MINUTES

MONTANA SENATE
59th LEGISLATURE - REGULAR SESSION

COMMITTEE ON ENERGY AND TELECOMMUNICATIONS

Call to Order: By **CHAIRMAN KEN TOOLE**, on February 10, 2005 at 3:00 P.M., in Room 317-C Capitol.

ROLL CALL

Members Present:
Sen. Ken Toole, Chairman (D)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Essmann (R)
Sen. Dan Harrington (D)
Sen. Dave Lewis (R)
Sen. Greg Lind (D)
Sen. Dan McGee (R)
Sen. Gary L. Perry (R)
Sen. Glenn Roush (D)
Sen. Carol Williams (D)

Members Excused: None.

Members Absent: None.

Staff Present: Casey Barrs, Legislative Branch
Claudia Johnson, Committee Secretary

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

Committee Business Summary:
Hearing & Date Posted: SB 356, 2/3/2005; SB 321, 2/1/2005
Executive Action: SB 356; SB 365; SB 256

HEARING ON SB 356

Opening Statement by Sponsor:

SEN. JEFF ESSMANN (R), SD 28, opened the hearing on **SB 356,** Modify PSC authority for protective orders.

He informed the Committee this bill is a result of a Supreme Court Opinion, Great Falls Tribune vs. Montana Public Service Commission (PSC). The opinion determined what can be shielded from the press and the public. The bill strikes Section 1, 69-3-105 (1), a flat 90-day closure for information, that conforms to the Supreme Court Opinion. Section 2, 69-3-105, MCA, is intended to add language or other information that can be protected under the law.

Proponents' Testimony:

Greg Jergeson, Chairman and Commissioner of the Public Service Commission (PSC), said for such a short bill, it deals with very important legal issues.

Robin McHugh, Legal Counsel for the Public Service Commission (PSC), informed the Committee of the changes the bill makes to 69-3-105, MCA. He discussed the concerns of the PSC. He said the PSC doesn't have a problem removing language on line 14, after the word "public", and striking "at reasonable times". He added, the language is only to protect trade secrets, confidentiality, and proprietary information.

Dennis Lopach, representing NorthWestern Energy Company (NW), stated his support for SB 356, and urged the Committee to pass this bill.

Opponents' Testimony: None.

Informational Testimony: None.

Question from Committee Members and Responses:

SEN. LIND asked **Mr. McHugh** if there is a process in place for how the PSC will handle this. **Mr. McHugh** replied that the PSC has a lengthy set of rules that describe how they go about to retain a protective order. He added that the Great Falls Tribune now has to come forward with legal arguments, analyzing, and making a case that the information is legitimate under Montana law.

{Tape: 1; Side: A; Approx. Time Counter: 11.8 - 12.8}

Closing by Sponsor:

SEN. ESSMANN closed. He informed the Committee this is a cleanup bill intended to limit a provision that does not comply with the Supreme Court Opinion, and it adds a provision that the Supreme Court can comply with.

EXECUTIVE ACTION ON SB 356

{Tape: 1; Side: A; Approx. Time Counter: 12.8 - 14.7}

Motion/Vote: **SEN. LIND moved that SB 356 DO PASS. Motion carried unanimously by voice vote.**

SEN. ESSMANN informed the Committee after he had a discussion with **Mr. McHugh**, and the amendment is no longer needed.

EXECUTIVE ACTION ON SB 365

{Tape: 1; Side: A; Approx. Time Counter: 15 - 19}

Motion: **SEN. ESSMANN moved that SB 365 DO PASS.**

Discussion: **SEN. LEWIS** informed the Committee this is one of the Universal System Benefit bills.

VICE CHAIR WILLIAMS said this bill only deals with the sunset provision by extending the sunset from September 31, 2005 to September 31, 2007.

Vote: **Motion carried unanimously by voice vote.**

HEARING ON SB 321

{Tape: 1; Side: A; Approx. Time Counter: 19 - 25}

Opening Statement by Sponsor:

SEN. KEN TOOLE (D), SD 41, opened the hearing on **SB 321**, Authorize PSC initiation of rate cases for certain utilities.

SEN. TOOLE distributed a handout showing the difference in rates between Montana Dakota Utilities, and the Montana Power Company when it was still regulated. He informed the Committee the

handout is to show the lack of variation. He said the reason for the lack of variation is from MDU not presenting a rate case to the PSC. SB 321 will give the PSC the authority to request a public utility company to file a public rate case. The bill also creates an immediate effective date, and a retroactive applicability date. A general rate case means a contested case review of all necessary components of the revenue requirement, allocated cost of service, and rate design of a public utility. **SEN. TOOLE** said there is a similar case with a telephone provider. He said the bill will not affect telephone companies that provide services to less than 12,500 consumers.

EXHIBIT(ens33a01)

{Tape: 1; Side: B}

Proponents' Testimony:

Tom Schneider, Commissioner, PSC, informed the Committee this bill is straight-forward and is a simple bill. He said, if a utility believes it is not termed, such as it's cost has increased, or it's profitability has fallen, they can support that it's rates are just and reasonable. He discussed the utilities from the 1970s and 1980s, and how important they were in the legislation. Since inflation has subsided, and the Colstrip plants are completed, the Commission has not set underlying basic rates in the last 20 years of utilities in a general rate case. He said there is a severe imbalance in the existing statutory framework. Unilaterally, utilities can seek a rate increase to cover their costs, but there isn't anyway under the recent court decision that either the Montana Consumer Council or the Commission can require a utility that has not been in for a decade and a half to show it's rates were made just and reasonable. He informed the Committee that it is totally unacceptable from the Commission's view. The Commission has endorsed this bill unanimously to restore some balance in the regulatory realm. Once rates are set and approved by the Commission, the rates are just and reasonable until someone else shoulders the burden of proof to show they are not reasonable.

Mr. Schneider said the Committee may have some amendments to exclude small utilities, such as the telephone companies under 12,500, and said the PSC is okay with this. He said that the Montana Consumer Council and the Commission and any other public entity is prevented from requiring a utility to demonstrate on a periodic basis that the rates remain just and reasonable.

Mr. Schneider talked about the difference between rural and non-rural telecommunication utilities, and informed the members that

Quest is the only utility that isn't non-rural. **Mr. Schneider** distributed two handouts. Exhibit 2 is a memorandum from **Commissioner Tom Schneider, PSC,** requesting Qwest to confirm and update its Montana earnings level via a minimum rate case filing. Qwest objected and challenged the PSC's authority to Order such financial filing. The PSC and the Montana Consumer Council now have to file a complaint and carry the "burden of proof". A recent District Court opinion substantially affirmed Qwest's position, and the PSC has appealed that decision to the Montana Supreme Court. The rate of return for Qwest is shown in Exhibit 3.

EXHIBIT(ens33a02)
EXHIBIT(ens33a03)

Mike Strand, CEO and General Counsel for Montana Telecommunication Systems, said they represent telephone cooperatives across Montana. He said the telecommunication systems supports the bill and amendment suggested by **SEN. TOOLE.** He said the rate cases are very expensive for small telecommunication companies. He informed the Committee they have very few complaints from the customers of these rural telephone companies.

{Tape: 1; Side: B; Approx. Time Counter: 8.6 - 14.8}

Jeff Feiss, General Manager of the Montana Telecommunications Association, said they represent the small and rural telecommunication providers throughout the state. He informed the Committee they support the bill if it is amended. He said there are two types of telephone companies; part 9-69-3, which applies to certain abilities to relax some regulations to companies that are fewer than 12,000. The rural company exemptions that appear in federal and state law apply to non-bill companies, which include: BellSouth, Verizon, SBC Communications, Inc., and Qwest. He stated these four companies provide services to approximately 94 to 95 percent of all wireline customers in the country, and approximately 600 independent telephone companies that provide services to the rest of the customers in the country.

Bob Nelson, representing the Montana Consumer Council, distributed the amendment that exempts rural telephone companies that have fewer than 12,500 customers. The effective date is on passage and approval by the legislature, and is retroactive back when the general rates were established on or after January 1, 1985. He said the amendments are reasonable, and they allow the PSC to require utilities to show their rate case.

EXHIBIT(ens33a04)

Opponents' Testimony:

John Alke, legal counsel representing Montana Dakota Utilities (MDU), informed the Committee that MDU takes great pride in its mission to provide electricity and gas to customers in eastern Montana, western North Dakota, western South Dakota, northeastern Wyoming, that is cheap and as stable of rates as possible. In the last 25 years, he has defended 10 cases for MDU gas rates. The last rate case he did for MDU took place in 1987. When the rate case took place, the rate for MDU was two cents a kWh higher than the Montana Power Company. No rate case has been filed since 1987, and the MDU rate case is now lower than Montana Power (NorthWestern Power) by two cents kWh. He said, according to **SEN. TOOLE** and **Commissioner Schneider**, MDU is not working properly, because they haven't been filing rate cases, and have been raising their rates. Under Montana law, every utility that does this in the state is only trying to charge the rate approved by the PSC. It is understood that the rate set by the PSC is the law, and anyone that challenges those rates are proven that their rates are not justified and reasonable. He stated that under Montana law, three parties can file a complaint at any time toward any regulated utility, and the Commission wants to challenge MDU, but they don't want to do the work, because the party that files the suit is responsible to pay for the suit.

{Tape: 2; Side: A}

Calvin Simshaw, representing CenturyTele, Inc, stated they oppose the bill if the amendment, (see Exhibit 2), is not included. He said that CenturyTel is a small company serving 21 states. They are losing land lines due to wireless and internet voice service. He said the children of today will not be purchasing land lines tomorrow. The competition in telecommunications has created Enrons.

Tom Ebzery, representing Qwest Communications, stated this bill is a blatant attempt to reverse the court decision that **John Alke** is trying to appeal at this time to bring MDU in for rate case review, a repeal to the courts by the PSC, or have the legislature intervene when the law is already established. He addressed the bill asking why five years is a magic number; what triggers a rate case; and changing the burden of rates that was just and reasonable five years ago. He discussed the application of rates that were established on or after January 1, 1985. He wanted to know why the bill is going back 20 years ago. He said, this is wrong, and the PSC is attempting to have it both ways. He said the PSC has all the authority they need to collect

information from a regulated entity, or they can request the information, and it will be provided. The case (Great Falls Tribune vs. PSC), is currently pending in the supreme court, and now is not the time for the PSC to be coming in and asking for a change in the law.

{Tape: 2; Side: A; Approx. Time Counter: 13.9 - 19.7}

John Fitzpatrick, representing NorthWestern Energy (NW), informed the Committee he feels this bill is anti-consumer and anti-rate. He distributed two handouts that show the normalized and authorized rates for NW energy and gas rates. He explained the rate of return versus the authorized (PSC) return. He said if this bill is passed, it will be used in a precarious and arbitrary manner against a regulated utility.

EXHIBIT(ens33a05)
EXHIBIT(ens33a06)

Informational Testimony: None.

Questions from Committee Members and Responses:

SEN. CROMLEY wanted to know why there is a amendment that goes back 20 years retroactive. **CHAIRMAN TOOLE** replied that the purpose is for the PSC to go back to whatever date they want to go back to.

SEN. MCGEE asked **CHAIRMAN TOOLE** if he agreed with the second amendment, and wanted to know why the small rural carrier was left on, and who is left. **CHAIRMAN TOOLE** replied, yes, that he agrees with the second amendment. The other question was deferred to **Tom Schneider** who said no, the bill applies to all regulated, electric utilities, all regulated natural gas utilities, private water companies, and Quest, who is the only non-rural utility. He said this will apply to everything that is referred to under Montana law under the distinction of the telecom concept.

SEN. MCGEE asked **CHAIRMAN TOOLE** to explain the basis for excluding the small telecomm carriers. **CHAIRMAN TOOLE** responded if the carrier is dealing with a small number of customers in the rural areas, there is less of a trial system.

SEN. MCGEE asked if a utility that has gone before the PSC, and has gone through a rate case, and have rates established, if it can that be argued in court that it is a de facto contract, and if the Committee/legislature does a bill like this, and it goes back with a retroactive date such as 20 years, if that will be a

ex post facto, which is, no law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the legislature.

{Tape: 2; Side: B}

Mr. Alke responded, that he wasn't sure he could agree with him. He did say that he feels the PSC made this bill retroactive so the PSC can say that MDU rates 20 years ago should have been this, and now they can back to MDU and tell them they owe a refund to their customers.

SEN. PERRY asked **CHAIRMAN TOOLE** why this bill exists, and what is it trying to solve. **CHAIRMAN TOOLE** replied that he is not trying to reach back 20 years into MDU's pocket. He said these utilities being discussed are regulated utilities that entered, theoretically, into an agreement with the public in exchange for getting them out of a monopoly franchise, and they agreed to submit themselves to government regulation and review. There are a number of rules how this happens, and the problem with MDU rates is they has been a flat rate for a long period of time. They are not subject to any competitive pressure, and do not face any budget discipline, but the discipline they do face comes from the regulators. MDU has not come before the PSC for any rate adjustment for a long time, so the PSC is curious as to what is going on. **CHAIRMAN TOOLE** stated that MDU must be doing very well. If they are not able to recover their costs, they would have been before the PSC very quickly filing a rate case. He added that the rate of return and the rate of recovery costs are two different issues.

{Tape: 2; Side: B; Approx. Time Counter: 6.7 - 11.5}

SEN. ESSMANN asked **Mr. Schneider** about the battle between the PSC and MDU, and who will pay for the review. He asked if the PSC is concerned about reviewing MDU's rate of return, why doesn't the PSC just review them. **Mr. Schneider** responded that the PSC has no interest in the cost to the utility to file a rate case, because the rate payers represented by the PSC pay for the filing of the rate case. He stated that the 20 year trend doesn't really mean anything. All the PSC wants is to go forward with rates that are just and reasonable. This bill only ensures that consumers know the PSC has a handle on utilities that have not had a case in the last 10 to 12 years, etc.

Closing by Sponsor:

CHAIRMAN TOOLE closed. He distributed a amendment that excludes small telecommunication providers from the bill.

EXHIBIT(ens33a07)

{Tape: 3; Side: A}

CHAIRMAN TOOLE informed the Committee that SB 143, the orphan share bill that transfers funds into other accounts, will be split into two bills. He said that the cleanup issue will be a separate bill that will go to the Natural Resources Committee, and the amendments will be another bill that will stay in this Committee.

EXECUTIVE ACTION ON SB 256

{Tape: 3; Side: A; Approx. Time Counter: 3 - 17}

Motion: SEN. TOOLE moved that SB 256 DO PASS.

Motion/Vote: SEN. TOOLE moved that AMENDMENT SB025606.acb BE ADOPTED. Motion carried 7-3 by voice vote with SEN. CURTISS, SEN. ESSMANN, and SEN. MCGEE voting no.

EXHIBIT(ens33a08)

Motion: SEN. PERRY moved that AMENDMENT SB025605.acb BE ADOPTED.

EXHIBIT(ens33a09)

Discussion: SEN. PERRY asked the Committee if **Mr. Fitzpatrick** could address the amendments. **Mr. Fitzpatrick** informed the Committee that the amendments clarify language and allow the PSC to compensate the consumer what they have net metered. The consumer that is generating energy will still has to pay for the transmission distribution services.

Motion: Motion carried 7-4 by voice vote with SEN. WILLIAMS, SEN. TOOLE, SEN. CROMLEY, AND SEN. LIND voting no.

Motion/Vote: SEN. TOOLE moved that SB 256 BE TABLED. Motion carried unanimously by voice vote.

ADJOURNMENT

Adjournment: 5:00 P.M.

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SEN. KEN TOOLE, Chairman

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CLAUDIA JOHNSON, Secretary

KT/cj

Additional Exhibits:

EXHIBIT(ens33aad0.PDF)