annual report, and also in its 10-K filings that it is successor to the Montana Power Company. Northwestern acknowledges they bought the gas and electric transmission distribution business and assumed the ongoing liabilities associated with that business. They reject that they bought the decision making by the board of directors and executive officers to break up the Montana Power Company. He contended Touch America has never been served its summons. In fact, it is not a real defendant in this case. The plaintiffs are trying to imply Northwestern is the sole successor to Montana Power and liable for any judgement. He discussed the McGreedy class action lawsuit. **EXHIBIT(fcs57a06)** A major portion of the judgment could come from Northwestern, which is trying to operate a utility in this state, and it may in fact, be hit with a judgment, 95% of which will go to parties outside the state of Montana. Institutional investors could have purchased a million shares of Montana Power in 1998 or early 1999, at $30 a share and sold it in March of 2000 at $64 a share, for a profit of $34 million. They are members of this class, and if the plaintiffs succeed, they will potentially recieve millions of dollars. He referred to a document about who gets the money from a judgement. **EXHIBIT(fcs57a07)** It talks about the contracts with Westmoreland and PPL being declared null and void and having those assets put into a trust. The document is unclear as to what happens to Touch America Holdings and Northwestern. There was shareholder approval to separate those companies and sell off the T & E business to Northwestern. ***{Tape: 2; Side: A}*** The assets go back to the shareholders who received the benefits of $2.6 billion in proceeds. That money may have not been very well managed by their elected directors and the officers, but the shareholders of

Montana Power and then Touch America received $2.6 billion in sale proceeds. Now their fear is a judgment to have everybody who purchased those properties in good faith to hand them back. He maintained the lawyers will get between 33% and 50% of everything generated in a judgment. The Montana shareholders will get from 2.5% to 3%. All of the Montana shareholders combined will get 10% of what the four lawyers will get. In the worst case, they will get 5%. Touch America will not be paying it, they're not in the lawsuit and have no risk. Bob Gannon and the officers and directors of Touch America, formerly of Montana Power, will not pay. They are protected by liability insurance bought by the company. There are nine others in the lawsuit including Northwestern. He submitted there is a major risk, not just to the company, but to the people of Montana and the ratepayers. The lawsuit is targeted and he explained who could continue to be sued. **EXHIBIT(fcs57a08)** The plaintiffs chose not to sue Touch America Holdings. They can still go after the officers and Goldman-Sachs, etc. and the four companies that didn't get shareholder approval. The only party affected by the bill is Northwestern. They purchased the assets with shareholder approval in a competitive bidding situation. He felt liability should follow those whose actions created the injury and not innocent third parties. He addressed an allegation in the *Montana Standard* that the company would be relieved of its liability at Milltown Dam, an allegation he described as categorically false. He referred to a letter from the Attorney General's office. **EXHIBIT(fcs57a09)** He did not believe the bill is unconstitutional because if it was, the opponents would not be putting on a full court press to try to kill the bill. The plaintiffs have no vested right; they have a claim that has not been rendered to a judgment, and at this point the legislature has every right to change legislation if it so chooses. The bill will not have a major effect on merger law in the state of Montana and only comes into play in a complicated merger situation with two or more successor companies. He closed with a baseball analogy.

Don Peoples, CEO MSE, Inc., testified MSE is one of Butte's major employers and they employ 220 people. At one time, the Montana Power Company was the dominant factor in the community. He stated he is the former CEO of Butte-Silverbow local government. Northwestern played no role in the decision to break up the Montana Power Company. It was an innocent third party, purchaser of the gas and electric transmission and distribution assets of the former Montana Power Company. The purchase was made after a competitive bidding process and a vote of the shareholders. He was involved with a group of Montana citizens who tried to purchase the gas and electrical distribution on behalf of the cities in the state. Northwestern was the successful purchaser

of those assets. He believed Northwestern is developing into a Montana citizen and shouldn't be burdened by the problems created by the former owners. Butte has already been devastated by the Montana Power Company breakup. He held the liability should not be extended to Northwestern as an innocent third party. To do so would have dire consequences on Northwestern, which is already suffering substantially in its financial foundation. If Northwestern is not successful, he is concerned about additional devastation for the Butte community. Butte has suffered enough, and he encouraged a favorable action on the bill.

Dan Flynn, IBEW Local 44, Butte, testified they are the linemen that work for Northwestern. They believe that a stable utility in the state of Montana is good for the state of Montana.

Bob Nelson, Montana Consumer Council, advised they are charged with representing consumer interests in public utility proceedings. He addressed Section 1 of the bill which provides protection for both ratepayers and shareholders of the public utility providing services to ratepayers. The bill precludes recovery from ratepayers in certain civil judgments. He advised they might hear testimony that Subsection 1 would be implemented with or without the bill. He hoped that would be the result, but there is no guarantee. He believed the commission could not fully protect ratepayers from certain financial impacts simply with dis-allowances. Subsection 2 would have the effect of actually voiding the imposition of certain liabilities under certain circumstances, which he thought was preferable to simply relying on commission action. Because **SB 458** protects ratepayers from direct and indirect impacts of such liabilities, they urged favorable consideration of the bill.

Web Brown, Montana Chamber of Commerce, drew an analogy of a cattle ranch with employees, customers, and silent partners. On the side, he started a chicken ranch as a sideline. The chicken ranch starts to pick up speed, and does better and better, so he decides to sell the cattle ranch. The employees and the silent partners agree that's what he should do because they see the potential and the benefit of the chicken ranch as well. So they sell the cattle, the property, and the holdings. They take the money from the sale of the ranch, and put it into the chicken side of the business. Unfortunately, the chicken ranch goes belly up. The partners and others want to try to take back some of the cattle ranch. It was sold, paid for, and he pocketed and used the money. The cattle ranch is operating; whether the cattle are scrawny or not is another point. The ranch still has responsibilities; they still have to maintain the fences, the stock ponds, and those things they agreed when they took the cattle ranch. They should not bear the responsibility for taking

over the mistakes that may or may not have been made in the chicken ranch side. He thought the liability should stay with him; when he made the decision to sell the cattle ranch and invest in the chicken side of the business and take his chances there. He took the money, still has the control, and the silent partners. To take back what was sold in good faith, didn't make sense to him.

Bob Pavovich, IBEW 233, Butte, wanted to go on record in support of **SB 458**. He stated Northwestern is a good corporate citizen.

Ronda Carpenter, Great Falls Area Chamber of Commerce, advised the instability in the electric market is hampering their ability to attract new businesses. The Chamber believes that passage of **SB 458** will help stabilize electricity prices and that will help them to attract those new businesses.

Opponents' Testimony:

Alan McGarvey, Attorney, testified he represents thousands of Montanans who lost hundreds of millions of dollars when the Montana Power Company wrongfully sold all of its power business without shareholder approval. By depriving them of their right to vote, Montana Power Company breached the most fundamental duty to its shareholders, and it cost hundreds of Montanans their whole retirement nest egg they worked their entire lives to achieve. The shareholders sued the Montana Power Company and others to get a remedy for this wrong. **SB 458** would take away his clients' right to continue their lawsuit against the Montana Power Company. He wanted to review the principles of law that dictate that there must be successor liability in every form of corporate reorganization. He wanted to review the facts that will belie the analogies that have been presented to the committee, and address some of the specific issues that have been raised. **SB 458** would radically change the rule of successor liability which is essential to business law and to business in Montana. When two corporate entities merge, the liabilities must flow to the surviving entity. If not, the creditors are left behind with no recourse. Business cannot be conducted that way. Every state law provides that the merger of two entities must include successor liability. In this case, the shareholders sued Montana Power Company. After that suit was brought, and while it was pending, the Montana Power Company merged with Montana Power LLC. The purpose and the effect of **SB 458** is to say that in such a merger, the liabilities are left behind. There can be no exceptions to the rule of successor liability. The liabilities must always pass to the surviving entity or creditors are left holding the bag. Business cannot operate in that environment. Proponents of **SB 458** suggested Northwestern bought assets, that

the merger was between Montana Power and Touch America, and that the attorneys belatedly added Northwestern in a shameless search for deep pockets. He presented documents that prove those assertions aren't true. **EXHIBIT(fcs57a10)** He referred to Tab A (Exhibit 10) and explained the duty owed to his clients was the duty to give them a vote. That duty was owed by the corporate entity to its own shareholders. Bob Gannon and the board and management which has gone off with Touch America, also owed duties to his clients who had been shareholders in Montana Power. The primary duty was owed by the Montana Power Company to its shareholders. When that duty was breached, the liability to those people attached and the shareholders, therefore, brought the suit against the Montana Power Company. After the suit was filed, the Montana Power Company did a reorganization. It did a merger with an empty shell, Montana Power, LLC. After that merger, Montana Power, LLC, the surviving entity, succeeded the liabilities. He referred to the document at Tab E (Exhibit 10) from the proxy done at the time of the reorganization, and this is what the shareholders voted on. This is what Northwestern participated in. The merger is Montana Power Company, the defendants in the lawsuit, merged into Montana Power, LLC, which is the surviving entity. The effect of that merger or restructure was pursuant to 35-1-817 and 35-8-1203, the very statute **SB 458** would now retroactively change. The company will have succeeded to all of MPC's right, title and interest in the assets and properties. He referred back to Tab A (Exhibit 10) and the document at A-2 (Exhibit 10), where there was a copy of the law. When a merger takes effect, all debts, liabilities, and other obligations become the obligations of the surviving entity. Montana Power Company is now Montana Power, LLC. It was expressly agreed and understood that 35-1-1817 and 1203 would apply to assure that all MPC assets and liabilities, including the shareholder's lawsuit, would pass to Montana Power, LLC. While the lawsuit was pending, the ownership of this new entity was transferred to Northwestern Corporation. Northwestern Corporation, based out of South Dakota, is the parent corporation. It bought the ownership in Montana Power, LLC. If those two entities are kept separate, it can be understood why what Northwestern is now proposing is unfair. This was not an asset sale. It was a transfer of ownership to the corporate entity that was a defendant in the lawsuit. He referred to Tab A-3 (Exhibit 10), a document that Northwestern filed with the Secretary of State of the state of Montana. It is the statement of what happened at the time of the transfer, a statement of dissociation of Touch America Holdings, and an election by Northwestern Corporation to continue the business of Montana Power, LLC. Northwestern Corporation purchased all of the ownership interest in Montana Power, LLC. Touch America holdings sold its entire ownership interest and is dissociated. That is what Northwestern deliberately chose to do. Northwestern chose

to continue the business of Montana Power, LLC. His clients, the former shareholders of what used to be the Montana Power Company, are not the same as the current shareholders in Touch America, nor is their status a claim as shareholders. Their status is a claim of people who were wronged when they were shareholders. They are creditors pursuing a lawsuit. He referred to Tab A-4 (Exhibit 10) which is the document that effected the name change. The Montana Power, LLC, formerly Montana Power, was simply renamed Northwestern Energy. Proponents use the Northwestern label and ignore those two separate entities. It is important to distinguish between Northwestern and Northwestern Energy, LLC. The parent corporation, Northwestern, is the holding company that takes the profits that are distributed by Northwestern Energy, LLC. Northwestern Energy, LLC, is nothing more than the former Montana Power Company as a matter of law and a matter of fact. Northwestern Corporation was not sued; Montana Power Company was sued. Because Northwestern Energy, LLC, is the Montana Power Company, it remains the defendant in the lawsuit. Northwestern Corporation was not sued; they are simply the people that bought the entity knowing it was a defendant in the lawsuit. Northwestern Energy is in the lawsuit for no other reason than the fact that it is the Montana Power Company. It is the company that was originally sued; it is the corporate entity that owed the duty to his clients to give a vote and that liability can't simply disappear. ***{Tape: 2; Side: B}*** The press heard these two different views and called a law professor at the University of Montana and asked her for the true description of what happened. **EXHIBIT(fcs57a11)** The letter explains this was not an asset sale, but was a merger and a sale of ownership of the merged company. The letter further explained why the principles of successor liability must apply to that transaction. The idea that 33-50% of this lawsuit would go to the attorneys is profoundly absurd. The idea that the clients he represents would only get 10-20% is profoundly absurd. The idea that Bob Gannon is not being sued and will not be forced to pay for his participation in this wrongdoing, is simply false. A court of law will test those allegations and test them according to appropriate procedures. He was involved in a class action lawsuit involving the employees of the Columbia Falls Aluminum Company. When it was done, they applied for an attorney fee. The attorney fee can only come by order of the court. The court awarded between 10-20% and that is typical. His clients, the employees who now work for Northwestern Energy and have to keep working because they lost their 401-K's, will get 80-90%. It would include those employees working for PPL Montana. The goal of the lawsuit is to recover those retirement funds for the people who invested in Montana Power Company. This will come in the form of a judgment, if they prevail, against the former officers and directors, those who aided in the wrongdoing, including Goldman-Sachs. The central defendant is the Montana

Power Company, now known as Northwestern Energy, LLC. That company breached the duty they owed to the shareholders. If the plaintiffs get a judgment, Northwestern Energy will be required to pay its creditors, including his clients, out of the profits of its operations, rather than sending those profits back to the parent corporation, Northwestern Corporation out of South Dakota. They are not attacking the Montana utility. They are not attacking Dennis Lopach or the management team of the Montana utility. This business will continue to operate. The profits should not go off to Northwestern Corporation before this company's creditors are paid. It was suggested ratepayers will suffer. The Consumer Council testified the law already recognizes a company cannot pass along to the ratepayers anything other than a prudently incurred expense. The breach of duty to shareholders is not a prudently incurred expense of utility operation. That can't be passed to ratepayers, nor would the **PSC** ever permit that. It was suggested bankruptcy would harm the ratepayers. Bankruptcy is not bad for a utility; it is good news for a company that is in trouble, because bankruptcy is a system of protection. It assures the utility will continue to run, and the obligations to creditors will be fully resolved and discharged in an orderly fashion. He referred to Tab C (Exhibit 10) which included materials from some leading experts including representatives of the utility industry. Their conclusion is that bankruptcy is good from the standpoint of the utility, the utility customers, and ratepayers. He read an example from Vermont. The proponents of the bill raised a concern, based on speculation, of the possibility that the ratepayers might suffer. He asked if justice would be thrown out for thousands of Montanans who have lost hundreds of thousands of dollars of retirement, upon speculation that somehow ratepayers might be adversely affected. He submitted these people suffered enough without taking away their right to recover. If there is a bankruptcy, the Montana utility will continue to operate. Dennis Lopach and the management team will remain operating this company in Butte, Montana. The excellent workforce in Butte and throughout Montana will continue to operate this profitable business. The bankruptcy will simply assure that the profits will flow first for the benefit of the creditors before profits are siphoned off by the owner back in South Dakota. Some believe Northwestern is an innocent purchaser of assets. Others believe Northwestern knowingly bought a company that was in the middle of a lawsuit and has no reason to complain. The truth is that Northwestern bought a company that was the defendant in a lawsuit and did so knowingly, with express recognition of the consequences of its successor status. It even used it's successor status to it's advantage. He referred to Tab H (Exhibit 10), which listed some examples. Northwestern Energy, LLC used its "MPC successor" status to obtain PSC approvals, in filings with the Security and Exchange Commission, and in it's

own lawsuit vs. PPL Montana. Northwestern bought the Montana Power, LLC, knowing the shareholder lawsuit came with it. The shareholders approved the reorganization of MPC. The lawsuit was founded upon the express assurance the lawsuit would continue against the successor entity. It is unfair to give special privilege and immunity to Northwestern Energy, LLC. It is unfair to retroactively take away the rights of a shareholder agreement. He was confident it is unconstitutional. The shareholders he represents ask the rules not be changed after the game has already been played out. The shareholders have a legitimate claim against the Montana Power Company, and they have brought it in the court system. The court system is designed to sort out the facts and to apply the law to effect the principles and policies of justice and fairness. This is matter that belongs in the courts and that system and the laws need to be trusted. The former shareholders ask their right to continue to pursue a just resolution of their claim against the Montana Power Company and its successor not be taken away.

George Ochinsky, Clark Fork Coalition, testified there is some disagreement about whether or not the bill will or will not affect the liability at the Milltown Dam. He had several discussions with **Mr. Fitzpatrick** after the last hearing and prior to this one. There was a suggestion that an amendment could be added to clarify this single issue. **Mr. Fitzpatrick** talked to his attorneys who were somewhat concerned about specifically naming the Milltown Dam and associated liabilities within a special purpose bill. He suggested amending the bill to include a new section stating "nothing in this bill is intended to exempt a party from superfund or environment liability arising from the operation or ownership of an existing dam." Milltown is not mentioned but it is clear the will of the legislature is this bill is not intended to hold anyone harmless from liabilities from existing problems. He referred to Tab F of the handout (Exhibit 10. If the amendment was added, the Clark Fork Coalition would remain out of the debate.

Susan Good, representing the plaintiffs in the McGreevey lawsuit, thanked **SEN. WALTER MCNUTT** for his interest in protecting the shareholders. They are not convinced **SB 458** is the vehicle to do that. In her former job at the **PSC,** she fielded calls from shareholders who's rights had been abridged in some of the business conduct of the Montana Power Company. These conversations were emotional, tearful, and in some cases people lost everything. Documents showed there is no doubt that Northwestern bought the company and not just the assets from its predecessor. **EXHIBIT(fcs57a12)** She worked on public policy for 15 years, and had never stood up alongside the trial lawyers; this time they are right. She heard serious concerns from

legislators about the fees that the trial lawyers stand to make from this lawsuit. It appears to be a real serious issue. She explained the amount of relief due the shareholders involved in the McGreevey lawsuit and the amount the trial lawyers will take. Whatever they will take is going to be what is given to them by a judge and will not be decided or negotiated by the trial lawyers. She addressed the issue of bankruptcy. After a lot of research, she found bankruptcy of a utility ends the uncertainty. Northwestern is in very uncertain times, currently, regardless of what happens with the lawsuit. The uncertainty would end with some sort of protection, not only for the utility, but also for the people it serves. In other jurisdictions when a utility has gone bankrupt, people can still make their toast and turn their lights on. The cost of capital declines for a utility and so do other expenses. Currently, investors aren't looking at Northwestern kindly. In a bankruptcy proceeding, those kinds of issues would be mitigated to a great extent. The employees stay on; only the ownership changes. If the shareholders prevail in the case, it could mean the shareholders of the former Montana Power Company would be the people who actually own its successor company. One of the issues raised by proponents of the bill is the plaintiffs are after the wrong guys. She referred to Tab H (Exhibit 10) of the handout. It is a request for Northwestern to be added as a party to this lawsuit. The attorneys did not want them in the lawsuit, but they have asked to be in the lawsuit. Northwestern can't, in good conscience, be in when it suits them, and come to the legislature to avoid any responsibility it has. Montana Power had mastered this trick. They scared the legislature with stranded costs and jobs in telecommunications being at risk, bankruptcy, etc., and the legislature has done the company's bidding time after time. **MPC** begged to get out from under government regulation, and she saw many faces in the room who were here during those debates. Northwestern wanted in this game and the retirees have put up their retirements. All the cards have been dealt, and she asked the matter be left to be played out in the courts. She urged the committee to kill **SB 458.**

Matt Leow, Montana Public Interest Research Group, expressed concern with the protections of ratepayers. As a consumer group, they are very concerned about expenses from a shareholder lawsuit getting passed through to consumers. The do not believe that **SB 458** is necessary to do this. It is the job of the **PSC** to determine what rates are approved and to decide what expenses can be passed through to the ratepayers. They believe the **PSC** would not approve such a passthrough because the costs were not critically incurred. If **SB 458** is about protecting ratepayers, then he encouraged passing that section of the bill. They were concerned about the implications in the rest of the bill. The

issue of the Milltown Dam is an example of the type of liability that may disappear as a result of **SB 458**. The rest of the bill is potentially dangerous and he asked that they kill the bill.

Roger Sullivan, McGarvey Law Firm, testified he is an attorney representing the shareholders of the Montana Power Company. He explained the reason Northwestern Energy is in the lawsuit is simply because Northwestern Corporation chose a merger transaction instead of a simple sale of assets. Northwestern Corporation is now named as a defendant in the lawsuit because Northwestern Corporation petitioned the court to become a defendant in the lawsuit so that it could upstream assets into the corporation which were previously owned by a Montana Corporation, Northwestern Energy, LLC. Northwestern entered into these transactions with their eyes wide open. The lawsuit was filed in August of 2001. The shareholders had the opportunity to vote on the merger transaction with the safety and protection of the statutes that are now being proposed to be amended. They voted to approve the transaction in September of 2001. In February of 2002, with the litigation pending, they chose and entered into the merger transaction. Under the laws that are well established, not only in Montana but in all states, they agreed consciously to go through with this transaction. He read the second to the last paragraph of the letter from **Professor Kristen Juras.** (Exhibit 11) He held that it is important to recognize these are the organic principles of corporate law which govern the union. ***{Tape: 3; Side: A}*** Northwestern, because they don't like the offspring of this union, is asking the legislature to engage in a highly speculative and risky process of genetic engineering. This would harm thousands of Montanans who were the shareholders who approved the merger under the laws they are now being asked to change. He thought it important to recognize this process would not create the beautiful and unblemished child that Northwestern would have them believe. It will release a Frankenstein that will haunt Montana for generations to come. There is enormous complexity involved in terms of facts and law. He referred to an editorial in the *Great Falls Tribune* that advised this is a matter properly left to be resolved by the courts and the bill should be killed. In terms of the retroactivity, it is simply unfair to change the rules of the game after this has already been played out. He thought it is unconstitutional, but is also a question of fairness. He offered to provide the committee with any information they might request. He advised the legislation would have profound negative effects on Montana and its citizens. He thanked the committee and the leadership.

Wade Dahood, Attorney, Anaconda, advised putting aside all political labels and discussing the issue as fellow Montanans.

He testified he is one of the attorneys for the shareholders in the class action lawsuit. The defendants lost an argument before **Judge Thomas M. McKittrick,** in October of 2002. They then had an eastern law firm come in and place the case in federal court where it is currently, on a remand petition to come back into the Montana judicial process. He contended they came forward with the bill because they are not doing very well in the courtroom. This bill has nothing to do with ratepayers; that is nothing more than a subterfuge. In the bill are immunities for the people that engineered the destruction of the Montana Power Company. Goldman-Sachs is one of the defendants, and the principle defendant is a large banking corporation out of New York that accepted over $20 million to break down the assets of the Montana Power Company. Their net profit, prior to this fiscal year, was $2 billion in one year and $4 billion in another. Their income exceeds $32 billion every year. He asked why the legislature would want to give them immunity. This is an immunity bill for big corporations, for the big banking firms back in New York, and that's not the purpose of legislation. The case is in court, and **John Fitzpatrick** presented an excellent argument for a jury. The case belongs in the courtrooms of Montana and the bill should be defeated.

Informational Witnesses:

Tom Schneider, Public Service Commission, advised the PSC's official position is to monitor and provide information. He asked if they struck the ratepayer protection provision in Section 1-1 and let the bill stand on its merits, how they would vote. His view was that Section 1 (1) is meaningless. The real protection, as the **Consumer Council** described, if there is protection at all, it is in the meat of the lawsuit. Regarding the severability clauses of Sections 5 and 6, he urged the committee get an answer to what non-severability and severability mean in terms of ratepayer protection.

Questions from Committee Members and Responses:

SEN. SCHMIDT asked **Mr. Dahood** to respond to what severability and non-severability means as far as ratepayer protection.

Mr. Dahood advised when he read the bill as a whole, it was basically structured to provide immunity from liability for all those that participated in the structuring of the dissolution of the Montana Power Company. The bill gives a blanket immunity to all who participated in the dissolution of one of Montana's and the nations' best utility corporations. That is not only unfair and unconstitutional, but there is a case in court that deals with it. He wondered if **SB 458** was an admission of wrongdoing.

If they did nothing wrong, that will be established in the court process.

SEN. SCHMIDT asked the same question of **Mr. McGarvey.**

Mr. McGarvey did not understand the severability provisions in the bill. It seemed problematic that a bill that is designed to immunize Northwestern from this particular lawsuit is done through amendments of basic corporate law--the merger statutes. It is then attached to a ratepayer protection clause, which the witness from the **PSC** has advised is really meaningless. How the statute would survive the severance policy unconstitutional, unfair provisions or its stated purpose from its true effect, he had no idea.

SEN. COBB asked **Mr. Schneider** to go over Section 1 where he said it was meaningless.

Mr. Schneider advised under normal circumstances, if there is a liability found in a court of law, the utility would have a tremendously high hurdle to demonstrate to the commission that somehow ratepayers ought to be responsible for the liability determined in the courts. It is effectively meaningless.

SEN. MCCARTHY stated Anaconda sold to Arco, Arco sold to BP, and BP is now deep pockets for the Milltown money. She asked what the difference is in that scenario and the sale that is currently being discussed.

Mr. Fitzpatrick advised the fundamental difference is that a chain of mergers ended up with a single successor. In this particular case, the breakup of the Montana Power Company, there were two successors. The bill clarifies language for what takes place if there are two successors, and simply says that the liabilities will follow the decision makers and the shareholders in that particular case. The bill does not leave all the supposed liabilities hanging as **Mr. Sullivan** implied in his testimony. If the bill is enacted, the liabilities associated with the ongoing utility business will follow Northwestern. The decision for the shareholder breakup will follow Bob Gannon and his officers in Touch America. One of the contentions opponents had been making, is this is going to change the liability protections for people involved with asbestos lawsuits against W.R. Grace. He contended that's not true because W.R. Grace was the sole successor in that particular case, and is being sued very actively by **Mr. Sullivan** and **Mr. McGarvey**. To apply the logic in that case that they've applied here, W.R. Grace would not be sued; the company that bought the used mining equipment in the mine would be sued. The bill does not essentially shield

everybody from their liabilities. The statements made by **Mr. Dahood** are absolutely inaccurate, he held. Everybody will be in this case that was in this case, except for Northwestern, if this bill passes.

SEN. SHEA asked **Mr. McGarvey** if his take on this is the shareholders will recover their loss, Northwestern will go into bankruptcy, and everything will be back to normal. She said in her community, there are several shareholders that had some real concerns about Northwestern being involved in this. She asked where is the assurance that Northwestern or whomever will be the utility that will stay in Butte, the assurance for the employees, and the recovery for the Northwestern stockholders.

Mr. McGarvey advised the ability for the Montana utility to stay in Montana has nothing to do with the lawsuit. While Northwestern, the parent corporation, is in serious trouble, he submitted it has nothing to do with the trouble Northwestern Energy is in. Rather, the value of the Montana utility is in the business itself. It is in the quality of the workforce and management. There is no reason to expect that, in bankruptcy, anyone would want to replace the most valuable asset. That is why the community of Butte is protected. The stockholders in Northwestern Energy, the utility in Montana, is one stockholder. That stockholder is Northwestern Corporation. Northwestern Corporation will lose a lot of money from its acquisition of this company just as any shareholder who purchases stock in a company will be at risk if that company fails for any reason or owes obligations to its creditors. He felt creditors should be paid before profits go to the shareholder.

SEN. SHEA asked if Touch America had never been served with a summons.

Mr. McGarvey advised Touch America is named in the lawsuit, and has been served with both a cross-claim and third party complaint. They are not only named in the lawsuit, they are physically in the lawsuit. As a practical matter, because Touch America has almost nothing left, whatever judgment the plaintiffs or any other cross claimants, including Northwestern, may obtain from Touch America, is probably meaningless. They are pursuing all defendants on the basis of their participation and role and which duties they owe.

SEN. SHEA asked **Mr. Schneider** if he is allowed to be a proponent or opponent in his role as Public Service Commissioner in something like this.

Mr. Schneider indicated they take positions on various bills all the time as proponents, opponents, and informational witnesses. The statement he made is informational and is the position of the commission.

SEN. SHEA advised her confusion was she didn't know if he was allowed to that. She felt he sounded like an opponent.

SEN. JON TESTER asked if there was a conscious decision by Northwestern to buy the assets in order to do the merger. He asked why they would want to do that.

Mr. Schneider advised Bob Gannon and Joe Sullivan submitted testimony before the **PSC** about this transaction. The thrust of the discussion at that time was what happens if somebody buys this corporation and there is a premium paid; where does the gain go. Mr. Gannon and Mr. Pederson, the CFO at the time, said this is different than the sale to PPL Montana. This is not an asset sale where the ratepayers have a claim on the gain. Rather, everybody that's bidding needs to understand this is a stock transaction. This is a sale of the corporation, and everything comes with it, including the poles, pipes, wires, and all the assets, and the whole works on the liability side--the whole package. That was widely covered by the press. He thought that was the context of the sale of the Montana Power Company.

SEN. STAPLETON asked about the lawsuit itself and **Mr. McGarvey's** testimony about Northwestern claiming attorney fees would be excessive. He asked if the norm would be 10-20% of the $3 billion lawsuit.

Mr. McGarvey clarified he gave the example of the aluminum plant case and the fee there was part 10% and part 20%.

SEN. STAPLETON advised 15% of $3 billion is $400 million. There are four plaintiff lawyers of which **Mr. McGarvey's** firm is one. He asked if the work is equally split up or if his is the lead firm.

Mr. McGarvey advised it is not an exact 25% split. There is an arrangement that reflects the involvement of all the different attorneys.

SEN. STAPLETON asked if it was 25% each, what in the world would his firm do with $100 million. He thought it feeds the stereotype that a small law firm deserves $100 million.

Mr. McGarvey agreed his law firm would not warrant that kind of recovery. The size of recovery should reflect the risk

undertaken, the benefit achieved for the class, and the size of recovery. For a small recovery, 15% would be inadequate. For a multi-billion dollar recovery, 15% would be excessive. The suggestion of what the fee should be in this case should not be made at the front end, it should be made at the back end after it is known what the law firm has been through, what was accomplished for the client, what amount was recovered, and based on that, the judge will decide what is the fair amount. To take a flat percentage on some of the huge recoveries around the country is not appropriate.

SEN. STAPLETON said **Mr. McGarvey** made statements about this not being the arena to make this sort of decision and suggested a court would be a better place to do that. To back up a couple of assertions, the law professor from Missoula was mentioned. He said legislators were always trying to get their hands around stereotypes and issues like huge recoveries and what is accomplished by a lawsuit and what would be excessive. He was glad **Mr. McGarvey** agreed 10-15% would be excessive. The only place that Montana can impact that is to put it into law and cap it. They can't wait for a court to decide.

CHAIRMAN ZOOK remarked he guessed that was a question.

Mr. McGarvey advised if the legislature is concerned that the courts will not fairly assign these things, then legislation should be designed and an appropriate hearing held to determine how these fees should be monitored. He didn't think Montana has a problem. If the legislature thinks it may become a problem, that should be addressed in a separate bill. This bill is not designed to deal with attorney's fees. This bill attacks the clients.

SEN. COONEY asked when the merger of the Montana Power, LLC, and Northwest Energy, LLC, took place, if were there any conditions placed upon the liability being assumed.

Mr. Fitzpatrick advised Northwestern purchased the assets of the company in September of 2000. At that time the representation was they were buying the gas and electric utility. There were a number of known liabilities at that time that were apportioned between the companies.

SEN. COONEY asked about the apportionment of liabilities and if that was in some sort of document provided to the committee.

Mr. Fitzpatrick did not think so.

SEN. COONEY asked if there is such a document that shows that apportionment.

Mr. Fitzpatrick stated it is the purchase agreement and schedules that the companies agreed on to apportion these.

SEN. COONEY asked if it would be possible to provide the committee with any sort of documentation that would show that apportionment.

Mr. Fitzpatrick said he couldn't give them everything. That particular set of apportionments took place at the time the agreement was signed. There were certain things that were known at that point in time, and certain lawsuits that related to the operation of the dams were either sent with PPL or were assumed by Touch America. At the time the particular transaction was taking place, Touch America essentially indemnified Northwestern for their part in the decision making related to the sale of these various assets, such as the oil and gas company, the coal company, etc. There was no shareholder lawsuit sitting there challenging Northwestern at the time, so there is nothing specifically talking about potential shareholder lawsuits. Northwestern didn't get brought into a shareholder lawsuit until after the purchase was consummated. ***{Tape: 2; Side: B}*** If you saw a lawsuit that was focused on shareholder approval, and you were getting shareholder approval, and in fact got shareholder approval, would you assume you would be sued under the same set of conditions. He thought the answer was no. It was not until the deal was done, that Montana Power, LLC, got named in the complaint. In January, they asked Touch America to indemnify Northwestern for this particular transaction and they refused. At this point in time, Touch America hadn't been served and they were looking at the opportunity to walk away with all of the cash and none of the liability for those decisions. They said no, and that's where the issue lay. He remarked statements had been made, Northwestern knew about all this stuff in advance. He didn't think that was true; they anticipated because of the unique nature with which Northwestern was buying this particular company, that they were protected by the fact they had a shareholder vote. When Montana Power merged itself into Montana Power, LLC, they merged a number of assets, part of which were sold to Northwestern, and part were a dividend to Touch America. Touch America and the operating company Tetragenics, went to Touch America Holdings. Constructing the situation from the opponents point of view, the assets went to Gannon and the liabilities follow the power lines exclusively to Northwestern. They don't think that's the case.

SEN. COONEY asked what liabilities other than the shareholder suit would be immunized by this bill.

Mr. Fitzpatrick answered none that he was aware of. They have publicly stated and accepted the liabilities associated with the ongoing business of the transmission and distribution utility.

SEN. COONEY asked if any other state had taken action as proposed in the bill.

Mr. Fitzpatrick replied not that he is aware of.

SEN. COONEY said the bill proposes to amend the merger statutes in Montana. He asked if there is a possibility, if the bill is successful, that companies in the future could utilize the changes as proposed to basically structure a walking away of liability.

Mr. Fitzpatrick thought it does just the opposite, because the liability follows the decision makers and shareholders. If someone was engaged in fraudulent practices and wanted to pass them off to a third party in the course of a merger, that wouldn't happen if this particular legislation was passed. It could happen if the existing law is not changed.

SEN. COONEY asked **Mr. McGarvey** to summarize briefly some of the points he had asked **Mr. Fitzpatrick** about.

Mr. McGarvey advised concerning the idea that Northwestern didn't know the company it was buying was the defendant in a lawsuit, documents clearly demonstrate that they did know and in fact signed indemnification to Touch America because that lawsuit was pending. Regarding the suggestion Northwestern was not named in that lawsuit at that time, he stated of course it wasn't because the name of the company at that time was the Montana Power Company. That was the company they were acquiring under a different name. They knew that, and they knew they were acquiring that liability.

SEN. COONEY asked if he was aware of any conditions that were placed upon any of the liabilities when the merger occurred between MPC, LLC, and Northwest Energy, LLC.

Mr. McGarvey explained while there were indemnifications that would mitigate the effect, there neither were nor could have been any limitations as a matter of law. By operation law, the liabilities must go to the successor company.

SEN. COONEY asked if that was a result of the laws dealing with merger.

Mr. McGarvey indicated it is the requirement of the law of merger in every state.

SEN. COONEY asked if he was concerned that the bill immunizes any other liabilities.

Mr. McGarvey advised there is no question that this law would immunize Northwestern Energy, LLC, from every liability other than those that it expressly undertook by written contract. That would include environmental liabilities, etc.

SEN. COONEY asked if he was aware of any other state taking the action proposed in the bill of changing merger laws.

Mr. McGarvey advised no state would take such a radical approach because any company could follow the six steps outlined in the bill, and push the liabilities off on shareholders and officers which are not the people that ran the company. The people that ran the company would go off cleansed of their liability. He suggested it would be a disaster.

SEN. LAIBLE referred to the discussion on triangulated merger. Some assets stayed with Touch America. Under the theory of the triangulated merger, he asked if Touch America is a surviving entity. He asked if there could be two surviving entities.

Mr. McGarvey advised there is no such thing as a triangulated merger. There is a very common practice of a triangulated reverse reorganization that involves a merger. All of what was formerly the Montana Power Company went into Montana Power, LLC. It is true that, thereafter, some of those assets were up-streamed. Whoever owned Montana Power Company, LLC, owned that company subject to its liabilities. He thought an argument could be made by Northwestern that in addition to being the legal successor, Touch America may, under equitable principles, also be a successor following the Bob Gannon group. He thought that argument has some merit and should be tested in court. The principles of law have to be kept to work. Otherwise, there is just a possibility that some equitable principle might be applied and the company who really is the successor at law walks away from this liability. That is what is being sought.

SEN. LAIBLE indicated looking at the other four transactions that took place, none of those had stockholder approval, but he didn't think any of them were a spin-off of Touch America. He asked if

there are lawsuits against those entities that purchased those assets as well.

Mr. McGarvey answered there is no lawsuit arising out of reorganization and acquisition of Northwestern. The only lawsuit is based on four transactions which were fully completed when the lawsuit was brought. The only question is, who's liable for the breach of duties that occurred in those four previous transactions. An entity that's responsible is the entity that owed duty and that is Montana Power Company, now known as Montana Power, LLC, Northwestern Energy, LLC.

SEN. LIABLE said the question is on this one transaction where Northwestern purchased the assets, and there was shareholder approval. He wondered how the shareholders could approve the sale of Montana Power, LLC, and then come back and sue that it didn't turn out well.

Mr. McGarvey responded shareholders are not doing that. They approved the reorganization because it was expressly represented to them in proxies that the lawsuit would follow the successor. They have no problem with the reorganization and no reason to object to it for precisely that reason. Northwestern was not sued. They have no problem with the organization and simply want to follow their lawsuit to the successor company.

SEN. LAIBLE asked if he was talking about Northwestern Energy as the one that's being sued as opposed to Northwestern Corporation.

Mr. McGarvey indicated that is correct.

SEN. LAIBLE asked about Northwestern knowing before the transaction was completed that there was a lawsuit, however benign it may have appeared at the time. It seemed to him the time to insulate the company from the liability would have been before the purchase was done.

Mr. Fitzpatrick advised that in fact did happen. Once this case became known, the company went back to Touch America to ask for indemnity and Touch America refused. Touch America was out of the lawsuit and still isn't in the lawsuit, he claimed. **Mr. McGarvey** said Touch America had been brought in; it wasn't brought in. Northwestern endeavored to bring Touch America into the lawsuit and put them in a position where they will bear responsibility for those decisions. The plaintiff's lawyers lined up to keep Touch America out of the case.

SEN. LAIBLE asked if there was no way to pull out of the deal at that time.

Mr. Fitzpatrick imagined they could have pulled out of the deal, but he wasn't specifically informed of what the costs would have been to the company at that time.

SEN. ED BUTCHER asked if $2.6 billion was paid to somebody.

Mr. McGarvey stated a lot of money was paid to Montana Power Company for the sale of its assets.

SEN. BUTCHER asked if the stockholders are unhappy with where that money went.

Mr. McGarvey said they are unhappy with where it went and more specifically, they are unhappy that they were denied a chance to vote.

SEN. BUTCHER said there was a willing buyer and a willing seller; the deal was consummated. He asked if that was correct.

Mr. McGarvey advised no, it is the contention of their lawsuit the deal was not consummated because it cannot be consummated without the approval of shareholders.

MR. BUTCHER asked if someone accepted the money.

Mr. McGarvey responded the Montana Power Company received the proceeds of those sales.

MR. BUTCHER said the individuals paid the money in good faith, and the other individuals accepted it. He asked if this is an internal problem between the stockholders and whoever stole their money if they didn't approve it. The money was given, and yet they are going after the guy who paid the money and bought the business.

Mr. McGarvey said he mostly agreed with that characterization; it is a matter between the corporation and it's shareholders. The duty was breached by the corporation. He disagreed with the part that the purchasers were innocent. It is their contention the purchaser knew the shareholders were required to vote and they decided to proceed in these acquisitions without getting stockholder approval because they wanted the assets and knew shareholder approval would not be given.

SEN. BUTCHER asked if it is correct that these people were over twenty-one.

Mr. McGarvey responded he wasn't sure who "these people" are, but he was sure they were all over twenty-one.

SEN. BUTCHER said in other words, they were their own entities that were making these deals. It appeared to him, **Mr. McGarvey** was talking about criminal activities going on within the Montana Power operation, rather than with the person who in good faith paid $2.6 billion, and yet the guys who already paid the $2.6 billion are suddenly now liable for additional money to the stockholders because they didn't get the $2.6 billion.

Mr. McGarvey explained the contention of the lawsuit is that the sale was made of all of the assets of the corporation, and the corporation belongs to the shareholders. Montana law requires shareholder approval. To the extent that any entity, including the Montana Power Company and the purchasers participated in depriving the shareholders of their rights to retain the Montana Power in the form that it was in, they should be responsible. Ultimately, that is between the Montana Power Company and the purchasers.

SEN. BUTCHER asked where is the $2.6 billion now.

Mr. McGarvey replied much of the money went to taxes, distributions, to repurchase shares, and to further the activities of Touch America. It was a poor choice, in hindsight.

SEN. BUTCHER said it appeared to him, their efforts should be to follow the money and to recover the money that has already been paid in good faith.

Mr. McGarvey advised the lawsuit sues quite a number of individuals and they designed the lawsuit to assign responsibility in exact correlation of the responsibility of each participant. Some of that, he agreed, should follow the money. some would follow other sources where responsibility had been breached.

SEN. BUTCHER asked if there was a great deal of incompetent legal advice being given to these parties, and that was why they were in such a pickle with everybody trying to sue everybody.

Mr. McGarvey said it is the allegation of their clients this was caused to a large extent by advice given by Goldman-Sachs, etc.

SEN. STONINGTON asked about language in the bill that is immunizing Northwestern and what the language is actually doing to overturn merger law. She asked **Mr. McGarvey** to walk them through new Section 1, Subsection 2. It describes that any entity under Title 69 , which refers to public utilities and carriers, may not be made a party to litigation. In Subsection 3, it exempts a public utility that was regulated pursuant to

1997. They are trying to tie it to Northwestern Energy. She was curious where the section of the "Northwest passage" is in the bill and how it would work.

Mr. McGarvey advised Section 1, parts (2) and (3), are specifically directed at a utility entity and specifically at Northwestern Energy, and therefore have no application to the "Northwest passage" concern that was raised in the materials. They would have a broader concern other than the lawsuit. The problem is specific immunity, impairment of contract of the shareholders, and preventing any claim for such liabilities. Sections 2 and 3 are changes of merger law, which are not limited to utilities, but apply broadly to everything. He attempted to illustrate in his discussion of the "Northwest passage" at Tab G (Exhibit 10), is that the bill basically is a recipe. If the steps are followed, an entity is free from the liability and the liability goes to this other company who has the same officers and directors or has the same shareholders. It is easy to follow that recipe, spin off leaving an empty shell, go ahead with the same directors and shareholders, and escape the liability.

SEN. STONINGTON asked him to walk through what the recipe is.
{Tape: 3; Side: B; Approx. Time Counter: 27.1 - 28.9}

Mr. McGarvey replied not all the steps are necessary. The first step is to replace existing officers with what is called a suicide group. The reason to do that is to meet the legal requirements of subsection (3)(a)(ii). The liabilities follow them. Another way is to ignore that step and just use the shareholders by creating a subsidiary. The subsidiary structure is the shareholder. At (3)(a)(ii), the liability would follow the company that has the same shareholders, the original shareholders of the corporation. That corporation would remain to be sued. The new company would have new shareholders. The same people get to operate the same company, but the liability doesn't go with the company, the liability goes with the shareholders.
{Tape: 4; Side: A}

SEN. STONINGTON asked if the recipe in the bill as written is applicable to any corporation.

Mr. McGarvey affirmed it would be applicable to any corporation. As soon as the bill is passed, any corporation can give an attorney $300 to do these six steps.

SEN. STONINGTON advised because the sponsor and the proponents claimed only Northwestern Energy will be eligible for this remedy, she wondered where that is in the bill.

Mr. McGarvey did not think **Mr. Fitzpatrick** was saying that Sections 2 and 3 would only apply to Northwestern, he was saying it would only apply to reverse triangular mergers, as if those were a special category. It would apply to every reverse triangular merger. The law does not impose a rule of equity. It applies to anyone who wants to follow this recipe.

SEN. STONINGTON asked if the bill will provide any remedy to Northwestern Energy if it was Section 1 only.

Mr. McGarvey responded it would. Section 1 is the protection of ratepayers, which is meaningless. Subsection 2 and 3 of Section 1 are directed specifically at one thing--Northwestern Energy's immunization retroactively to this lawsuit.

SEN. STONINGTON asked when Northwestern attempted to indemnify themselves and Touch America said no, what would be his contention about when in the process that occurred and whether Northwestern at that point was able to pull out of the deal.

Mr. McGarvey stated from the very beginning, this obligation was there. The lawsuit was filed and was discussed and recognized by Northwestern in August. Anytime after that, Northwestern could have said they were out of the deal. Northwestern made a business decision to go forward, and he speculated the business decision reflects the business reality they had a great opportunity to buy a wonderful Montana utility. The purchase price reflected that. The reason the purchase price reflected that is, as the commissioner explained, when Montana Power came before the commission it said this is not an asset sale. Therefore, they didn't have to give back to the ratepayers the profit they realized on the sale. That created an incentive and better deal to just pass it on to Northwestern. They presented the deal to the shareholders and now they are asking the legislature to reverse that.

SEN. STONINGTON asked **Mr. Fitzpatrick** if Section 1, parts 1,2, and 3, provide remedy to Northwestern Energy, why are Sections 2-8 in this bill if they open wide a door that overturns merger laws.

Mr. Fitzpatrick said they don't think it opens the door to completely revolutionizing merger law in the state of Montana. It changes the rules of the game in the lawsuit statute for complicated mergers such as the reverse triangular types. A typical merger is between two companies. The one surviving is the larger company. The law would clarify what happens in situations like what happened to the Montana Power Company but it steps beyond their situation.

SEN. MCCARTHY asked **Mr. Sullivan** about his testimony that he had been in both caucuses and visited with the minority and majority. She asked if he is a registered lobbyist.

Mr. Sullivan advised he filed papers with the office identifying himself as the attorney for the shareholders of the Montana Power Company. He signed the standard along with the principles for this endeavor.

SEN. MCCARTHY asked if his law partner is registered as well.

Mr. Sullivan answered yes.

SEN. MCCARTHY found it a misnomer that he lists he is an attorney for the shareholders of the Montana Power Company, but he is basically the attorney for eight shareholders and their attorneys. She asked if that is more accurate.

Mr. Sullivan explained what occurs in a class action lawsuit. There is a process for class certification in a proceeding before the court. All of the statutory criteria must be met, so that denominated shareholders can be representative for the entire class of shareholders. That was accomplished in this case and they have a certified class of the shareholders of the Montana Power Company as of December, 1999.

SEN. MCCARTHY asked **Mr. Fitzpatrick** if this is headed for court regardless of the outcome of the bill.

Mr. Fitzpatrick said he was sure that's true. There have been a number of claims made by opponents of the bill that it is unconstitutional, and Touch American has a tremendous incentive to try to get this declared unconstitutional. **Mr. McGarvey** said repeatedly that the officers of the Montana Power Company breached their duty and responsibilities to the shareholders. Those people are not the officers at Northwestern, they are Bob Gannon, Terry Pederson, and the people on the board of directors. The attorneys don't want them to pay; they aren't even in the lawsuit. They want Northwestern to pay.

SEN. MCCARTHY asked about the effect of this bankruptcy on the community of Butte.

Mr. Fitzpatrick thought the lawsuit is incredibly serious, and not just for Butte. In the annual report for Northwestern, they reported $2.6 billion in assets. About four weeks ago, reports indicated the company was writing off assets that would take that figure down to $1.9 billion. They already have debts of $2.2 billion. As a person who has been with a company that has gone

to bankruptcy and an employee of another one that has gone right to the edge of the cliff, he stated bankruptcy is not a good thing. He suggested there is real harm to employees. People get concerned about the certainty of their job and they start looking for work. It becomes difficult to find new employees. Benefit programs are threatened. Pay raises are usually extinguished and in some cases there are cuts or staff is reduced. It is not just a simple matter of getting together to restructure the obligations. It is devastating to consumers. When a company goes into bankruptcy, the cost of business does not go down, it goes up. Everybody is afraid they will not be able to pay the bill and there is a risk premium on everything. Right now, they are having to put money up front to buy natural gas to serve the customers they have. They don't need a bankruptcy because of this lawsuit, they are in real deep trouble in terms of getting people to supply services. The court will order people to do it, but it doesn't come cheap.

SEN. MCCARTHY asked how many employees are currently in the Butte area.

Mr. Fitzpatrick said roughly 550.

SEN. ESP asked **Mr. McGarvey** about his testimony that the shareholders voted to sell and if it is the intention that the lawsuit continue.

Mr. McGarvey said that is correct. The document he referred to is the proxy document that is at Tab E (Exhibit 10).

SEN. ESP referred to the document at Tab E (Exhibit 10), and the effect of restructuring. He said **Mr. McGarvey** quoted part of it but not the end where it says "as described in that certain Confidential Offering memorandum dated May, 2000 prepared by Goldman Sachs, etc." He asked if that confidential memorandum was available when they voted.

Mr. McGarvey stated the question is whether the shareholders who received this proxy received the confidential memorandum. The answer to that question is no. If the question is did they have these statutes in the existing law, which is the basis of the transfer of the liability, the answer to that is yes.

SEN. ESP asked about the proxy form, and how they knew they still had the ability to sue Montana Power.

Mr. McGarvey said restructuring is a matter of law and is expressly discussed. Liability is passed by operation of law, that law being 35-107 and 35-103. The statute that effects the

merger says expressly that "all liabilities go to the successor entity". The merger document references those same statutes again and says Montana Power Company merges into Montana Power, LLC, which is the surviving entity.

SEN. ESP asked **Mr. Fitzpatrick** if the intentions of Northwestern changed throughout the process. Early on in the process, as the potential sale was before the **Public Service Commission**, both the Montana Power Company and Northwestern stated the sale was for the entire business and not just for the assets. In his testimony, he stated it was a narrower definition of the business they were buying. He asked for comment.

Mr. Fitzpatrick advised their intention never changed. They believed they were buying an ongoing gas and electric transmission and distribution business. Prior to the shareholder lawsuit being filed, when they were working through this process with the Montana Power Company, there were questions being raised about the decision making associated with the sale of those assets. They agreed at that time to indemnify Northwestern from those decisions. He assumed that at the time they agreed to those indemnities, they weren't accepting the liabilities and decisions that went with those assets sales. Then all of a sudden the shareholder lawsuit showed up. Montana Power, LLC, the entity which Northwestern was about to buy, was not mentioned. It wasn't even named until after the transaction was completed. What's in the lawsuit is all about shareholder approval. Northwestern was seeking shareholder approval and got it. Then saw the shareholder lawsuit there. They went back in and asked for indemnity and Bob Gannon said no. In that situation, he guessed you could back out of the deal or consummate the deal. They had seen **MPC** willing to indemnify Northwestern for their corporate decisions to break up the company. The lawsuit was all about shareholder approval, which Northwestern was obtaining. He didn't think Northwestern's intentions had changed. He thought there had been a unique application of the law by the plaintiff's attorneys. Instead of going to Touch America as the successor of the company, which they have claimed to be, they shy away from it. His personal theory is that Touch America is on the verge of bankruptcy. If they go bankrupt, the case can end up in bankruptcy court and that confines the litigation seriously. Perhaps the only mistake they made is trying to single out Northwestern as the deep pockets with the very high potential that they may push them to exactly the same place they want to keep Touch America from going.

SEN. ESP said it was stated that early on in the sale, Northwestern Corporation was buying the entire business--assets

and liabilities. He asked if that it is still their position that's what they did.

Mr. Fitzpatrick said if they bought everything that was in Montana Power, LLC, they would own Touch America and the operating company; they would own Tetragenics. Those were all entities that were subsidiaries of the Montana Power Company that were all merged into Montana Power, LLC. Some of those went to Touch America and the gas and electric business went to Northwestern. Once the merger had taken place, a dividend of the assets went to Touch America. Now the position seems to be that certain assets go to Touch America, but Northwestern gets all of the liabilities.

SEN. ESP asked if his position is that everything that went with the merger is what they bought.

Mr. Fitzpatrick declared they bought the liabilities associated with the ongoing gas and electric transmission and distribution business. They didn't buy the decision to break up the company.

SEN. BALES asked **Mr. Schneider** if it is easier to transfer a company per se, than it is to just transfer assets. He asked if there is something in the regulation environment that makes it more advantageous or almost mandatory to do that.

Mr. Schneider advised the expressed intent by Mr. Gannon and Mr. Pederson was to structure the deal as a stock sale so that the Commission did not have authority over it and did not have authority over the gain that would normally be associated with a straight asset sale. He thought they made a very conscious decision.

SEN. ROYAL JOHNSON asked **Mr. McGarvey** about dancing around the reason for not having Touch America Holding, Inc. named as defendant in this suit on the same level as everybody else. He asked for an explanation.

Mr. McGarvey advised it amazed him to hear testimony before this committee to the effect that they didn't sue Touch America or Bob Gannon. The document at Tab H (Exhibit 10) was filed by Northwestern and is their motion to come into the case. Before they moved to come into the case, the entities that they sued were the Montana Power Company, Montana Power, LLC, Touch America Holdings, Inc., R. P. Gannon, J. P. Pederson, all of the directors of the Montana Power Company, Goldman Sachs, and other entities. They were all sued and Touch America has special status in the sense that they are not aggressively suing Touch America to the extent that it is meaningless to do so. They

assume that in the ultimate judgment, Touch America will be held as a liable entity. It will be meaningless from the standpoint of the plaintiffs and the co-defendants to the extent that Touch America has no assets. They are certainly in the case. Bob Gannon is certainly in the case. They are aggressively pursuing Mr. Gannon and the directors.

SEN. JOHNSON asked if he was absolutely certain there are no assets in Touch America, and those assets they have are not worth what's owed against them.

Mr. McGarvey said it is their fond hope they very well may obtain a valuable, not just a meaningless, judgment against Touch America and that there will be assets to execute against. They will vigorously pursue that to the extent that its available. Touch America is a responsible party; the entities that went out with it are responsible parties.

SEN. JOHNSON asked him to liken that to the situation with Northwestern regarding the dollar number of assets and liabilities--$2.6 million in liabilities and $2.2 million worth of assets. It seemed to him Touch America would have more assets available than Northwestern if those figures are correct because they're now a line company and they do not have divisions. Northwestern Energy is not a division of Northwestern Corporation, it is a part of Northwestern Corporation.

Mr. McGarvey replied, notwithstanding the up-streaming of assets, their lawsuit originally against the Montana Power Company and now against Northwestern Energy, LLC, its successor, is against that entity. Northwestern, the parent, is only in this case because it has volunteered to make sure it's appeared in the case and offered to back up the responsibilities of Northwestern Energy. If it's unable to do that, because it up-streamed those assets, and it's balance sheet is in a tenuous situation as described, then the system by which they permitted the up-stream expressly reserved that they could go after the subsidiary entity, Northwestern Energy, LLC, which is a strong company with a strong balance sheet. The way that's done is through the fraudulent transfer provisions and it's expressly reserved that they did not lose the right to continue the action, just as if Northwestern had never purchased the company. They would be perfectly happy if it hadn't and they seek to return to that position. ***{Tape: 4; Side: B}*** Northwestern didn't purchase this piece and that piece; they purchased a company. They would be perfectly happy if it hadn't purchased the company, because their lawsuit is against the company.

SEN. BARKUS asked if any of the plaintiffs in the lawsuit were present. He asked **Gary Willis, Northwestern Energy**, as a relatively large shareholder of Touch America and an old Montana Power stockholder, what he might expect out of this lawsuit.

Mr. Willis testified he had shares in the old Montana Power company and several thousand shares in Touch America. Those folks in the IBEW have several thousand shares. If the lawsuit is successful, and somehow manages to pick up $100 million or $200 million out of Northwestern; he gains $1 a share but they break the company doing it. As an employee of Northwestern, he and the employees down at the shop didn't feel it would be worth it. Even though he might gain a buck or two, he didn't see where it was good for Northwestern, the present employees, and himself later as far as his health benefits and pension. He didn't see where it's good for anyone.

Mr. Dahood declared he is a stockholder.

CHAIRMAN ZOOK advised the question was answered.

SEN. COBB questioned **Mr. McGarvey** about Section 1 (1) being meaningless and because it's meaningless, it could be put into law. He said **Mr. McGarvey** stated he would only go after the profits of the company. He said if they are only going after the profits in order to protect everyone, that can be put into law too.

Mr. McGarvey said he wouldn't have a problem with that from a perspective of law-making; he thought it would present a problem from the standpoint of the best resolution for Northwestern Energy.

SEN. COBB said in a bankruptcy situation, even though testimony that says bankruptcy judges never order rate increases, they can order rate increases.

Mr. McGarvey said it was his understanding the bankruptcy court cannot order rate increases that are not approved by the **PSC**.

SEN. COBB said if it's not in statute, the **PSC** may think they have the call, but the bankruptcy judge could overrule that. He just wanted to make sure that **Mr. McGarvey** wouldn't have any problem getting it clear that the bankruptcy judge can't order rate increases on ratepayers to pay for this judgment.

Mr. McGarvey said he wouldn't have a problem with it, but didn't believe it's necessary because it's already built in.

SEN. COBB asked built in where and is there a statute.

Mr. McGarvey responded it's built into the system of laws that govern bankruptcy.

SEN. COBB said they don't think judges would do it, they can't do it, and that was his concern. He asked if those other sections of law aren't needed, just Section 1 and the retroactivity.

SEN. STAPLETON stated Northwestern had some choices of how to structure this sale and chose a merger. He asked what the economic benefit was of going with a merger.

Mr. Fitzpatrick advised they didn't set up the structure of this sale, Montana Power Company did.

SEN. STAPLETON asked if there was economic advantage to Northwestern in doing that.

Mr. Fitzpatrick replied not that he could think of. They paid $1.1 billion for the business and it had a book value of $1 billion, so they paid $100 million over book.

SEN. STAPLETON said it made no sense to him. Six months after the lawsuit was filed, they went ahead with the purchase. They couldn't have known what the legislature would do and how a court would react. He asked why they would move forward and if the market was so lucrative it was worth the risk. He asked what was the decision.

Mr. Fitzpatrick said he didn't know the exact decision because he wasn't part of it. He came to work for the company a few months ago. He thought the reason the company went forward with the deal was because this particular lawsuit was directed at the officers and directors of the Montana Power Company, alleging that they took a series of actions that allowed the selling off of portions of the company without shareholder approval. In Northwestern's case, they were obtaining shareholder approval for the transfer that would ultimately take place with Northwestern, and felt comfortable that this lawsuit didn't affect their transaction.

CHAIRMAN ZOOK asked **Mr. Sullivan** about the principles of corporation law and how those are developed.

Mr. Sullivan advised the principles of corporate law, frequently referred to as the Model Business Corporation Act, were adopted by the Montana legislature in 1991. The Montana Law School and the State Bar Association worked to review the principles of

Montana's merger statutes to assure they were in conformity with the merger statutes of the other states because of the need for consistency of commerce. The state elected to adopt the act which is substantially similar to the merger statutes in all fifty states.

CHAIRMAN ZOOK asked if it is done through legislation after input from attorneys, etc.

Mr. Sullivan said that is correct.

CHAIRMAN ZOOK said there had been two different viewpoints presented by attorneys. The legislators are the ones who draft legislation and implement it. He asked which way they were supposed to go.

Mr. Sullivan suggested that the job of this legislative body is to look to principles of public policy. Each ran for office and were elected because they had in mind their responsibility for the greater public good. He suggested the reason all fifty states have the same merger statutes under which the Montana Power shareholders voted in approving this transaction, is because it embodies sound well developed principles of corporate responsibility. Above and beyond the limited lawsuit at issue, he advised, there is the embodiment of broad principles.

CHAIRMAN ZOOK asked if what they have in statute should never be changed.

Mr. Sullivan advised in the past when the Montana legislature elected to amend the Model Business Corporation Act, it was through a very thoughtful process so the principles that it was changing were in accord with corporations across America, and so that when dealing with investment decisions and transactions on an increasingly national basis, our laws of commerce are in harmony with the laws of commerce of all fifty states.

Closing by Sponsor:

SEN. MCNUTT stated **Mr. Sullivan** hit the nail on the head. This is about principled public policy. The whole thing is narrowly brought down to a technicality of who bought what. The lawsuit is against Montana Power, LLC, because the plaintiffs claim they bought it all. If they bought it all, how come they still have Touch America on it. Before this, Touch America was part of Montana Power Company. There were negotiations going on for quite a while and it was no secret that the leadership of the then Montana Power Company wanted to divest itself of the energy business and become a telecommunications company. He heard in

1998 that was going to be the goal. Montana Power Company started selling off portions of the company. The Board of Directors were making decisions to do this. The question before the legislature is what did Northwestern Energy buy. In his opinion, they did not buy all of Montana Power, LLC. He spent quite a bit of time talking to legal staff about the bill and was assured this bill is constricted to a public utility. The intent of the drafter was certainly not to materially, dramatically change all merger law. He discussed new Section 1 and thought it was defining exactly what was intended. Sections 2 and 3 of the bill may not be needed, but it isn't all that bad to codify what is meant by Section 1. As far as this legislature not being able to be deliberative and take its time and make good judgments, he took exception and thought they do a pretty good job. The statement was made that the **PSC**, under normal circumstances, would not allow a rate increase. He suggested this is not normal circumstances. If Northwestern winds up in a bankruptcy, that is not a normal circumstance. As far as the **PSC** having sole control over rates in a bankruptcy, he asked the committee to look what's going on in California. The **PSC** regularly intervenes with the court to mitigate rates to the ratepayers. The judge is the one that is trying to do it in California. He didn't know why it would be any different in Montana. He believed the bankruptcy judge would claim to be boss, and the **PSC** would be invited to intervene. The policy decision is a fundamental question: is it right for a willing buyer to buy part of what was left of the Montana Power Company, to have stockholder approval, and face bankruptcy. As for unconstitutionality, he couldn't remember a bill he either presented where that wasn't raised, and the legislature doesn't determine that. As far as the retroactive part of it, he asked who would be harmed; there have been no decisions or awards made. He stated he was not elated to be here but believed the bill is good for Montana. He didn't believe it would turn merger law on its ear.

ADJOURNMENT

Adjournment: 12:36 P.M.

_____
SEN. TOM ZOOK, Chairman

_____
PRUDENCE GILDROY, Secretary

TZ/PG

EXHIBIT(fcs57aad)