



HARRISON INSTITUTE FOR PUBLIC LAW
GEORGETOWN UNIVERSITY LAW CENTER

Memorandum

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.

Overview of the General Agreement on Trade in Services (GATS)

Introduction

The General Agreement on Trade in Services (GATS) is one of 18 trade agreements of the World Trade Organization (WTO). GATS rules do not apply directly to services; they apply to “government measures,” including regulations, fiscal policies and subsidies that affect trade in services. The GATS covers services at all levels of government – national, state and local. In addition, GATS covers any entity that has power delegated to it by government and that establishes policies or regulations touching on services.

The GATS rules are designed to regulate the regulators by applying two sets of rules to policy and regulation: general rules that apply to measures that affect services in all sectors, and specific rules that apply only when the United States Trade Representative (USTR) has made a “specific commitment” to apply additional rules on market access and national treatment to a particular service sector.

General Rules

The general rules apply to all measures that affect services in all sectors. These rules include most favored nation (MFN) treatment, provisions on monopoly and exclusive suppliers, transparency, and domestic regulation.

- ***Most favored nation (MFN) treatment.*** The most favored nation (MFN) rule requires that the United States treat the service suppliers of WTO members as well as or better than the services or service suppliers of any other country, regardless of whether the other country is a member of the WTO.
- ***Monopoly and exclusive suppliers.*** The monopoly and exclusive service supplier rule requires that the U.S. government insure that monopolies and exclusive service suppliers observe the MFN rule and do not behave in a way that cuts against the U.S. GATS commitments. The monopoly rule requires, upon request, that the United States provide information to the WTO on service operations that are contested by foreign governments. The monopoly rule also requires that if the United States or a subnational government grants new monopolies, it must, upon request, negotiate compensation to affected service providers from other countries.
- ***Transparency.*** The GATS transparency rule requires that the United States, at national, state, and local levels publish or make available all policies that affect services. It also requires that the United States, at all levels of government, respond to information requests that are made by other WTO members. The transparency requirement could place significant informational burdens on all levels of government.
- ***Domestic Regulation.*** The domestic regulation provision grants rule-making authority to the Council for Trade in Services. This authority allows the Council to create new rules in order to ensure that qualification requirements and procedures, technical standards, and licensing requirements touching on services are not more burdensome than necessary to ensure the quality of the service. The Council for Trade in Services has not yet used this rule-making power to require that domestic regulations are subject to the “burden” test.

Specific Rules

The specific rules apply to measures that affect services only in those sectors or subsectors that the United States has committed in its Schedule of Commitments. These rules include additional provisions for national treatment, market access, and domestic regulation.

- ***National Treatment.*** The national treatment rule requires that the United States 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 violates national treatment if neutral regulatory measure changes the conditions of competition in a way that disadvantages a foreign company, even if the measures does not have a discriminatory purpose.
- ***Market Access.*** The market access provision consists of six rules that prohibit quantitative limits, quotas, economic needs tests or other measures that:
 - limit the number of service suppliers;
 - limit the total value of service transactions or assets;
 - limit the number of service operations or quantity of service output;
 - limit (min. or max.) the total number of persons employed to provide the service;
 - limit or require specific types of legal entity or joint venture a service supplier may use to supply a service; or
 - limit the participation of foreign capital.
- ***Domestic Regulation.*** In addition to its rule-making authority, the domestic regulation provision applies the "burden test" mentioned above to service sectors where the USTR has already made specific commitments. However this test is yet to be defined and its potential affect is not clear.