

**MINUTES**

**MONTANA SENATE  
57th LEGISLATURE - REGULAR SESSION  
COMMITTEE ON TAXATION**

**Call to Order:** By **CHAIRMAN BOB DEPRATU**, on February 7, 2001 at 8:00 A.M., in Room 405 Capitol.

**ROLL CALL**

**Members Present:**

Sen. Bob DePratu, Chairman (R)  
Sen. Alvin Ellis Jr., Vice Chairman (R)  
Sen. John C. Bohlinger (R)  
Sen. Mack Cole (R)  
Sen. Pete Ekegren (R)  
Sen. Jon Ellingson (D)  
Sen. Bill Glaser (R)  
Sen. Dan Harrington (D)  
Sen. Emily Stonington (D)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Lee Heiman, Legislative Branch  
Deb Thompson, Committee Secretary

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

**Committee Business Summary:**

Hearing(s) & Date(s) Posted: SENATE BILL 325, 1/31/2001  
Executive Action: SENATE BILL 258 Pass as amended 9-0

**HEARING ON SENATE BILL 325**

**Sponsor:** SENATOR DALE MAHLUM, SD 35, Missoula

**Proponents:** Allen Thiessen, Lambert, Montana, Montana Electric Co-op Association; Chris Wheaton; Doug Hardy, Park Electric and Montana Electric Co-op Association; Warren McConkey, Flathead Electric Co-op; Mike Strand, Montana Independent

**Telecommunication Systems; Tom Harrison, Montana Cable Television Association****Opponents: Mark Baker, Attorney representing AT&T; Curtis Weittenhiller, Spring Creek Coal Company**

**Opening Statement by Sponsor: SENATOR MAHLUM** presented the bill. The bill contains modifications to the electric Co-op group. The enabling law was set in 1939 and affected taxing districts of 3,500 people or larger. In 1997, SB 390 passed which provided a choice for electric Co-ops on whether to opt into competition or not. Senate Bill 325 will change three areas of the old enabling legislation from 1939 to bring the law more current. It will remove conflicts with newer, restructuring laws, outlined in Montana Code. The tax impacts are addressed in this bill. Currently, Co-operatives serve annexed areas of towns or cities with populations over 3,500. The tax code recognize that utility ownership in these cities, however, the old enabling law was not updated to recognize this ownership. Neither tax law nor the enabling law contemplated electric co-operative ownership of 100% of the facilities to serve these consumers. This means, without SB 325 if a co-operative purchases the poles and wires in a municipality with a population over 3,500 people, consumers in these communities are denied membership in the co-operative. Instead, citizens have to be served in another manner, such as through a subsidiary, thus creating a barrier to these citizens memberships into a co-operative. This was the case when Flathead Electric was the successful purchaser of a willing seller, which was Pacific Power and Light in the Kalispell area. Senate Bill 325 removes this barrier. It allows an electric co-op, when purchasing the poles and wires from a willing seller, to provide those consumers the benefits and responsibilities of membership. Membership in a co-operative gives the customers governing authority in their co-operatives. It gives them a right to include electing delegates or trustees to represent their particular interest. The bill modifies a part of the code, and for tax purposes, electric utilities, properties and municipalities over 3,500 if purchased by co-ops, that are formally known by public utilities as of January 1, 1998, are placed in a Class 9 property tax. The bill specifies that these properties remain in the same tax class and rates under the co-operative ownership as they would have under public utilities. Consequently, there is no money lost in property taxes.

Another change to the 1939 laws contained in SB 325, would allow co-op members to retain membership in their co-op if they choose to purchase their electricity from another supplier, such as an energy marketer. In this case, the individual would use a distribution system in the co-operative that delivered

electricity to their properties. Under current law to be a member of an electric co-op, the member must purchase the electric energy from the co-op. Without the passage of SB 325, those using just the poles and wires, have to forfeit their membership in these rates because they are not buying electric energy from the co-op. SB 325 allows poles and wires only to customers who retain co-operative membership. Because the interest of the co-op members using just the poles and wires are very different, from most traditional members, they can bundle services. SB 325 would allow different classes of members. Members may decide that different classes of members suite the needs of their members wanting to acquire new generation versus those who merely want delivery services. Members may decide if they want to be better represented through an area election of delegates to represent them at certain times. When a membership meeting requires a few hundred miles be driven, not everyone can attend. SB 325 removes any question of state mandated barriers to classes. The changes in SB 325 are not mandated, rather the bill would allow local members to make these changes if desired by the local members, through by-laws. This bill will not cause a loss of property taxes to state or local government or to schools. It will not allow co-operatives to take any public poles or wires or territory. Co-operatives can purchase utilities poles and wires from a willing seller. SB 325 will not change whether a co-operative may sell electric energy over another utilities poles and wires. Those restrictions were established in the newer restructuring laws which was passed in the 1997 Session.

**Proponents' Testimony: Allen Thiessen**, President of the Montana Electric Co-operatives Association, supported the bill. He distributed written testimony. **EXHIBIT(tas31a01)**

**Dave Wheelihan**, representing Montana Electric Co-operatives Association, read testimony from **Terry M. Holzer**, Manager of the Yellowstone Valley Electric Co-operative who could not attend the hearing due to bad weather. **EXHIBIT(tas31a02) {Tape : 1; Side : A; Approx. Time Counter : 11.9 - 16.9}**

**Doug Hardy**, Manager of Park Electric of Livingston, Montana, testified in favor of the bill. He presented written testimony. **EXHIBIT(tas31a03) {Tape : 1; Side : A; Approx. Time Counter : 16.9 - 20.9}**

**Warren McConkey**, General Manager of Flathead Electric Co-operative, spoke in support of the legislation. **EXHIBIT(tas31a04) {Tape : 1; Side : A; Approx. Time Counter : 21.4 - 28}**

**Mike Strand**, Executive Vice President and General Counsel for Montana Independent Telecommunication Systems, testified in support of the bill. He said rural telephone co-operative members tend to be very loyal to their co-operatives because they have a voice in how their co-operatives are governed and have a voice in their rates. This bill recognizes the changing landscape of the industries as they are restructuring and expanding. **{Tape : 1; Side : A; Approx. Time Counter : 28 - 29.1}**

**Opponents' Testimony: Tom Harrison**, representing Montana Television and Telecommunications Association, discussed concerns. He suggested a conceptual amendment. **{Tape : 1; Side : B; Approx. Time Counter : 0 - 7.8}** Regulation by the board of directors and local control has been suggested by the proponents. However, it should be pointed out that this bill effectively eliminates the Public Service Commission from regulation. It creates an uneven playing field amongst electrical providers in the state of Montana. If this bill passes, that portion should be eliminated. The concerns are outlined in the handout.

**EXHIBIT (tas31a05)** He explained the invoices were a bill to TCI Cablevision from 1999 and one from the same time period in 2000. The dramatic increase causes great concern as there is no control over facilities or service providers of this magnitude without any public regulation.

**Mark Baker**, Attorney for Anderson and Baker and representing AT&T Corporation, spoke against the bill. He explained that AT&T acquired the assets of TCI Cablevision of Montana as well as other cable systems across the country. When they acquired those assets, they have been in the process of upgrading those systems to provide digital cable in the Kalispell area and other areas of Montana. They represent 90% of the cable systems in Montana. This legislation is okay, trying to make the state whole in terms of tax treatment for previously regulated utility property of bonafide electric co-operatives but the same impact is happening in the private sector through this change. Specifically, the issue of pole attachments is of concern. Before the acquisition of Pacific Corp properties in the Flathead area, they were paying Pacific Corp a federal rate mandated by the FCC of \$3.75 per pole. On those poles, there a number of wires owned by others or leased to other companies to provide services to constituents in the area. AT&T leases out wires on those poles to provide cable television service and now digital cable television service and hopefully in the future, telephony and high speed Internet service. During the acquisition of those Pacific Corp properties, the PSC mandated in the acquisition agreement that through the balance of 1999, the subsidiary that was created by Flathead Electric would have to abide by the federal rate of

\$3.75. There are over ten thousand poles in Flathead Electric's territory. There are also 900 poles used through the Flathead Electric's Co-op's territory, prior to the acquisition. Those 900 poles were being treated at a rate of \$13.40 per pole, almost a four fold increase. The status quo was maintained through 1999. In 2000, the bill received raised the rates, doing away with the federally mandated rate by the Federal Communications Commission and impose the unregulated rate that Flathead Electric was using within its own co-operative territory to raise the rates over \$13 a pole. That is a 370% increase that AT&T cable in the area had to deal with. They have protested the rate but the issue has not been resolved. He offered a proposed amendment that would say if an electric co-op acquires what was a previously regulated utility that they would have to abide by the federal rate. That would prevent the impacts of the extreme rate hikes from being passed on to the customers. **EXHIBIT (tas31a06)**  
**{Tape : 1; Side : B; Approx. Time Counter : 7.8 - 13.1}**

**Curtis Weittenhiller**, General Manager for Spring Creek Coal Company in Decker, Montana, discussed his concerns regarding the bill. He said the bill was a general revision to the co-op law. He shared his experiences with Flathead Electric, as a member of the co-op and a previous customer of Pacific Corp. He distributed a handout demonstrating the coal company statistics. **EXHIBIT (tas31a07)** He described the background regarding the coal company electric services, which previously were publicly regulated. Affordable tariff rates were provided to Spring Creek Coal. The Electric Restructuring Act in 1998 provided the opportunity to choose an outside supplier for electric rates. The mine opted to continue to rely on Pacific Corp as a supplier of power. Later that year, at the end of 1998, Flathead Electric purchased the assets, transmission and distribution assets of Pacific Corp which included Spring Creek Coal and Decker Coal. They had been told by Flathead Electric that the sale would be seamless with no impacts regarding cost of power under the tariff rates. Four months later, they were informed from Flathead that there was a problem. The problem was they did not have power contracted to serve the loads and they would have to go to the market place and find power and the mines would be obligated to pay whatever the price. A year later, the same situation occurred. When that occurred, the contract that they were able to execute increased costs by 40%. That contract expires March 31, 2001. Flathead Electric has not contracted for power beyond that date for Spring Creek or Decker Coal. What that means, with the market where it is now for power, things do not look good. He pointed out there were many industrial businesses in the state that were having financial difficulties because of high power, but the coal companies are in a unique situation because they have never opted out under the restructuring act. They have

always been loyal to the public utilities. However, under the situation with Flathead Electric and the decisions made by their board, the mines are now in the open market exposed to the swings in the prices. The impact on Spring Creek and Decker will be far reaching and the viability of those operations are in jeopardy.

**{Tape : 1; Side : B; Approx. Time Counter : 13.1 - 21}**

**Questions from Committee Members and Responses: SENATOR BOHLINGER**

asked if the C=co-op relationship allowed for access to cheaper Bonneville Power. **Mr. McConkey** replied that Flathead Electric and Energy Northwest was a composite with several different tower supply contracts with Bonneville and Pacific Corp that are contractually, legally earmarked for specific groups of customers. Specifically with regards to Energy Northwest Incorporated block, Bonneville Power began service of 16 megawatts of power to Energy Northwest on March 1, 1999 because it was a publically owned entity but did not fall under the Montana co-operative statutes. They couldn't sell it to us under what is known as their most preferential rate, called the "PF" rate. They could only sell it under a surplus rate and it could only be delivered to Energy Northwest in Kalispell. When that contract expires, on October 1, Bonneville no longer has any surplus power. They are over subscribed and having to buy from the markets. That contract will terminate and Energy Northwest as it exists today, will not be eligible for any Bonneville power. The contingency contract signed with Bonneville Power, only Energy Northwest conversion into Flathead Electric - set aside 16 megawatts for Energy Northwest customers that would be consolidated into Flathead Electric at the cost based rate, which right now is potentially going up 100%.

**SENATOR BOHLINGER** asked how the proposed amendment by **Mark Baker** would affect the co-ops. **Mr. McConkey** discussed the AT&T pole attachment rates as an ongoing ruling. The FCC has ruled that Energy Northwest, Inc. is "co-operative like" in that it has a local board of directors that is empowered with the ability to determine the various pros and cons and uses of the poles in that local community. Energy Northwest is deemed today to be exempt from Federal Communication's jurisdiction. That ruling has been appealed by AT&T. The pole attachment rate applied, is the use of the current FCC pole attachment rate. That rate has evolved over the past five or six years. There have been substantial modifications to the different determinants that FCC considers when determining pole attachment rates. The current formula, the 2000 formula, is the formula used for both the rural and urban portion. They are not subject to FCC but are using their standard to determine the rate. He also noted this applied to other communication carriers, such as Century Tel. If there were one pole attachment rate for one telephone carrier and another

rate for another telephone carrier that would be wrong. **{Tape : 1; Side : B; Approx. Time Counter : 21 - 30.1}**

**SENATOR ELLIS** referred to a comment by **Mr. Harrison** regarding electric service being denied to a restaurant in competition with another business. **Mr. Harrison** replied this issue had been brought out during a meeting so he had no first hand knowledge of the reference. However, the importance of guaranteed access to service should be referenced in the bill. This is what the Public Service Commission would do. They would make access guaranteed. None of these protections are within the co-op structure. **{Tape : 2; Side : A; Approx. Time Counter : 0 - 2.6}**

**SENATOR ELLINGSON** asked how the rise in electric rates related to the membership in the co-op. **Mr. Weittenhiller** said their company was under Pacific Corp and the PSC tariff which was affordable, in the neighborhood of \$23 per megawatt hour. When they went under the ownership of the co-op, the co-op did not have any PSC regulation. There were regulated and governed by the board and the board identified what they commonly called the border load which included the two businesses - the Decker Mine and Spring Creek Mine. This took them out of the tariff rate which they were under before, and put them in a new tariff rate. The new tariff rate had specific numbers for the transmission and distribution but no specific number for what they would pay for the power. Basically, it says the mines would pay whatever the contract they were able to sign them up for. They signed a one year deal in 1999 and signed an eleven month deal in Spring of 2000. The second contract was a forty percent increase in prices over the previous year. This year there is no contract in place but they are looking to five to ten times that in today's market place. He said this was how the situation came about. He felt the board had not been equitable. There is no higher power governing over the top of the board. Under Flathead Electric, the mines are no longer protected. The price moratorium that had protected them, vanished. They are now completely subjected to the market.

**SENATOR ELLINGSON** asked if the mines were a victim of deregulation. **Mr. Weittenhiller** replied he did not think so, but rather the rules had changed. They were now scrambling for their lives to stay in business as they were subjected to market exposure. They were now being charged for the co-ops cost of service. The PSC provided a tariff rate that kept that from happening. He described the Flathead Electric "border load" which ran from the Montana Wyoming line to the mines. **SENATOR ELLINGSON** asked what would happen to the mine operation if they had to come up with an extra \$15 million dollars a year to pay power costs. **Mr. Weittenhiller** said this was an extremely

serious situation. They felt the four cent increase per ton of coal costs were high. Now they are looking at \$1.50 per ton increase. **{Tape : 2; Side : A; Approx. Time Counter : 2.6 - 14.1}**

**SENATOR ELLINGSON** asked **Mr. McConkey** to respond to this major increase in projected electricity costs to Spring Creek Coal of \$15 million dollars. **Mr. McConkey** replied that was literally the cost of the power. They felt Flathead Electric was the victim of the de-regulation process. The cost of purchasing 20 megawatts of power that they need to serve the boarder loads, the two coal mines, Cooke City and the Silvertip Oil Field was under the Wyoming transmission system that was all served under a completely different load control and generation area. When they made the acquisition, Pacific Corp did not have any contracts offered for power supply. Flathead Electric was forced to go to the market to find a power supply. They worked with both mines and the different oil field owners to try to find various, longer term options. He claimed they did not mark the distribution tariff up one bit. Transmission and distribution components are paid to the power supplier, whether it be Deseret GNT in Utah, or scheduling and transmission services from Pacific Corp and Dynergy. Those costs are directly passed through and they are going up like crazy. **{Tape : 2; Side : A; Approx. Time Counter : 14.1 - 16.4}**

**SENATOR ELLINGSON** asked if they had not made their purchase from Pacific Corp would the rates have continued under PSC regulation. He asked how Pacific Corp would have managed their obligation under PSC established rates. **Mr. McConkey** said the retail rates are going up to reflect the costs. As the cost of power supply is going up, Flathead Electric is raising their retail rates to reflect that. In the state of Montana, they have their distribution separate from their generation. All power has gone up in price. As long as they are able to demonstrate their costs of power supply have gone up, even in the Public Service Commission regulating tariff, that is adding to those costs. Regulation isn't about utilities losing money, when adding up their total costs. **{Tape : 2; Side : A; Approx. Time Counter : 16.4 - 17.9}**

**SENATOR COLE** asked whether the cost would have still gone up because they were getting the power from out of state. **Mr. McConkey** said given the other events going on in Montana and separating energy supply from distribution, the same type of scenario is being faced by Energy Northwest, Northwest Corporation and Montana Power Company and their future power supplier, once the original contract runs out, that is the case in the regulated environment in Montana. If Pacific Corp had

retained full ownership of all distribution and generation that they had in Montana, and remained fully under Public Service Commission jurisdiction, like Montana Dakota Utilities had, then they would currently have a similarly regulated rate based on a full regulation of power and distribution.

**SENATOR GLASER** mentioned that he had recently read a letter from three legislators from California to the federal government that basically changed Montana. What happened, California had not addressed their power shortage problem. They are diverting power from Montana and raising our rates. As a result of that, everyone in Montana is suffering. They took the energy from the Aluminum Plant down to California under the Senate of the United States letterhead. He asked if **Mr. McConkey** was aware of this. **Mr. McConkey** said that was a correct assessment. He pointed out the headlines of the Daily Interlake yesterday in Kalispell said power rates were to double. This threatens Plum Creek's existence. It is all driven back to a mess created out of California. He said that was the root problem. It is also a wholesale rate problem. However, this bill addresses distribution ownership. *{Tape : 2; Side : A; Approx. Time Counter : 17.9 - 22.1}*

**SENATOR ELLIS** asked what the basis for the purchase by Flathead Electric to purchase the area where the mines are located. **Mr. McConkey** replied it was a complicated history. Pacific Corp didn't even realize they had that property in the state of Montana. It had been under the Wyoming Public Service Commission's jurisdiction. Pacific Corp had to get completely out of Montana in order to separate jurisdiction from their ownership at Colstrip and their ownership of any distribution in Montana. They had to get out from under the Public Service Commission in this state. Therefore, this was included in the Flathead Electric purchase. *{Tape : 2; Side : A; Approx. Time Counter : 22.1 - 30.4}*

**SENATOR COLE** asked if there were any alternatives, such as Tongue River or some longer term contracts. **Mr. Weittenhiller** said they were working on the problem. The Tongue River Co-op is within five miles of the site. They informed him that their contracts did not allow for growth of the service area. **SENATOR COLE** asked what it would take to change some boundaries on a co-op. **Mr. Wheelihan** replied that under present law, if co-operatives sat down and worked out an exchange, that could be done. *{Tape : 2; Side : B; Approx. Time Counter : 0 - 7.4}*

**SENATOR EKEGREN** asked **Mr. Jay Stovall** from the Public Service Commission to comment on the issue. **Mr. Stovall** said the view of

the situation of Spring Creek Mine is they should come under SB 390. They should come under the moratorium, as they did not opt out, as should all the other areas down there when Pacific Corp was under PSC regulation in 1988. Anyone that didn't opt out should be under the cap. That cap should continue even after the sale. Whoever bought Pacific Corp should be responsible for that cap. He said this was his own views, not the Commission as a whole. **{Tape : 2; Side : B; Approx. Time Counter : 7.4 - 11.2}**

**SENATOR STONINGTON** asked **Mark Baker** if the proposed amendment would give preferential treatment to his client versus other customers under the electric co-op. This is a deregulated environment and we were trying to let the market run and now he was asking it come back under regulations. **Mr. Baker** pointed out the co-op had set their rates by using the criteria that is mandated by the FCC. If this were the case, in 1999 when Pacific Corp had to live by that mandate, the pole attachment rate was \$3.75 approved by FCC. At the same time, the unregulated rate within the Flathead Electric Co-op territory was \$13.44. If they are using the same criteria, it is difficult to believe there would be that type of discrepancy in the rate. If they are using the criteria, then the amendment that was suggested should not be a problem. **SENATOR STONINGTON** asked for **Mr. McConkey's** response. **Mr. McConkey** said they are currently applying the 2000-2001 FCC formula, pole attachment rates, voluntarily, which is what the amendment says. The Public Service Commission does not have jurisdiction over pole attachment rates. It is a Federal Communications matter in the state of Montana. The Federal Communications appeal will bring resolution to this, whether Flathead Electric prevails or AT&T prevails. The reason the lower rate was in place, until 1999, was a judgement issued in a complaint between AT&T and Pacific Corp. A Montana District judge imposed a stay on the implementation of the new FCC rule pending the negotiated outcome at the end of 1999. Beginning January 1, 2000 that is when we started going to the new rates because that was the end of the judges stay on that matter. There is an additional twist on this as well. **{Tape : 2; Side : B; Approx. Time Counter : 9.6 - 15.9}**

**Closing by Sponsor: SENATOR MAHLUM** closed. He noted the frustration that existed. He said this was a commodity problem that happened with de-regulation. He pointed out the closing of Milltown Dam after PPL purchased Montana Power and Smurfit Stone. The bill does not help the cost of power. It is designed to help electric co-ops. These were designed to help urban people so they could have the conveniences of the urban people. Co-ops have local people serving on the boards that can be accessed when needed.

**EXECUTIVE ACTION ON SENATE BILL 258**

**SENATOR BOHLINGER MOVED DO PASS ON SB 258.** He said this bill dealt with the college savings account and would bring us into compliance with enabling federal laws. **HE MOVED AMENDMENT #25802. EXHIBIT (tas31a08)** He said this would allow for people to place money in equities. The question was called on the amendment. The motion **PASSED** unanimously. **SENATOR BOHLINGER MOVED THE BILL AS AMENDED.** The question was called. The motion **PASSED** unanimously.

**ADJOURNMENT**

Adjournment: 9:52 A.M.

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SEN. BOB DEPRATU, Chairman

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DEB THOMPSON, Secretary

BD/DT

**EXHIBIT (tas31aad)**