



HARRISON INSTITUTE FOR PUBLIC LAW
GEORGETOWN UNIVERSITY LAW CENTER

M e m o r a n d u m

TO: Senator Jim Elliott
FROM: Douglas Lucke 202-662-9609
RE: How the GATS May Affect Montana's Electricity Policy
DATE: June 25, 2003

Energy issues have recently become a focus of negotiations for the expansion of World Trade Organization (WTO) rules regarding international trade. Proceeding under the framework of the General Agreement on Trade in Services (GATS), these negotiations have the potential to negatively impact Montana's ability to regulate energy services in the interests of its citizens. Of noticeable concern is the United States proposal to create a comprehensive sector for energy services to be added to the agreement. If agreed to, this proposal could lead to nations applying the most stringent GATS rules to a broad spectrum of energy services that are not currently covered by these rules.

As outlined in its proposal on energy services, the United States seeks to create an energy services sector that would incorporate all energy services. The United States also seeks to apply the broadest possible limits on a government's ability to impose quantitative restrictions on private corporations' participation a market, and to prohibit regulations that could have the effect of giving a domestic company an advantage over a foreign corporation. Council for Trade in Services, Special Session, Communication from the United States, Energy Services, WTO Document S/CSS/W/24, 18 December 2000.

If adopted in its present form, the U.S. proposal could result in conflicts between the United States' GATS commitments and energy regulatory and financial measures that have recently been adopted by the Montana Legislature. The following examples highlight the potential conflicts:

1. *GATS market access rules and measures to promote stable electricity prices and green power.* The market access provision consists of six rules that prohibit the United States, and state and local governments, from placing quantitative limits, quotas, or economic needs tests on services and service suppliers from other WTO members. The United States proposes that market access commitments should be applied to energy transmission and distribution services. This could conflict with Montana energy measures that are intended to promote stable electricity prices. The United States also proposes that market access commitments should be made without regard for the technology used to provide energy services. This could conflict with Montana energy measures that are intended to promote the use of electricity from renewable sources.

Measures that could conflict with market access rules include:

- Montana's "default supplier" measure, which requires most consumers to purchase power from one supplier, could violate the market access provision because it limits the number of service suppliers who can participate in the market.
- Montana's "green power" measure, which requires utilities to offer electricity that is generated from certified environmentally preferred resources, such as wind, geothermal, and solar power, could violate the market access provision because it limits the quantity of service output and because it is not technologically neutral.
- Montana's electricity supply procurement measure, which regulates the procurement of electricity by a utility, could violate the market access provision because it also limits the quantity of service output.

2. ***GATS national treatment rules and measures to ensure an adequate supply of electricity.***

The national-treatment provision requires that the United States, and state and local governments, give to the services and suppliers of other WTO members treatment as favorable as it gives to United States businesses that provide similar services. The United States proposes, under its national treatment commitment, to require non-discriminatory third-party access to and interconnection with energy networks and grids where government entities or large suppliers dominate the grids. This could conflict with measures recently enacted in Montana to ensure an adequate supply of electricity through public financing of energy facilities.

Measures that could conflict with national treatment rules include:

- Montana's Power Authority Act measure, which provides revenue bonds for financing of power generation, transmission and distribution facilities, could violate the national treatment provision because it provides favorable treatment to in-state service providers.
- Montana's Board of Investment energy investment measure, which authorizes the Board of Investment to invest in electricity generating capacity, and to purchase electricity from qualified facilities, could violate the national treatment provision because it also provides favorable treatment to in-state service providers.



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Committee on Energy

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UTILITIES COMMISSION

Idaho State Capitol
700 W. Jefferson #334
Boise ID 83720

April 15, 2003

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Ambassador Robert Zoellick
Office of the U.S. Trade Representative
1724 F Street
N.W. Washington, D.C. 20006

Dear Ambassador Zoellick:

Like many state legislatures, we believe that international trade agreements can promote U.S. economic growth while respecting state sovereign authority. Recently, the National Conference of State Legislatures (NCSL) wrote you a letter expressing concerns about negotiations on the World Trade Organization's services agreement, the General Agreement on Trade in Services (GATS). We share NCSL's concerns that negotiations under GATS are proceeding, even though provisions that affect state and local governments remain undefined. Idaho officials provided USTR with input prior to adoption of GATS in 1994, and we appreciate this opportunity to assist your office in the current round of negotiations.

We are writing to expand upon the concerns raised by NCSL with particular attention to state-level energy policy, which is of crucial importance to Idaho's economy. We are aware that the United States and the European Union have exchanged comprehensive proposals for applying GATS rules to the energy sector. We have reviewed the Initial Offers issued by your office on March 31, 2003. We have also studied the E.U. request and other reports from the GATS Council of the WTO. Our review raises the following general concerns:

- **Local monopolies** – Will GATS affect Idaho's ability to regulate utility monopolies?
- **Domestic regulation** – Will GATS affect domestic regulation generally, including broad powers to regulate water or electricity in the "public interest"?
- **Specific commitments** – Will specific energy commitments by the United States affect our ability to continue developing Idaho's electricity policy?

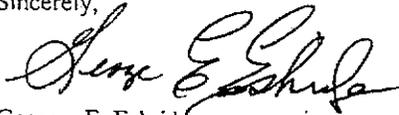
These concerns are elaborated in the following set of questions. We would appreciate a written response unless there is a document that already answers our questions.

1. **Local monopolies.** If the United States makes a specific commitment on energy services, any future decisions that "grant" monopoly power require the United States to pay compensation under GATS. Although many states are choosing to deregulate or privatize electricity services, Idaho has purposefully continued to fully regulate the provision of electric service to customers. Idaho regulates by protecting the customer base of electric utilities from competition while limiting the rates electric utilities can charge the ratepayers. Idaho law specifically prohibits an electric provider from "pirating" a customer already served by another Idaho provider.
 - a. Would existing or future measures adopted by the Idaho Legislature that revise, expand or strengthen our electricity monopoly structure conflict with GATS provisions on grants of monopoly power?
 - b. Would the transfer of a service area from one electric utility to another constitute a "granting" of monopoly under GATS?

- b. Part II of the energy services offer identifies services for which commitments have not yet been made. How would commitments for "pipeline transportation of fuels" and "bulk storage of services of liquids and gases" be integrated with the need to protect critical infrastructure including water, electric, natural gas and telecommunication facilities?

Thank you on behalf of the Idaho Legislature for taking the time to address our concerns. We appreciate this opportunity to assist you in safeguarding state authority under international trade agreements and look forward to your response to our questions.

Sincerely,



George. E. Eskridge
Idaho House of Representatives
Co-Chair, Energy Committee



Joe Stegner
Idaho Senate
Co-Chair, Energy Committee