



Electric Utility Industry Restructuring Transition Advisory Committee

57th Montana Legislature

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April 22, 2002

TO: Transition Advisory Committee (TAC)

FR: Todd Everts, TAC Legal Staff

RE: Legal Analysis of the Legal Impacts of the Rejection of House Bill 474 by
Montana Voters

This memorandum is in response to the Transition Advisory Committee's (TAC) request for a legal opinion from me as the TAC's legal counsel on the following issue:

**If Montana voters in November of 2002 vote to reject by referendum (IR-117)
House Bill 474 enacted by the 2001 Legislature, what are the legal impacts and
implications?**

IR-117 entitled "Repeal House Bill 474 Relating to Electrical Energy" is the referendum that I have been asked to analyze that has qualified for the ballot in November of 2002. Under Article III, section 5, of the Montana Constitution, Montana voters "may approve or reject by referendum any act of the legislature except an appropriation of money." An act referred to the people is in effect until suspended by petitions signed by at least 15% of the qualified electors in a majority of the legislative representative districts (Article III, section 5). Backers of IR-117 failed to get the requisite number of signatures to suspend House Bill 474 until the November 2002 election. House Bill 474 is currently in effect and is being implemented unless and until Montanans see fit to reject the act in November 2002.

The legal effect of rejecting an act of the legislature is that the act becomes ineffective from the beginning, not because the people repealed the act, but because it lacks the approval of a constitutional branch of the legislature. See *Fitzpatrick v. State Board of Examiners*, 105 Mont. 234, 70 P.2d 285 (1937). Stated another way, the effect of voters rejecting an act through referendum would be as if the act itself never existed. The legal analysis of nonexistence is fairly straightforward -- what would the Montana Codes look like if House Bill 474 never existed? However, the legal analysis becomes extremely complex in light of events that have occurred, are occurring, or will occur implementing many of the provisions of House Bill 474 and other provisions of the Electric Utility Industry Restructuring and Customer Choice Act. Set out below are the elements of House Bill 474 that would be eliminated if Montanans vote to reject. My

analysis consists of a description of the specific element of House Bill 474 to be eliminated and an analysis of the impact and implications of voters rejecting that specific element.

Analysis:

1. **Montana In-State Investment in Electrical Generation Facilities (17-6-301 through 17-6-331, MCA)**

- a. **Description:** House Bill 474 sets up a program to provide low-interest loans through the Montana In-State Investment Act of 1983, with certain conditions, to create up to 450 megawatts from the construction of new generation projects in Montana and allows the purchase of up to 120 megawatts from existing qualifying facilities.
- b. **Legal Impact and Implication of Voter Rejection:** Rejection by the voters eliminates an incentive utilizing coal tax trust fund money to provide for low-interest loans through the Board of Investments for new electrical generation or purchase of electricity from certain qualified facilities. To date the Board of Investments has received and approved (subject to Public Service Commission (PSC) approval of the contract) one application for this incentive. The applicant was the Thompson Falls Co-generation Plant in the amount of a \$5.35 million loan.

2. **Transition Period (69-8-103 and 69-8-201, MCA)**

- a. **Description:** House Bill 474 extends the transition period for customer choice to July 1, 2007 (previously July 1, 1998, through June 30, 2002). It also eliminated the authority of the Public Service Commission (PSC) to extend the transition period.
- b. **Legal Impact and Implication of Voter Rejection:** No Change. The end of the transition period for customers going to choice remains July 1, 2007. The 2001 Legislature passed Senate Bill 19 (Ch. 584) that also extended the transition period to July 1, 2007. Senate Bill 19 also eliminated the PSC's authority to extend the transition period. Senate Bill 19 would not be impacted by voter rejection of House Bill 474.

3. **Default Supply (35-19-104, 69-8-103, 69-8-201, 69-8-203, and 69-8-210, MCA)**

a. **Description:** House Bill 474 statutorily designates the default supplier as the customers' distribution supplier and requires that the default supplier provide for the full electricity supply requirements of all default supply customers. House Bill 474 also states that the distribution services provider has an ongoing regulated default supply obligation beyond the end of the transition period. It allows all customers who previously elected an alternative electrical energy supplier an opportunity to receive electrical energy from the default supplier. The Montana electricity buying cooperative or a local government may no longer serve as a default supplier. However, the Montana electricity buying cooperative may serve as a supplier or promoter of alternative energy and conservation programs. House Bill 474 eliminates the PSC's authority to designate and license one or more default suppliers.

b. **Legal Impact and Implication of Voter Rejection:**

(1) Following rejection, the default supplier is the same entity. The distribution services provider is the default supplier under an existing PSC rule (ARM 38.5.6007, 1999). The PSC's authority would be reinstated to license additional default suppliers, including local governments and the Montana electricity buying cooperative.

(2) Rejection by the voters eliminates the clarification that the distribution services provider has an ongoing regulated default supply obligation beyond the end of the transition period. The crux of the issue here is whether under pre-House Bill 474 law the default supplier has an obligation to serve customers beyond the end of the transition period. An argument can be made that such an obligation exists. Pre-House Bill 474, the default supplier is charged with providing regulated default service for those small customers of a public utility that are not being served by a competitive electricity supplier (69-8-201, MCA 1999). Nothing in 69-8-201, MCA pre-House Bill 474, prohibits the PSC from imposing the default supply obligation on the default supplier beyond the end of the transition period. Under 69-8-403(9), MCA 2001, it states "Until the commission has determined that workable competition has developed for small customers, a default supplier's obligation to serve remains." Nothing in the PSC's rule designating the distribution services provider as the default supplier mentions or refers to an obligation termination date (ARM 38.5.6007, 1999). Under 69-3-201, MCA 2001, a public utility has an obligation to provide reasonably adequate service. It is also a well-settled principle of state and federal utility law that a

utility is not allowed to abandon its obligation to serve its customers. See *City of Polson v. Public Service Commission*, 155 Mont. 464, 473 P.2d 508 (1970); *Tobacco River Power Co. v. Public Service Commission*, 109 Mont. 521, 98 P.2d 886 (1940); *Great Northern Railway Company v. Board of Railroad Commissioners*, 130 Mont. 250, 298 P.2d 1093 (1956); *United Fuel Gas Co. v. Railroad Commission of Kentucky*, 278 U.S. 300, 49 S. Ct. 150 (1929).

On the other hand, an argument can be made that the default supplier may not have an ongoing obligation to serve beyond the end of the transition period if the PSC determines "workable competition" exists (69-8-403(9), MCA 2001). It is highly speculative at this point as to whether or when "workable competition" will exist. Rejection by the voters creates legal uncertainty as to whether the default supplier has an obligation beyond the end of the transition period.

(3) Rejection makes it possible for the PSC to designate an additional default supplier that is not the distribution services provider. The PSC would have to modify ARM 38.5.6007 to accommodate this change. In addition, the PSC would have the authority to license other default suppliers under 69-8-416 and 69-8-417, MCA 1999. The default supplier licensing provisions (69-8-416 and 69-8-417, MCA 1999) that were repealed under House Bill 474 would be reinstated if voters reject House Bill 474. The issue of multiple default suppliers does raise cost liability issues associated with customer assignment to other default suppliers.

(4) Rejection raises the issue of whether large customers who previously elected an alternative electrical energy supplier other than the default supplier are potentially prohibited from receiving electrical energy from the default supplier. It is very clear under House Bill 474 that the large customer may receive electrical energy and services from the default supplier. Nothing in pre-House Bill 474 law prohibits a large customer from returning to the default supplier, but on the other hand, there is nothing that explicitly says that a large customer may return to the default supplier. In 1998, the PSC administratively precluded large customers that elected an alternative electrical energy supplier from returning to the original default supply rate (PSC Docket No. D97.7.90, Order No. 5986d, 1998). Rejection by the voters creates some legal uncertainty on this issue and places the decision on whether large customers are allowed to receive electrical energy and services from the default supplier in the hands of the PSC as opposed to the Legislature.

4. **Transition to Customer Choice (69-8-201 and 69-8-203, MCA)**

a. **Description:** House Bill 474 requires the PSC to establish procedures and terms under which customers (both large and small) may choose an electricity supplier other than the default supplier or may choose to be served by the default supplier. The choice must be available for the period beginning July 1, 2002. The procedures must provide for an orderly process of choice during the transition period and provide conditions for leaving and returning to the default supplier. The procedures must take into account electricity supply contracts for supplying customers during the transition period. The procedures must provide for the recovery of costs associated with those customers who choose an alternative electricity supplier and who wish to return to the default supplier.

b. **Legal Impact and Implication of Voter Rejection:**

(1) Rejection would eliminate House Bill 474 provisions clarifying that the PSC shall set up a process for customers to choose an electricity supplier other than the default supplier. Other than the removal of the July 1, 2002, date for allowing some form of customer choice, elimination of these provisions through voter rejection would probably have little impact on the procedure to develop a process for transition to customer choice.

Currently, provisions of the Electric Utility Industry Restructuring and Customer Choice Act (EUIRCCA) not amended by House Bill 474 (translation: provisions of law that are operable both under House Bill 474 and pre-House Bill 474 law) give the PSC broad rulemaking authority to implement the act (69-8-403(10), MCA 2001). The act also requires a public utility to propose a method for small customers to choose an electricity supplier (69-8-201, MCA 2001). Public utilities are also required to educate small customers about customer choice (69-8-201, MCA 2001). Rejection of House Bill 474 would reinstate a provision of law that states "A public utility may phase in customer choice to promote the orderly transition to a competitive market environment. . ." (69-8-203(3), MCA 1999). What does all of this mean? Following rejection, the public utility has the responsibility for proposing a process for small customers to transition choice, but the PSC, through its broad rulemaking authority, would also take an active role in process development. The PSC's rules must be consistent with and not in conflict with the statutory provisions of EUIRCCA. The PSC, through its transition plan approval authority, would also be responsible for approving the process that a public utility proposes (69-8-202, MCA 2001).

(2) An argument could be made that the pre-House Bill 474 transition to customer choice has already been completed. Under Order 5986d in 1998, the PSC approved for all Montana Power Customers (now Northwestern Energy customers) the opportunity to choose.

5. **Recovery of Electricity Supply Costs (69-8-103, 69-8-210, and 69-8-403, MCA)**

a. **Description:** House Bill 474 allows default supplier recovery of all statutorily defined electricity supply costs subject to a prudence test by the Public Service Commission. The term "electricity supply costs" means actual costs of the electricity. Actual costs include fuel, ancillary service costs, transmission costs, including congestion and losses, and any other costs directly related to the purchase of electricity and management of electricity costs or a related service. Revenue from the sale of surplus electricity must be deducted from the costs. Total transmission costs are recoverable only once in electricity supply costs. The terms used in the definition of "electricity supply costs" must be construed according to industry standards. The PSC is required to establish electricity supply rates for individual customer classes, which may vary based on cost factors associated with classifications of service or customers and any other reasonable consideration. Collectively, the individual electricity supply rates reflect the full level of electricity supply costs that the default supplier incurs on behalf of its customers. The PSC is required to use an electricity cost recovery mechanism that ensures that all prudently incurred electricity supply costs are fully recoverable in rates. The cost recovery mechanism must provide for prospective rate adjustments for cost differences resulting from cost changes, load changes, and the time value of money on the differences. The default supplier is required to submit a proposed electricity supply cost recovery mechanism to the PSC for approval on or before July 1, 2001. The PSC is required to adopt a mechanism before March 30, 2002. The commission is also required to establish a method to provide for full recovery of electricity supply costs that extend beyond the end of the transition period.

b. **Legal Impact and Implication of Voter Rejection:**

(1) Voter rejection eliminates House Bill 474's very specific statutory electricity supply cost recovery language and replaces it with very vague pre-House Bill 474 language. The literal "million dollar" question here is what is the difference between cost recovery for the default supplier under House Bill

474 as opposed to cost recovery under pre-House Bill 474 law and existing law not amended by House Bill 474? The analysis of this question raises some very complex issues for which there are not any easy answers. Depending on the different legal scenarios and the PSC's discretion, it can be credibly argued either that the cost recovery mechanisms with or without House Bill 474 are very similar or those very same mechanisms are as different as night and day.

(2) The overall intent of EUIRCCA, with or without House Bill 474, is to move Montana electricity customers into a competitive market so that customers can choose an electricity supplier (69-8-102, MCA 2001). The driving force behind EUIRCCA is that the market establishes the cost of electricity supply and therefore sets the price of electricity for Montana customers. Under House Bill 474, the default supplier is reimbursed for prudently incurred electricity supply costs (69-8-103(12) and 69-8-210, MCA 2001). House Bill 474 and EUIRCCA generally have shifted the whole paradigm of utility law from traditional PSC rate-basing decisions to cost recovery decisions. Traditional utility rate-basing mechanisms exist in law today concurrently with EUIRCCA and House Bill 474, and some people have argued that the law is very applicable to the current default supply portfolio debate. Rate basing involves:

* whether the acquisition, investment, or construction of utility assets in hindsight are used and useful (69-3-109, MCA 2001) and are the least cost (69-3-1204, MCA 2001). *See also Montana Power Company v. Public Service Commission, 214 Mont. 82, 692 P.2d 432 (1984), for a discussion on used and useful.*

* in reviewing utility charges, whether those charges were reasonably and justly incurred and every unreasonable charge is prohibited and declared unlawful (69-3-201, MCA 2001).

Traditional rate basing allows for a reasonable rate of return (profit) to flow back to the utility. As the Montana Supreme Court noted in *Great Northern Utilities Company v. Public Service Commission, 88 Mont. 180, 293 P. 294 (1930)*:

"Any order made by the Commission must be just and reasonable. What is a reasonable charge, or a just and reasonable order, must depend upon the facts in each case. What a utility is entitled to demand in order that it may have just compensation is a fair return upon the reasonable value of the property at the time it is being used for the public . . .; and this should include sufficient to enable the Utility out of such revenue to keep in reasonable

repair its equipment so as to render reasonable service." (at page 218)

The question here is whether pre-House Bill 474 law is similar to the cost reimbursement mechanism in House Bill 474 or is analogous to the traditional utility rate basing? Pre-House Bill 474 EUIRCCA law does not define electricity supply costs and is silent on the PSC's review criteria on default supply procurement. There is some pre-House Bill 474 statutory language in 69-8-210, MCA 1999, on cost recovery that allows the commission to establish cost-based prices during the transition period and requiring the distribution services provider (the default supplier) to either extend cost-based contracts from an affiliate supplier or purchase electrical supply from the market and use a mechanism that recovers electricity supply costs in rates to ensure that those costs are fully recovered. Under the EUIRCCA provisions not amended by House Bill 474, the PSC has the authority to regulate the price of electricity supply that is procured by a default supplier or by distribution function of a public utility (69-8-403(1), MCA 2001). In addition, under EUIRCCA provisions not amended by House Bill 474, a public utility during the transition period: "may not charge rates or collect costs that include costs reallocated to transition costs at a level higher than the public utility would reasonably expect to recover in rates had the current regulatory system remained intact" (69-8-211, MCA 2001). Following voter rejection, the pre-House Bill 474 and EUIRCAA language not amended by House Bill 474 seems to give the PSC much more discretion to use traditional rate basing processes in reviewing default electricity supply costs, suggesting that there could be a substantial difference between House Bill 474 and post-voter-rejection review of electricity supply costs. The PSC has in fact expressed a legal desire to use traditional rate-basing processes in asserting its jurisdiction over the generation assets held by the Montana Power Company on May 2, 1997, or its successor or assignees (Commission Order 5986t, Docket No D97.7.90).

An argument can also be made that the PSC's review of electricity supply costs with or without House Bill 474 would be similar. In the hearings on House Bill 474, there was testimony to the effect that the insertion of "prudence" into the electricity supply cost recovery mechanism mirrors pre-House Bill 474 PSC review of cost recovery. *See Free Conference committee on House Bill 474, April 20, 2001, minutes.* Under Montana utility law, the PSC reviews utility charges to determine whether those charges were reasonable and justly incurred and every unreasonable charge is prohibited and declared unlawful (69-3-201, MCA 2001). The term "prudence" generally in utility law involves foresight not hindsight and

decisions must be judged as to their "reasonableness" at the time they were made and not after the fact (Phillips, Regulation of Public Utilities, 1988). This prudence standard is very similar to the language used in House Bill 474 review criteria and seems to be consistent with the just and reasonable standard in 69-3-201, MCA 2001. In a very analogous situation, the PSC has applied the just and reasonable standard that mirrors the prudent standard in House Bill 474 in review of portfolio style natural gas purchases by Montana-Dakota Utilities and the Montana Power Company. The PSC is required under 69-3-330(4), MCA 2001, to list any disallowed expenditures by amount, category, and purpose. In reviewing a number of PSC orders involving natural gas and electricity charges and expenses, the House Bill 474 electricity supply cost definition seems to be substantially similar to those costs that are allowed to be traditionally recovered. The PSC, following rejection, has the discretion to use a cost recovery mechanism that is similar to House Bill 474's cost recovery mechanism.

(3) Rejection of House Bill 474 by voters, combined with the PSC's assertion of jurisdiction over generation assets held by Montana Power and now PPL Montana, creates some very complicated legal dilemmas in terms of cost recovery. The PSC has asserted jurisdiction over generation assets held by the Montana Power Company on May 2, 1997, or its successor or assignees (PPL Montana) and that those assets remain in rate base until the effective date of the PSC's order approving the utility's transition plan (Commission Order 5986t, Docket No D97.7.90). The PSC has not approved a transition plan yet. The PSC's assertion obviously reflects a desire on the part of the Commission to continue rate basing cost recovery as opposed to the cost reimbursement mechanism set out in House Bill 474. As I have discussed above, rate basing, especially generation assets that have been sold to an electricity supplier, is a significantly different breed of horse than cost reimbursement of electricity supply contracts. The betting stakes are high. The PSC will ultimately have to decide which horse it plans to ride. That decision could dramatically impact customer rates (either positively or negatively) and dramatically impact default supplier and electricity supplier (PPL Montana) risks and obligations.

(4) The PSC, in reliance on House Bill 474, will issue a cost recovery order on or before July 1, 2002--4 months prior to the November 2002 election. The PSC could also reject some of the current energy supply contracts as not prudent, requiring the default supplier to enter into short-term contracts to cover the shortfall and then eventually analyze other energy supply contracts presented by the default supplier after the referendum vote in

November 2002. The default supplier, relying on the PSC's order, will begin to recover its costs based on the House Bill 474 definition and criteria. If voters reject House Bill 474, is it possible that the PSC could reopen this docket and apply pre-House Bill 474 criteria and definitions retroactively? Yes, that possibility exists, but raises significant legal issues of contract impairment, taking of private property, and due process. Is it possible that the PSC would apply the pre-House Bill 474 cost recovery criteria prospectively to contracts entered into by the default supplier following rejection? Yes, the PSC would be required under law to do so. Is it possible that the PSC would apply a House Bill 474 type of cost recovery mechanism prospectively after rejection? Yes, as I have discussed above, the pre-House Bill 474 language is vague, giving the PSC the discretion to do so.

6. **The Procurement Process of Electricity Supply**

a. **Description:** The default supplier must provide for the full electricity supply requirements of all default supply customers. To meet these requirements, the default supplier must procure a portfolio of electricity supply using industry-accepted procurement practices, which may include negotiated contracts or competitive bidding. The Public Service Commission may develop reasonable requirements for the use of competitive bidding in the procurement process. A default supplier may submit material related to proposed bids or contracts concerning electricity supply to the Public Service Commission before the default supplier enters into the contract. The Commission may comment on the material. In reviewing electricity supply contracts, the Commission must consider only those facts that were known or should reasonably have been known by the default supplier at the time the contract was entered into and that would have materially affected the cost or reliability of the electricity supply to be procured. A public utility is required to offer its customers an opportunity to purchase a separately marketed product composed of power from renewable resources.

b. **Legal Impact and Implication of Voter Rejection:**

(1) Pre-House Bill 474 law is silent on the process for procurement of electricity supply by the default supplier on behalf of default supply customers. Under the EUIRCCA provisions not amended by House Bill 474, the PSC has the authority to regulate the price of electricity supply that is procured by a default supplier or procured by the distribution function of a public utility (69-8-403(1), MCA 2001). Pre-House Bill 474, the default supplier would be required to purchase electricity from the market. In order

to purchase electricity, the default supplier would presumably send out a request for proposals for a variety of contracts in order to meet the default supply load requirements. The PSC would actively review the procurement process and approve or deny certain costs based on the criteria in 69-3-109, 69-3-201, 69-3-330, and 69-8-210, MCA 2001.

In the real world as we know it, the default supplier (Northwestern Energy) has gone out on the market and has contracted with multiple electricity suppliers for electricity supply. The PSC is currently reviewing energy default supply contracts and will, on or before July 1, 2002, through an order, set tariffs allowing recovery of some or all the default supplier's electricity supply costs that were incurred under those default supply contracts and through the procurement process. The PSC could also reject some of the current energy supply contracts as not prudent, requiring the default supplier to enter into short-term contracts to cover the shortfall and then eventually analyze other energy supply contracts presented by the default supplier after the referendum vote in November 2002. The PSC, under House Bill 474, is evaluating the current electricity supply contracts based on the prudence criteria and energy supply cost definition and criteria described above (69-8-103(12) and 69-8-210, MCA 2001). Does all this sound familiar? Under House Bill 474 currently or under a pre-House Bill 474 environment, the procurement process would likely be substantially similar.

(2) The procurement process raises the issue of whether rejection in November 2002 by voters would nullify or void existing electricity supply contracts entered into by the default supplier with an electricity supplier under House Bill 474 and approved by the PSC? Unless termination provisions in the contract accounted for possible voter rejection, rejection by itself would not nullify or void an existing contract. Procedurally, some other legal action, either by the PSC or some other party, asserting that the contracts are null and void because the cost recovery mechanisms under House Bill 474 and pre-House Bill 474 are substantially different would have to occur. An action of this type would raise contract impairment issues in addition to a number of other legal issues (due process, taking of private property, etc.). I will briefly analyze the contract impairment issue.

Under the Montana Constitution, "No ex post facto law nor *any law impairing the obligation of contracts*, or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the legislature." (Article II, section 31). Article I, section 10, of the United States Constitution says: "No state shall . . . pass any . . . law impairing the obligation of

contracts . . ." The legislative power is vested in the legislature but the people reserve to themselves the legislative powers of initiatives and referendums (Article V, section 1, of the Montana Constitution). The entire referendum process is considered legislative in character. See *Fitzpatrick supra*. The Montana courts have not addressed the specific issue of impairment of contract by rejection of an act by voters through a referendum. However, the Montana Supreme Court, following federal precedent, has developed a three-part test for contract impairment that requires an evaluation of: (1) whether the state law (or in this case, a state legislative action rejecting a state law) substantially impairs the contractual relationship; (2) if there is substantial impairment, whether the state has a significant and legitimate public purpose behind the law (or in this case, legislative action); and (3) whether the state law (or in this case, legislative action) adjusting the rights and responsibilities of the contracting parties must be based on reasonable conditions and be of a character appropriate to the public purpose justifying the legislation's adoption (or in this case, legislative rejection). See *Western Energy Company v. Genie Land Company*, 227 Mont. 74, 737 P.2d 478 (1987).

Depending on the post-cost-recovery mechanism that the PSC uses and the costs that are retroactively disallowed, there is a potential for substantial impairment of the existing contractual relationship between the default supplier and energy supplier. The real issue here is whether a court would determine that voter rejection and subsequent disallowance of electricity supply cost serves a significant public purpose and that adjusting the rights and responsibilities of the default supplier and energy suppliers is reasonable. It is highly speculative on my part to predict what the Montana Supreme Court's response to this issue would be. The bottom line is that rejection of House Bill 474 would create an atmosphere of legal uncertainty regarding the energy supply contracts.

(3) Rejection by the voters eliminates the requirement that a public utility is required to offer its customers an opportunity to purchase a separately marketed product composed of power from renewable resources.

7. **Universal System Benefits Programs (69-8-103 and 69-8-402, MCA)**

- a. **Description:** Extends the duration of the universal system benefits programs (USBP) and requires that 6% of the USBP funds be spent on irrigated agriculture energy conservation and efficiency programs for those utilities that have filed a transition plan. Clarifies the definition of "universal

system benefits programs" to include irrigated agriculture. Requires a public utility to offer a separately marketed renewable resource product.

b. **Legal Impact and Implication of Voter Rejection:**

(1) Rejection eliminates House Bill 474's 2 1/2-year extension of USBP funding to December 31, 2005. Following rejection, the termination date for USBP funding would be July 1, 2003. USB programs currently funded include: low-income energy assistance; low-income customer weatherization; cost-effective local energy conservation; reducing energy costs of irrigated agriculture in Montana through conservation and efficiency measures; renewable resource projects and applications including those that capture unique social and energy system benefits or provide transmission and distribution system benefits; research and development programs for energy conservation and renewables; and market transformation to encourage competitive markets for public purpose programs. Funding for those programs in 2001 totaled \$13,426,873.

(2) Rejection would eliminate the requirement that at a minimum, 6% of the USBP funds for those utilities that have filed a transition plan be specifically directed to irrigated agriculture efficiency and conservation measures in Montana. In 2001, Northwestern Energy (previously Montana Power Company) and the Montana Electric Cooperatives expended \$367,673 on irrigated agriculture.

8. **Montana Power Authority (69-9-101 through 69-9-115, MCA)**

a. **Description:** The Montana Power Authority is authorized to purchase, construct, and operate electrical generation facilities or electrical energy transmission or distribution systems and to enter into joint ventures for these purposes. The Board of Examiners is authorized to issue revenue bonds for the Montana Power Authority (not to exceed \$500 million), acquire electrical generation facilities, and build electrical energy transmission or distribution systems. The principal and interest on the bonds is payable from the sale of electrical energy from the facilities and from electrical energy transmission and distribution charges.

b. **Legal Impact and Implication of Voter Rejection:** Rejection eliminates the authority for the State of Montana, using up to \$500 million in revenue bonding authority, to purchase, construct, and operate electrical generation facilities or electrical energy transmission or distribution facilities. Given the

uncertainty regarding whether voters in November 2002 will reject or approve House Bill 474, the Montana Power Authority has not taken any action to date, nor has the Authority received any official request for project financing.

9. **Consumer Electricity Support Program (69-8-701, MCA)**

- a. **Description:** House Bill 474 created a consumer electricity support program to provide an affordable and reliable electricity supply from July 1, 2002, through June 30, 2007, to default supply customers. The consumer electricity support program may include financial support from the State of Montana or the assignment of electricity supply from electricity suppliers, electricity from the electrical energy pool, government power authorities, qualifying facilities, or other sources. In the event that an excess revenue tax, is imposed, up to \$100 million could be used to provide an affordable and reliable electricity supply to customers of the default supplier.
- b. **Legal Impact and Implication of Voter Rejection:** Rejection would eliminate the consumer electricity support program. This program does not go into effect until July 1, 2002. The 2001 Legislature did not pass the excess revenue tax, nor did Legislature allocate any money to this program. Since there is no money, it is highly unlikely that there would be any assignment of electricity supply to this program because an electricity supplier would not be reimbursed for its contribution.

10. **Montana Electric Buying Cooperative (35-19-104, MCA)**

- a. **Description:** House Bill 474 modified the purpose of the Montana Electric Buying Cooperative. It eliminated the authority for the buying cooperative to be designated as a default supplier. House Bill 474 clarified that the purpose of the buying cooperative was to be an energy supplier and that the cooperative could serve as a supplier or promoter of alternative energy and conservation programs. It repealed the PSC's jurisdiction to regulate the buying cooperative as a default supplier.
- b. **Legal Impact and Implication of Voter Rejection:** Rejection would reinstate the buying cooperative's purpose of supplying electricity to small customers as a default supplier.