Statement of the Large Customer Group on the Universal System Benefits Program before the Energy and Telecommunications Interim Committee of the Montana Legislature

I appreciate the opportunity to appear on behalf of the Large Customer Group ("LCG") to share its views on the Universal System Benefits ("USB") Program and any potential legislation considered by this Interim Committee to reform the program. The LCG is comprised of seven companies with operations in Montana, including Ash Grove Cement West, Inc., Calumet Montana Refining, LLC, Exxon Mobil Corporation, Holcim (US) Inc., Phillips 66, REC Advanced Silicon Materials LLC, and Stillwater Mining Company. The members of the LCG participate in the electric and natural gas USB programs as large customers as authorized by statute. Under the electric USB program, the LCG's members have participated in the self-direct feature of the program authorized by Mont. Code Ann. § 69-8-402(7)(ii). The LCG does not purport to speak on behalf of other large customers which may participate in the electric USB program through the authority in Mont. Code Ann. § 69-8-402(7)(ii).[1]

EXECUTIVE SUMMARY

The LCG acknowledges that the Legislature could amend statutes in Title 69 of the Montana Code to improve the administration of the USB program. However, if the Legislature chooses to retain the USB program, the LCG believes that the existing statutory structure and rules promulgating the statutory language are adequate in large part. We believe that some of the discussion surrounding the USB program is focused on devising a solution in search of a problem, rather than a problem requiring a solution.

To improve the administration of the USB program, the Legislature should create a mechanism to facilitate an increase in the filing of annual reports by large customers which self-direct USB funds as authorized by Mont. Code Ann. § 69-8-402(7)(ii). The LCG believes that the intent of the law is clear: if a large customer wishes to self-direct its USB expenditures, it has a duty to file an annual report with the Department of Revenue ("DOR"). If an individual or organization wishes to review a large customer's self-directed expenditures, the annual report allows this process to occur. On the other hand, the LCG believes that the Auditor's report overstates the problem when it appears to link the fact that only one self-directed expenditure has been challenged since the implementation of the USB program to existing "[s]tatutes and administrative rules mak[ing] public challenges of large customer USB expenditures difficult". For the years 2007 through 2012, an average of 32 large customers filed annual reports with DOR. So, although it is undeniable that compliance with the reporting requirement has been inadequate, the lack of challenges to USB expenditures that were reported suggests that historically there has been little public interest in challenging the self-directed expenditures .

Despite these concerns with the reporting of USB expenditures and potential challenges to those expenditures, the LCG believes that the self-directed expenditure option of the USB program has facilitated the implementation of energy conservation efforts.

[1] In the Performance Audit of the USB Program authored by the Montana Legislative Audit Division (13P-06) in May, 2014, the Audit Division concluded that between 49 and 53 large customers were reimbursed for USB expenditures each year for the six year period beginning with 2007.

BACKGROUND

Montana law requires large customers to file annual reports documenting "USB program activities and expenditures" undertaken pursuant to Mont. Code Ann. § 69-8-402(7)(ii) with DOR. Mont. Code Ann. § 69-8-402(10); Mont. Code Ann. § 69-8-414(1). DOR has adopted rules related to its role in administering the USB program.

In describing the purpose of its rules, DOR explains that they are designed to "help . . . ensure that money generated through a universal system benefits non-by-passable charge produces public purpose benefits." Admin. R. Mont. § 42.29.102(1). DOR's rules require large customers to maintain records and "other appropriate documentation" on expenditures related to USB requirements. Admin. R. Mont. § 42.29.105(2).

DOR is authorized to investigate the legal viability of any USB credit claimed by a large customer if a challenge is brought by a third-party within sixty days of the filing date of the large customer's annual report. Mont. Code Ann. § 69-8-414(2). The statutes and rules do not authorize DOR to undertake a review of a USB credit claimed by a large customer unless a third party files a challenge pursuant to Mont. Code Ann. § 69-8-414(2). If this appeal process is invoked by a third-party, DOR conducts an initial review. Mont. Code Ann. § 69-8-414(3). In the Performance Audit of the USB Program, the Montana Legislative Audit Division concluded that DOR has responded to only one such challenge since the program began. Performance Audit of the USB Program, p. 17. Depending upon its findings in the initial review, DOR may proceed with a formal review. Mont. Code Ann. § 69-8-414(3)-(4).

Some of the confusion surrounding the USB program stems from the definition of "cost-effective," which requires that "the expected benefits accrued as a result of pursing the action must exceed the expected costs associated with that action over some reasonable time period." Admin. R. Mont. § 42.29.101(1). As written, this definition of "cost-effective" is open to a broad spectrum of interpretations. This definition leaves large customers and other interested parties struggling to determine if a project qualifies as an eligible USB expenditure or not.

The LCG's Perspective On The USB Program:

- The USB program, including the ability for large customers to self-direct their share of USB contributions to qualified expenditures, is achieving at least one of the stated goals of the program: promoting the efficient use of energy.

- The ability for large customers to self-direct USB funds to qualified expenditures is an important attribute of the USB program. While the efficient use of energy benefits all of the citizens and energy consumers in Montana, the self-direct component of the USB program is efficient, avoids unnecessary bureaucracy, provides the most direct benefit possible, and preserves individual choice regarding where USB funds are spent.

- One aspect of the flexibility provided by the self-direct component of the USB program is that large customers can identify and pursue their own projects that qualify under the program, or they can elect to contribute to the utility USB programs.

- The self-direct aspect of the USB program also has the advantage of providing an opportunity for the money identified for USB programs to go directly to energy efficiency or low-income assistance programs, without needing to be administered by the utility, thereby avoiding unnecessary administrative expense and bureaucracy.

- The requirement for filing annual reports by large customers participating in the self-directed expenditures program is an appropriate level of oversight for the USB program. However, the LCG also agrees with the overall conclusion reached in the Audit Report that this aspect of the large customer component of the USB program can and should be improved.

- Finally, the LCG believes that an important attribute of the large customer component of the USB program is the opportunity for large customers to self-direct funds (or, in the alternative, to choose not to self-direct their share of USB funds) with absolutely no impact on the rates paid by other energy consumers. Instead, the self-direct aspect of the USB program allows large customers to receive a credit towards their USB obligation for projects and activities that qualify as USB program expenditures.

LCG's Response To The Audit Report.

- The LCG appreciates the time and resources dedicated to a review of the USB program, and generally agrees with the findings and recommendations made in the Audit Report.

- Specifically, the LCG agrees that the annual reporting requirements are an important component of the self-direct aspect of the USB program, and the LCG's members are committed to filing the annual reports as required by Montana law.

- Additionally, the LCG agrees that there should be greater coordination between the utilities and the Department of Revenue for the exchange of information regarding large customers who receive reimbursement for USB related expenditures. We believe that Recommendation # 3 in the Performance Audit of the USB Program should be adopted in a modified form. Specifically, electric utilities should only provide to DOR names of the large customers which received reimbursement for USB expenditures during the previous reporting year. DOR's rules allow a large customer to seek a protective order to prevent "confidential or proprietary materials" in annual reports from disclosure to the public. Admin. R. Mont. § 42.29.103(2). If the electric utility provides more than the name of the large customer to DOR, there is a risk that proprietary information could be left unprotected and subject to disclosure by DOR to third-parties.

- The LCG also agrees that it is appropriate to establish clear procedures allowing for the review and comparison of the annual USB reports provided by the utilities and large customers in order to identify large customers who are not in compliance with the reporting statutes. To the extent that large customers have failed to file annual reports, some sort of "notice and cure" period should be allowed in order for companies to get into compliance by filing the annual reports.

- The Legislature should provide additional guidance to large customers, the utilities, and the Department of Revenue regarding which type of self-directed expenditures would meet the public purpose benefits expected of all other USB funded programs. The LCG notes that, to the extent the statute requires that projects must result in a reduction in the consumption of electrical energy in the large customer's facility, all of the projects that the LCG's members have devoted USB expenditures to have reduced the consumption of electrical energy in their respective facilities. While the Audit Report focused on the payback period (as calculated by the Auditor), even the most "offending" projects outlined in the report still resulted in reduced energy consumption by the large customers. Additionally, there is an important benefit of the broad definition of "cost-effective" contained in the DOR's regulations that should not be overlooked. Internal standards governing the minimum Return on Investment associated with the expenditure of company capital can limit the types of energy efficiency projects that industrial and commercial energy users can pursue. The USB Program and broad definition of "cost-effective" gives large customers support for undertaking projects that conserve or reduce energy use that they may not otherwise be interested or even allowed to pursue. While most companies would pursue projects with a proper payback period regardless of the USB program, the broad definition of "cost-effective" allows companies to pursue longer payback periods for marginal conservation projects. In this way, the USB Program provides large energy consumers with an additional incentive to pursue projects to conserve or reduce energy usage that otherwise would be rejected under internal ROI standards.

- If changes to the program are to be made by the Legislature, the LCG believes that the overarching policies of efficiency, customer choice, ease of administration, and avoidance of unnecessary bureaucracy should be preserved.

    - For example, while additional guidance regarding which projects would be appropriate for expenditure of USB funds would be helpful, the LCG does not believe that prior approval of USB projects would be an appropriate or effective use of government and private resources.

    - Additionally, more detailed guidance regarding the filing of annual reports and coordination between the large customers, utilities, and DOR would help to provide the appropriate level of transparency and oversight to the large customer aspect of the USB program. However, the LCG believes that it is appropriate to preserve the deadline for challenging USB expenditures, as the deadline gives large customers some assurance that they will not be liable for costs associated with projects undertaken after a certain point in time.

- Finally, as part of the increased transparency, oversight, and efficiency, the LCG believes that all reports regarding the USB program should be available online, rather than only for in-person review at the Department of Revenue. This would allow interested parties increased opportunity to review the reports in a timely manner.

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