

**MINUTES**

**MONTANA SENATE  
59th LEGISLATURE - REGULAR SESSION**

**COMMITTEE ON ENERGY AND TELECOMMUNICATIONS**

**Call to Order:** By **CHAIRMAN KEN TOOLE**, on January 27, 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 235, 1/21/2005  
Executive Action: SB 143; SB 193

**HEARING ON SB 235****Opening Statement by Sponsor:**

**SEN. JEFF MANGAN (D), SD 12**, opened the hearing on **SB 235**, Revise major facility siting act.

He talked about the siting act, and the increased cost of the price of electricity. He discussed the California energy crisis that took place in 2001, and the blackout in 2003, in the upper Midwest and the East Coast. He said that SB 235 is intended to abbreviate the process by removing two things for major facility sites. 1) Exempting sub stations and switch yards. 2) Exempting existing transmission lines located on existing transmission right-of-ways. This bill will make it possible for the upgrade of transmission lines with little environmental affect. There are important steps in promoting the development of additional electricity generation in Montana, e.g., wind resources that will increase the state's electrical capacity. He said it is important to get this power to market, which is exported from Montana.

*{Tape: 1; Side: A; Approx. Time Counter: 5.2 - 6.2}*

**SEN. MANGAN** said in the last couple of years, there is more discussion about wind, and referred to **SEN. TESTER'S** bill, SB 415. He talked about the Judith Gap project, and a newspaper article on a wind plant in the Glasgow area that will require transmission upgrade. He added, there is another generated coal fire plant being built near Great falls.

**Proponents' Testimony:**

**John Fitzpatrick, representing the NorthWestern Energy (NW)**, said they are in support of this bill, and it will have a major affect in Montana. It is an important step in improving and creating a competitive electricity market in the state of Montana. He said this will be a stimulus for economic development and energy resources for central and eastern Montana. He discussed how energy has been coming around in the last five to seven years. In 1998, the Board of Directors and executive officers of Montana Power (MP) made the decision to sell their generation assets. Selling those assets consisted of their hydroelectric facilities on the Clark Fork and the Missouri river basins, and selling their Colstrip plants to PP&L Montana. The transaction from this sale went from cost-base, an integrating utility, to a market-base commodity with a de-regulated supplier. When NW purchased the ownership of the distribution and transmissions, they had been a regulated company. NW assumed the cost in the acquisition

of natural gas and electricity, which is regulated by the PSC. He said that NW purchases power from independent power suppliers, but their main source is from PP&L Montana. He informed the Committee at the time NW purchased MP, that MP had entered into a four year contract with PP&L Montana. At that time, the price of power was approximately \$22 per Mg, or 2.2 cents per kWh. When the four year contract expired, NW had purchased MP's portfolio to supply electricity for the next couple of years. PP&L now sells power to NW at \$31.90 for 450 Mg. This contract with PP&L extends until 2007, with price quotes to 2012. Thus, the reason that NW went into bankruptcy. **Mr. Fitzpatrick** discussed the upgrade of major transmission lines, and the use of existing right-of-ways. He talked about the contract that NW signed for a wind generator with Judith Gap. He added, NW is very interested in promoting wind generation in Montana. He asked the Committee to support SB 235.

**Van Jamison, representing himself**, stated this bill will make more efficient use of transmission. He urged support for SB 235.

**{Tape: 1; Side: A; Approx. Time Counter: 23 - 25.4}**

**Tim Gregori, General Manager of Southern Montana Electric Generation and Transmission Cooperative (GMT)**, informed the Committee that GMT provides wholesale electric energy, and supply services to five electric distribution cooperatives located in south central Montana, and select services for Great Falls, such as; water treatment facility, schools, airport, and municipal government functions. He said in 1994, GMT did a extensive study on suitable supply alternatives for future generations. They are constructing a 250 Mg circulating boiler for a coal fired generating system in Kentucky. When completed, this project will be the most environmentally compliant coal fired generator facility ever built in North America. He said this bill is a step in the right direction in ensuring that Montana will have a reasonable energy policy that adequately addresses energy needs while preserving the values of the Montana consumers they serve. He said that GMT supports the implementation of good policy that will encourage the development of a efficient transmission system. He urged the Committee to support SB 235.

**Neil Colwell, representing VISTA Corporation**, said that VISTA is a natural gas and electric utility located in Spokane, Washington. He said they are part owners of Colstrip Units III and IV, and the transmission lines that come from those units, and the Noxon Rapids Dam, which is part Clark Fork Project in western Montana. He urged support in the passage of SB 235.

**{Tape: 1; Side: B}**

**Leo Berry, attorney in Helena, representing Great Northern Power Company and partner Hughwitt Lang Companies,** informed the Committee these companies are applying for a clean air permit that will be submitted in a couple of months for a 500 Mg plant located near Circle, Montana. He talked about working for DNRC a few years back when he was the Director of DNRC. He said during that time, DNRC administered the maintenance of the siting act. He discussed putting in power lines from Colstrip to Townsend. He said this bill encourages the upgrades of Montana's power resources, wind and coal, and moving that power out of the state. He urged a do pass.

**Doug Hardy, representing Montana Electric Cooperatives Association,** distributed written testimony urging the Committee to support SB 235.

**EXHIBIT (ens21a01)**

**Jim Mockler, representing Montana Coal Companies,** talked about creating and the use of wind energy. He said this is a environmentally sound bill. He urged the Committee to support this bill.

**Tom Ebzery, representing Pacificorp, Portland General Electric, Puget Sound,** said they are part of the Colstrip owners with PP&L Montana, and co-owners with NW on the 500 Kv line. They support this bill for the reasons previously given.

**Dan Flynn, representing IBW Local 44,** informed the Committee the employees of IBW are the line construction and work utilities. He reported of the 250 members, most of these people have left the state to work in California and other places. He said that Montana linemen are some of the best power builders in the United States. They have a great reputation for being hard working people. He said it would be nice if some of these members of the local could work at home and sleep in their own beds. He urged the Committee to support SB 235.

**Barbara Ranf, Montana Chamber of Commerce,** stated their support for SB 235. She said they believe in the development and SB 235 is critical for Montana's economy. This bill is a important step in ensuring that Montana has transmission facilities to provide energy for Montana, and the export of power.

**Charles Brooks, representing the Billings area Chamber of Commerce,** stated they support SB 235. He discussed all the methods used in finding solutions for Montana's future power. Energy production, and the distribution alternatives will be a economical and efficient solution for Montana's future. He

informed the Committee there are two plants near Billings being developed. He urged a do pass for SB 235.

**SEN. GLENN ROUSH, SD 8, CUT BANK**, testified this is a very important piece of legislation for Montana. He talked about the new plants being built for alternative resources, and the economic development distributed from these plants, such as jobs, energy, and taxes that are paid by these facilities. He urged the Committee to support SB 235.

**Opponents' Testimony:** None.

**Informational Testimony:**

**Warren McCullough, Bureau Chief of DEQ Environmental Management Bureau**, informed the Committee this bureau administers the Emission Facility Siting Act. He said that the Department has chosen not to take a position on SB 235, but said he is here with **Tom Ring**, a veteran of the former Major Facility Siting Bureau, and they are both available if the Committee has any questions.

**Questions from Committee Members and Responses:**

*{Tape: 1; Side: B; Approx. Time Counter: 12.4 - 15.8}*

**SEN. LIND** asked how large will the new facilities have to be to accept the new transmissions and upgrades. **Tom Ring, Major Facilities Siting Program, DEQ**, responded. He said that over the years, they start regulating transmission lines that are greater than 69 kilovolts in size, and greater than 10 miles in length. He said above 230 kilovolts, there is no length limitation on the size of regulation. **SEN. LIND** asked if there are transmission lines that are less than 69 kilovolts. **Mr. Ring** replied that the siting act refers to a facility, and it varies on what constitutes a transmission line. He said one may be for a cooperative or one may be for NW.

*{Tape: 1; Side: B; Approx. Time Counter: 15.8 - 17}*

**SEN. LIND** asked **John Fitzpatrick** if a 50 kilovolt can be upgraded to a 500 kilovolt. **Mr. Fitzpatrick** explained that a transmission line in Montana begins at 69 kilovolts. He said that a 50 kilovolt is obsolete voltage, and they now start at 69 kilovolts.

**SEN. ESSMANN** asked about a ball park percentage on what it would take to upgrade the transmission lines. **Mr. Abzery** replied that it would take about 15 to 20 percent to move forward on the upgrade.

**{Tape: 2; Side: A}**

The Committee members discussed the size, space, and clearance, and what is required for the upgrade of the transmission lines, and its correlation to the size of the facility.

The Committee talked about the use of existing right-of-ways, and parallel lines from Colstrip to Townsend. **Mr. Fitzpatrick** informed them the parallel line wasn't reliable, because it is dependent on the size of the voltage. They discussed the causes of power voltage surges.

**CHAIRMAN TOOLE** asked **Ken Morrison, representing PP&L Montana**, who was holding the contract for Montana Power and the city of Los Angeles, and when that contract will expire, and how big the contract was. **Mr. Morrison** stated they currently are not holding any contracts with NW nor with LA Power and Water. **CHAIRMAN TOOLE** asked, when the facilities were purchased, how did the Colstrip IV power migrate. **Mr. Morrison** informed him that PP&L owns Colstrip I, II, and III. **CHAIRMAN TOOLE** deferred his question to **Mr. Fitzpatrick** who replied that Colstrip IV was sold in the early 1980s. Montana Power kept a portion of Colstrip, then sold power contracts to various people. He stated that one of the contracts was with Los Angeles Power and Water.

**Closing by Sponsor:**

**SEN. MANGAN** closed. He thanked the Committee for a good hearing from the Committee members, and testimony from the audience. He urged a do pass motion.

**EXECUTIVE ACTION ON SB 143**

**{Tape: 2; Side: A; Approx. Time Counter: 11 - 25.8}**

**Motion: SEN. PERRY** moved that SB143 DO PASS.

**Motion: SEN. PERRY** moved that AMENDMENT SB014301.ACB BE ADOPTED.

**Discussion: Casey Barrs, LSD**, distributed the amendment and explained to the Committee what it does. **Mr. Barrs** said the amendment moved the House Bill 2 money from the Orphan Share Fund Share to the DEQ, which must be credited against the amount owed to DNRC.

**EXHIBIT** (ens21a02)

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

**Motion: SEN. PERRY moved that SB 143 DO PASS AS AMENDED.**

**Discussion: SEN. LEWIS** stated his concerns about pulling \$2 million from the Orphan Share Account to DEQ.

**SEN. MCGEE** responded that the amendment will give the DNRC the chance to clean up the hazardous waste sites, and DEQ wasn't responding. **CHAIRMAN TOOLE** said the controversy was over a specific site. He discussed the fiscal note handed out in Committee showing the transfers from one account to another account (see Exhibit 3). He asked **Sandi Olsen, Remediation Bureau, DEQ**, to address the question. **Ms. Olsen** said there are two components to the bill. The one part transfers funds from the Orphan Share Account to the hazardous waste/CERCLA fund or the environmental quality protection fund. The second part refers to the providing of funds of a remedial investigation and feasibility study for the Reliance Refinery. The amendment is a directive for DEQ to use the money for Reliance Refinery, which is connected to the Orphan Share Fund.

**{Tape: 2; Side: B}**

**SEN. PERRY** read a letter from **Jane Mitchell, Counsel, for Swank Enterprises, Valier, Montana**, who was in opposition to the bill. The letter discusses a lawsuit made by DEQ toward Swank, Ent, and six other parties, and one of them is against DNRC to determine who will clean up the Swank site. The letter states that DEQ is still doing a study that has been on-going for the last 14 years, and there is still no solution. DEQ is still trying to recover \$250,000 from Swank. He stated his concern about state agencies filing lawsuits against private companies. He commented that he sides with **SEN. LEWIS** who made the comment about being uncomfortable with the \$2 million taken from the Orphan Share Account.

**Vote: Motion carried 7-4 by voice vote with SEN. LEWIS, SEN. PERRY, SEN. CURTISS AND SEN. ROUSH voting no.**

#### **EXECUTIVE ACTION ON SB 193**

**{Tape: 2; Side: B; Approx. Time Counter: 11.5 - 24}**

**CHAIRMAN TOOLE** informed the Committee that he has invited the **Code Commissioner, Greg Petesch**, to give the Committee a brief overview on the Constitutional issues dealing with the statute being amended. He stated there are six or seven amendments that

are doing things in recognition of the Constitutional issue in the underlying statute.

**Greg Petesch, Code Commissioner,** said in July of 2004, **SEN. BALES** had asked him to look at the Constitutionality of tax incentives in general, and certain taxes that are contained in statute. He did this, and has prepared a document. For these parts of tax incentives, there are two basic Constitutional concerns. 1) The the federal concern, a violation of Congress policy on the federal Constitution. He said that the United States Supreme Court has recently been striking down any number of tax incentives that are designed to favor in-state activity over out-of-state activity. In addition to the clause, there is a federal statute that was enacted in the late 1980s, that deals specifically with electricity. He added, this federal act was requested by a **SEN. DECONCINI** in Arizona. New Mexico had enacted a energy transmission tax, and they provided a credit against their in-state gross receipts tax. The energy was primarily going to Phoenix, Arizona, so the tax was being collected on all energy, but they were being credited back in taxes against on the state of New Mexico. **SEN. DECONCINI** passed a federal statute that prohibits any legislation from the state level that directly or indirectly favors in-state electrical energy customers over electrical energy customers in general. Congress has the authority to do this. **Mr. Petesch** did an analysis of Section 15-35-103, and stated it violates 15 U.S.C. 391 based on the statute, based on case law at that time, violated the Commerce clause. The other area of potential Constitutional challenge to the legislation he just spoke of is the state equal protection clause and the federal protection clause. Because he has concluded that the statute in question violated a federal statute and clerical pre-emptive, he didn't do a in-depth equal protection analysis of this statute. He stated that he did note in document, that the type of incentive that is contained the statute wasn't significantly dissimilar to the so-called window of opportunity, that was enacted in 1985. He said, he did note that particular law had not been challenged. Under the equal protection analysis, at the lowest level, there is a rational basis test. This test asks, does the state have a rational reason for treating similarly situated people differently. Under this statute, coal being sold to some electrical energy consignments, would be taxed at a lower rate than coal being sold to existing electrical energy plants. The only rational basis he can come up with, is to encourage the building of electrical energy plants in Montana. However, it is not a direct tie, but a indirect tie, because the coal is all being used to produce electrical energy, whether it is in-state or out-of-state. The coal is all being mined from the same location, even when sold to the same purchaser. That same purchaser would pay one rate of

tax on the coal used in one plant, and a different rate of tax used in another plant. He said it would be very difficult for the state to win an equal protection when challenged by the state Constitution on those grounds.

**SEN. HARRINGTON** asked **Mr. Petesch** if this would limit the rate in-kind when this tax rate would take place. **Mr. Petesch** said that the durational limit has the same underlying law that the current law has.

**SEN. ESSMANN** asked, what would happen if the Committee was to completely eliminate the discrimination as far as where coal is sold or used. **CHAIRMAN TOOLE** replied that he didn't feel that would solve the equal protection problem, because the coal would still be sold for production of electrical energy. If coal is taxed at one rate for plants built after a certain date regardless of their location, and a different rate for existing plants, those are the very type of tax incentives that the court has asked, "what is your purpose" for doing this. The purpose is to expand the mining of coal, and the mining of coal in Montana would set it back to the commerce clause violation, because it would be favoring in-state activity in the additional mining of coal. He said, this is where the commerce clause gets difficult, because all of the state's activity is designed to stimulate in-state activity, and that is all the state has jurisdiction over. He talked about how Hawaii had imposed a different rate on alcohol tax on the alcohol produced in Hawaii, as opposed to alcohol imported into Hawaii. The United States Supreme Court struck back at them. The timing issue is "why are we doing it, we are doing it so more coal will be mined in Montana". He said, it may be possible for the same purpose be achieved by reducing the tax rate for everyone.

*{Tape: 3; Side: A}*

**Mr. Petesch** said this bill does not exacerbate the underlying issue.

**CHAIRMAN TOOLE** said by looking at the title of the bill, it is very difficult to try and manage or do anything about the underlying cost.

**SEN. HARRINGTON** said it sounds like this bill is unconstitutional. He wanted to make a motion to remove Section 1(b).

**CHAIRMAN TOOLE** said he is concerned there is a controversy about this, it is very likely there will be a new producer taking advantage of the tax benefit, which is being challenged by PP&L

Montana, and the argument is not going to bring the new producers tax up to what someone else is paying. They will say, "my tax should go down to what the new producer is paying".

**CHAIRMAN TOOLE** discussed with the Committee about proposing a new Committee bill to take care of the underlying problem. It is his understanding that there should be a three-quarter vote in Committee for a Committee bill. He stated that this is the only way to touch the underlying issue.

**SEN. MCGEE** asked **CHAIRMAN TOOLE** what is his concept of a Committee bill was. **CHAIRMAN TOOLE** replied that he would take away the incentive for new coal production. Coal production will be at the same tax rate that is currently in place.

**SEN. HARRINGTON** asked **CHAIRMAN TOOLE** if it is his plan to strike Section 1 (b) off of the books. **CHAIRMAN TOOLE** replied, yes. It was unconstitutional then, and it is unconstitutional now. He said this could be a significant hit on coal tax.

**Motion:** **SEN. HARRINGTON** moved that a **AMENDMENT TO STRIKE SECTION 1(B) DO PASS.**

**Discussion:** **SEN. LEWIS** said there might be an argument for two Committee bills, one bill to remove the incentive, and one to lower the tax. **CHAIRMAN TOOLE** responded, if the Committee goes that way, they should not go either way. He said, what will happen is there are a number of amendments to add onto this, and he didn't feel any of them will work. He stated this is the reason he had **Mr. Petesch** before the Committee today. The cleanest way to handle the issue is to make a new Committee bill.

**EXHIBIT** (ens21a03)

**SEN. PERRY** felt that the Committee should take into consideration public input, and take more time to work on the bill. **CHAIRMAN TOOLE** said his concern would be the process in having a Committee bill drafted it then is introduced before Committee that requires a three-quarter vote, then a hearing is held, then public comment, and if the Committee tried to solicit public input on whether or not to draft a Committee bill. He stated that would be a great opportunity for public input, but the politics would get in the way. **SEN. PERRY** said his thought was for the Committee to "act like a interim Committee" and have public input, then draft a bill based on public input.

**SEN. MCGEE** asked about striking Section 1(b), and if it is repealing. **Casey Barrs, LSD**, responded that the incentive is contained in page 1, Section 1(b), and the same on page 2.

**SEN. LEWIS** asked if for purpose only, and to get this bill out of Committee, is it possible to remove the incentive, and the new bill to lower the tax.

**CHAIRMAN TOOLE** said if this bill is challenged, if it's in place, and someone gets it the state could lose the production that is now being taxed at the higher rate. He informed the Committee that as they are discussing this incentive to zero, there is something below zero that is a risk. He said if there is a challenge, it could reach into the current coal production in Montana, it would cost a chunk of change.

**SEN. PERRY** reiterated **SEN. LEWIS'S** concerns. He said there would be a degree of insensitivity if the Committee didn't consider thoroughly, a solution, or an alternative, other than taking this out, someone would have their taxes tripled. He stated, he wouldn't do this to any entity. He said the Committee should extend the courtesy to **SEN. MANGAN**, sponsor of the bill, and give him two or three days to maybe alter the bill.

**SEN. ESSMANN** said he would support **SEN. PERRY'S** motion to give **SEN. MANGAN** time to alter his bill.

**Motion/Vote:** **SEN. TOOLE** moved to create a new COMMITTEE BILL TO REPEAL SECTION 1(b) FROM SB 193 DO PASS. Motion failed 5-6 by roll call vote with **SEN. CROMLEY**, **SEN. HARRINGTON**, **SEN. LIND**, **SEN. TOOLE**, and **SEN. WILLIAMS** voting aye.

**SEN. ROUSH** commented that he would like to visit with **Mr. Petesch** again, if **Mr. Petesch** doesn't have a problem with it, he will support it.

**CHAIRMAN TOOLE** said the repealer was already done, and felt this was being heavy handed, but **SEN. ESSMANN** could make his motion.

*{Tape: 3; Side: B}*

**Motion:** **SEN. ESSMANN** moved that **AMENDMENT 1)** reduce coal severance tax repealer to the rates that are reflected in the bill, and **2)** reduction by one percent in the coal severance tax DO PASS.

**Discussion:** **SEN. ROUSH** informed the Committee he will not support this without public input.

**SEN. PERRY** asked **SEN. ROUSH** if the overall of the net revenues of the coal tax are not reduced there could be formula that in effect would eliminate Section 1 (b), yet the total tax rate

would be very minimally reduced, thereby, not reducing the net revenues of the coal tax, and asked **SEN. ROUSH** if he would support that. **SEN. ROUSH** reiterated he wanted to speak with **Mr. Petesch** first.

**SEN. CROMLEY** called the question.

**Vote: No motion made at this time.**

**CHAIRMAN TOOLE** informed the Committee they will work on this bill at the next hearing.

**ADJOURNMENT**

Adjournment: 5:15 P.M.

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SEN. KEN TOOLE, Chairman

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CLAUDIA JOHNSON, Secretary

KT/cj

Additional Exhibits:

**EXHIBIT ([ens21aad0.PDF](#))**