



Energy and Telecommunications Interim Committee

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58th Montana Legislature

SENATE MEMBERS

ROYAL JOHNSON
DON RYAN
EMILY STONINGTON
FRED THOMAS

HOUSE MEMBERS

DANIEL FUCHS
DAVE GALLIK
GARY MATTHEWS
ALAN OLSON

COMMITTEE STAFF

MARY VANDENBOSCH, Research Analyst
TODD EVERTS, Staff Attorney
REBECCA SATTLER, Secretary

MINUTES

Date: September 10, 2004

Room 102, State Capitol Building

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division. **Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.**

COMMITTEE MEMBERS PRESENT

SEN. ROYAL JOHNSON
SEN. EMILY STONINGTON
SEN. FRED THOMAS

REP. ALAN OLSON (Chairman)
REP. GARY MATTHEWS
REP. DAVE GALLIK

COMMITTEE MEMBERS ABSENT

SEN. DON RYAN
REP. DANIEL FUCHS

STAFF PRESENT

TODD EVERTS, Research Analyst
CYNTHIA A. PETERSON, Secretary

VISITORS

Agenda (ATTACHMENT 1).
Visitors' list (ATTACHMENT 2).

COMMITTEE ACTION

- The ETIC requested Mr. Everts to draft a letter to the PSC, to be signed by the ETIC Chairman and Vice Chairman, encouraging the PSC to act on the default supply load as much as practical this year.

Chairman Olson reconvened the Energy and Telecommunications Interim Committee (ETIC) meeting at 8:00 a.m., in Room 102, State Capitol Building, Helena, Montana.

LITIGATION AND ENERGY PROJECTS PANEL DISCUSSION

- **John North, Department of Environmental Quality**

Mr. John North, Chief Legal Counsel for the Montana Department of Environmental Quality (DEQ), gave a presentation on issues confronting DEQ concerning energy development in Montana. Mr. North identified coal bed methane development and the permitting of power plants as the two main issues. Mr. North summarized various pending lawsuits regarding coal bed methane for the ETIC. Mr. North stated over the past five years, DEQ has issued five permits for power plants, and provided an overview of the legal issues and challenges involved with each of the permits.

Mr. Tom Richmond, Board of Oil and Gas Conservation, explained there are two pending legal challenges in which the Board of Oil and Gas Conservation is the defendant. Mr. Richmond explained the first case is a constitutional challenge on the alleged wasting of groundwater and the alleged inadequacy of reclamation. The second case was filed in Big Horn County and challenges the plan of development filed by Fidelity Exploration and Production (Fidelity).

Mr. Patrick Judge and Jennifer Hendricks, Montana Environmental Information Center (MEIC) gave a power point presentation on the Roundup power project (EXHIBIT 1).

(Tape 1; Side B)

Mr. Judge submitted copies of newspaper articles relating to the positive relationships developed between MEIC and NWE and the Basin Creek Power Project in Butte (EXHIBIT 2). Mr. Judge stated he had reviewed the power point presentation delivered to the ETIC at its June 9-10, 2004, meeting in Colstrip, Montana, and took exception to the fact that an EIS was not required under Montana rules and that the Roundup Power Project volunteered to do an EIS. Mr. Judge explained the Roundup Power Plant had been removed from the siting act, but that it did require an air quality permit from DEQ, and the issuance of that permit does trigger MEPA, and an environmental review is required. Further, Mr. Judge stated it is up to the state, not the developer, to determine the level of environmental review required.

Ms. Jennifer Hendricks, attorney for the MEIC, provided further information on the opacity limit to the ETIC. Ms. Hendricks explained the Best Available Control Technology (BACT) rule means a visible emissions limit must be set and it has to be a "best you can do" analysis. Ms. Hendricks explained how the limit was set at 20 percent, but suggested no one ever determined what the BACT would be.

Mr. Mike Reisner, Northern Plains Resource Council (NPRC), gave a power point presentation (EXHIBIT 3), and submitted copies of the following documents:

1. "Doing it Right, a blueprint for responsible coal be methane development in Montana (EXHIBIT 4);
2. "Your Land, Your Rights" (EXHIBIT 5);
3. "Coal Bed Methane 101" (EXHIBIT 6);
4. "Technology-Based Effluent Limitations for Coal Bed Methane-Produced Wastewater Discharges in the Powder River Basin of Montana and Wyoming" (draft report) (EXHIBIT 7);
5. "Coal Bed Methane–Produced Water: Management Options for Sustainable Development" (draft report) (EXHIBIT 8); and
6. "Declaration of James Bauder" (EXHIBIT 9)

Mr. Reisner emphasized that the Northern Plains Resource Council supports responsible coal bed methane development and directed the ETIC to Exhibit 6. Mr. Reisner cited six ways that would ensure responsible development:

- The injection or reinjection of waste water. If reinjection is not feasible, NPRC would like to see 100 percent of the waste water treated prior to discharge.
- Complete reclamation of disturbed lands.
- Protection of the private property rights of farmers and ranchers. Mr. Reisner submitted a letter dated June 19, 2002, addressed to Mr. David Tate from Oscar L. Peters, Vice President of Operations and Engineering, Redstone Resources, Inc. (EXHIBIT 10). Mr. Reisner directed the ETIC to the threat of physical harm contained in the letter.
- Collection of adequate baseline data and ongoing monitoring to ensure early detection of impacts.
- Enforcement of Montana's existing laws to protect Montana's water quality and private property rights.
- Meaningful public involvement in the decision-making process.

Mr. Reisner stated eight lawsuits have been filed in accordance with the State and Federal Rules of Civil Procedure and reviewed the reasons for those lawsuits.

(Tape 2; Side A)

Mr. Bruce Williams, Vice President of Operations, Fidelity Exploration and Production in Sheridan, Wyoming, is responsible for Fidelity's coal bed natural gas operations in Wyoming and Montana. Mr. Williams pointed out that Redstone Resources is not associated with Fidelity or Redstone Gas Partners in any way. Mr. Williams distributed a handout updating the status of coal bed natural gas in Montana (EXHIBIT 11). Mr. Williams spoke of instances where landowners have benefitted from the development of coal bed methane on their land. Mr. Williams explained Fidelity is operating with approximately 56 negotiated owner agreements in place, and those agreements provide a detailed identification of how the land will be reclaimed. Mr. Williams suggested it is very important to Fidelity not to ignore the interests of landowners. Mr. Williams also suggested that injection or reinjection of the water ignores the landowner who wants to leave the water on his land. Mr. Williams agreed it is important to protect private property rights. Mr. Williams rebutted some of the photographs shown to the ETIC by Mr. Reisner. Mr. Williams stated contracts are offered to landowners, but in some cases they do not want to sign the agreement. Mr. Williams stated they attempt to provide water to ranchers, but it has been difficult to do because of lawsuits. Mr. Williams spoke about limiting the water delivered to ranchers to what the cattle could actually consume and the difficulties experienced. Mr. Williams stated Fidelity's objective is to work with all the stakeholders to determine how to responsibly develop coal bed natural gas. Mr. Williams testified it is difficult to work with stakeholders when those stakeholders are constantly filing lawsuits. Mr. Williams spoke about the costs of litigation contained in Exhibit 11. Mr. Williams advocated for a clear regulatory path to understand who has the responsibility to issue permits and under what conditions. Mr. Williams would like to see the Legislature clearly define the expectations of MEPA.

Mr. Joe Dickey, Project Manager for the Roundup Power Project, rebutted inferences that DEQ was not following the law and not doing its job. Mr. Dickey stated the staff of DEQ is very competent and takes their job seriously. In addition, Mr. Dickey noted the permit had an opacity limit of 20 percent, the amount required by law. Mr. Dickey explained a permit limit is something that cannot be exceeded during operations. Mr. Dickey noted lawsuits have been filed by Environmental Defense from Denver, Colorado, as well as MEIC. Mr. Dickey suggested it is entirely appropriate and legal to build an environmentally sound facility in Montana. Mr. Dickey stated Montana should be able to develop and use its natural resources. Mr. Dickey wondered why Environmental Defense was challenging the Montana plant, but not challenging plants in other states that have higher mercury emissions. Mr. Dickey stated the people of Montana are paying for the delay and estimated \$1 million dollars per month in taxes and \$750,000 per month in wages are being lost due to delays. Mr. Dickey stated that concentration levels are what affect public health and safety and that the plant will be well below the concentration levels. Mr. Dickey explained the Board of Environmental Review (BER) had identified two areas of concern: The first was had to do with sulphur emissions, and the second concern was with language added regarding equipment and the fact that the added the language did not go out for public comment. Mr. Dickey submitted an editorial from *The Wall Street Journal* entitled "The Mercury Scare" (EXHIBIT 12). Mr. Dickey also submitted an article from the Committee on Resources, U.S. House of Representatives (EXHIBIT 13).

(Tape 2: Side B)

Mr. Dickey spoke about global warming and explained how global warming is a natural occurrence and cannot be attributed to power plants. Mr. Dickey believed coal would be burned in power plants regardless of whether those plants were located in Montana.

- **Questions from the ETIC**

Sen. Johnson asked Mr. Williams whether Fidelity had other projects going in Eastern Montana. Mr. Williams responded Fidelity did not have any other coal bed natural gas development going in Montana. Sen. Johnson recalled a fairly large project planned for Stillwater County, and Mr. Williams reported Fidelity has no acreage in Stillwater County.

Rep. Gallik asked Mr. Williams why Fidelity does not want to reinject water. Mr. Williams stated Fidelity's geologists do not believe there are zones suitable for injecting water in the CX field area. Rep. Gallik noted there have been concerns regarding coal bed methane development expressed by Governor Martz and the Congressional Delegation and asked Mr. Williams for comment on those concerns. Mr. Williams pointed out coal bed natural gas and water quality is not the same everywhere.

Rep. Olson asked Mr. Williams if he knew what the total dissolved solids (TDS) were for the water. Mr. Williams replied the TDS were expressed as milligrams per liter (mpl) or parts per million (ppm), and the produced water in the CX field is approximately 1,450 mpl of TDS. Chairman Olson compared that amount to his residential water well which has 2,200 ppm TDS.

Rep. Gallik asked Mr. North to comment on Mr. Williams' statement that, "Regulatory agencies are so afraid of being sued, they do nothing." Mr. North explained they are very cautious and involve their attorneys in all decisions that have legal issues.

Rep. Gallik asked Mr. Reisner to comment about the issue of how much water cattle can drink. Mr. Reisner stated it is a principle of western water law that you are only entitled to the quantity of water you can legitimately put to a beneficial use, and stock water rights are limited to 20 gallons, per cow, per day. Rep. Gallik asked Mr. Reisner if he had any specific information regarding situation with Mr. Larson which was mentioned by Mr. Williams. Mr. Reisner stated his recollection was that one of reasons for keeping one of the stock ponds was for use on a plateau where water had historically not been available. Mr. Reisner could not offer further comment, but noted Mr. Larson was represented by counsel.

Rep. Gallik asked Ms. Hendricks about the concentration of mercury and carbon dioxide issues. Ms. Hendricks explained Tom Wellingham, a professor from Montana State University, discovered that fossil fuel burning contributes as much as 30 to 40 percent of the mercury contamination in Montana. Ms. Hendricks explained that mercury accumulates in the environment and in the human body; therefore, the total amount that is being emitted is important. Ms. Hendricks stated the same is true for carbon monoxide. Ms. Hendricks stated human activity is now driving the major changes in the climate and those changes will take us beyond the limits which have previously existed.

Rep. Gallik asked for clarification from Ms. Hendricks about the opacity issue. Ms. Hendricks stated DEQ was relying on the rule that sets the limit at least at 20 percent. The BER decided

the permit must specify a limit based on BACT analysis and the BER inserted the 20 percent limit. Ms. Hendricks stated the 20 percent figure was simply pulled out of the air.

Rep. Gallik inquired why Montana was the only state involved in litigation. Ms. Hendricks stated the MEIC has serious concerns about the directions being taken in Montana and could not speak to decisions made in other states.

Rep. Gallik asked Mr. Dickey if there was going to be sale of Bull Mountain, if a power plant was going to be constructed, and how the power would get to market out of the state. Mr. Dickey explained the permit is not for sale, but the development company will have new owners. Mr. Dickey explained there is currently a confidentiality agreement, and could not provide much information other than they are moving forward. Mr. Dickey explained the power will go out over the NWE system.

Sen. Thomas asked if today's technology emits less emissions from coal generation than the technology of the past. Mr. Dickey agreed that was the case. Mr. Dickey explained there are different types of mercury and that there are complex chemical reactions occurring. Mr. Dickey stated there is no commercial technology available today for mercury control. Mr. Dickey reiterated one percent of mercury emissions is generated from power plants in the U.S., and acknowledged there are other kinds of emissions from other industrial sources.

Sen. Thomas spoke about the 2000 forest fires and their extreme negative affect on air quality and wondered why more effort is not focused on cleaning up the forest in an attempt to prevent or minimize fires. Mr. Judge took exception to the one percent figure for emissions by coal plants and stated he could produce articles and studies that show the percentage is much higher. Mr. Judge believed the forest fire issue is very much tied to carbon dioxide emissions and power plants and did not feel the contribution of human activities to the forest fire issue should be trivialized. Upon question from Sen. Thomas about all the litigation barring development, Mr. Judge stated it is important to be a good neighbor, and there are mitigation efforts which can be taken to minimize impacts on the environment, and those measures should be placed in permits.

(Tape 3; Side A)

Sen. Thomas inquired whether Mr. Williams negotiated with MEIC, and Mr. Williams replied they did not have any conversations with MEIC. Upon being asked the same question, Mr. Dickey stated they also did not engage in any conversations with MEIC. Mr. Dicky explained that he first became aware MEIC would oppose the power plant when he read an article in the newspaper. Mr. Dickey depicted the Roundup Power Project as one of the cleanest plants in the nation.

Rep. Matthews asked Mr. Judge about the Montana First Megawatts project and asked whether the MEIC filed suit against the project. Mr. Judge explained that MEIC filed an administrative appeal on the project and resolved its issues. Mr. Judge explained that MEIC's principal concern regarding Montana First Megawatts was due to the lack of measures to control carbon dioxide. Rep. Matthews stated it is his understanding that Montana is in compliance with the federal Clean Air Act. Mr. Judge stated Montana does have a delegated program to ensure compliance with the Clean Air Act. Rep. Matthews stated he views Montana's compliance as an opportunity to develop. Rep. Matthews was concerned about mercury and summarized that

in the U.S. 50 percent of the generation comes from coal, and from that generation, one percent comes from coal-fired generation facilities in Montana. Mr. Judge disagreed and stated he would provide evidence that would show the amount is much more significant.

BASIN CREEK PROJECT UPDATE - Jim Williams

Mr. Jim Williams provided a status report on the Basin Creek Project and summarized the trials and tribulations experienced in the permitting process. Upon receipt of the final order and expiration of the appeal period, construction of the Basin Creek Project will begin. Mr. Williams was pleased with the outcome especially in light of the Montana's difficult regulatory environment. Mr. Williams shared his experiences working with MEIC and explained how they approached MEIC prior to announcing the intention to build the Basin Creek Project. Mr. Williams found it was better to involve MEIC right from the onset in order to understand and educate themselves about MEIC's concerns. Mr. Williams thought this approach was very successful. Mr. Williams explained that in the end, the project was supported by the Montana Consumer Council, the Natural Resource Defense Council, MEIC, and PSC staff. Mr. Williams identified his once concern as being the fact that a competitor (PPL Montana) was allowed to enter the process as an intervenor and was allowed all the rights associated with that legal status. Mr. Williams stated it is easy for an entity to use the process to slow competition. Mr. Williams found it very frustrating to allow a competitor access to information. Mr. Williams believed the proper place for competitors was in the RFP process. Mr. Williams stated the process was long, but they were pleased with the result.

Rep. Gallik congratulated Mr. Williams and asked him what advice he would give other parties in order to get through the permitting process. Mr. Williams explained the worst thing a party could do is to make an announcement early since it would polarize viewpoints. Mr. Williams stated it is important to get everyone together early on in order to understand all the parties' viewpoints. Mr. Williams noted that Mr. Dickey and Mr. Judge could not even agree on what the mercury emissions were, and thought this was indicative of poor communication. Mr. Williams stated it is difficult to agree on a solution if the parties do not agree on the problem.

Rep. Gallik stated everyone knows who the players would be, but wondered how to get beyond that initial step and get the parties together. Mr. Williams believed it is necessary to have a commitment to the process. Mr. Williams suggested a preliminary mandatory meeting between all the parties could be part of the permitting process. Mr. Williams explained how they were able to show the MEIC the economic realities associated with the project.

Sen. Thomas commented how Dick Vincent, Rocky Mountain Power Project, was able to get a new power plant approved in Idaho in two months and suggested there is something wrong with Montana's process. Sen. Thomas asked Mr. Williams about their discussions with PPL Montana. Mr. Williams explained they spoke early on and was surprised with PPL Montana intervening. Mr. Williams stated if he were running PPL Montana, he would have done exactly the same thing to keep competitors out.

Chairman Olson commented that in trying to negotiate with MEIC, his impression has been that it is either their way or nothing. Chairman Olson recalled MEIC's immediate opposition to the Bull Mountain project and how MEIC asked people for funding to fight the Bull Mountain Project and said if they could beat Bull Mountain, they could beat any coal-fired project in the state. Chairman Olson observed that kind of behavior does lend itself to establishing a good working

relationship. Mr. Williams could not disagree. Chairman Olson suggested one reason MEIC backed off the Basin Creek Project was because they needed to firm up the 150 megawatts of proposed wind generation at Judith Gap. Chairman Olson wondered if MEIC's attitude would have been different if the wind generation project had not been part of the portfolio. Chairman Olson also wondered if any other gas plant would face the same legal challenges that coal-fired plants have been faced with. Mr. Williams could not disagree. Mr. Williams thought it was important that if a dispute should arise, at the very least, people should be disagreeing on the same set of fundamental facts.

Rep. Gallik asked if MEIC in Montana is different than environmental groups in other states. Mr. Williams agreed activist groups are part of life.

Sen. Stonington thanked Mr. Williams for relaying the lessons he learned by going through the process. Mr. Williams thanked the ETIC and stated they appreciated everyone's help in the process.

PUBLIC COMMENT ON ANY MATTER NOT CONTAINED IN THE AGENDA THAT IS WITHIN THE JURISDICTION OF THE ETIC

Mr. Harmon Ranney, Power River Gas, LLC, was the EIS Project Manager for the Montana Coal Bed Natural Gas Alliance where he assisted the industry's response and input to the BER's efforts to set standards for sodium absorption ratio and electro conductivity. Throughout that process, industry gave major concessions on the setting of standards and received very little in return. Mr. Ranney is attempting to permit a coal bed natural gas project in Big Horn County that will treat water prior to discharge into the Tongue River. Mr. Ranney testified the treated water will meet the new standards, including EPA drinking water standards and the more restrictive Northern Cheyenne standards. Mr. Ranney stated for the past three years the Northern Plains Resource Council has wanted the water treated, but now says the standards that they agreed on are not good enough. Mr. Ranney believes Northern Plains Resource Council does not, in fact, want them to do it right, but does not want them to do it all.

(Tape 3; Side B)

Mr. Don Quander, representing Holland and Hart, observed that is not presently adequate in Montana to simply comply with the law if you want to get a project approved. Mr. Quander suggested most of the people who would invest in energy projects in Montana have alternatives and the perception is Montana is a high-risk alternative because of its permitting process. Mr. Quander suggested the threat of lawsuits affects decisions to build proposed projects in Montana. In addition, Mr. Quander suggested it is very time consuming to analyze impacts in Montana that are irrelevant to the ultimate permitting decision. Mr. Quander emphasized it is very difficult to prove the negative. Mr. Quander also spoke about the burden placed on DEQ by litigation and suggested DEQ staff should be able to work on more substantive issues.

Ms. Sue Wolfe commented that the governing structure should focus on legislation based on public health, safety, and welfare. Ms. Wolfe suggested litigation will arise when the public's health, safety, and welfare are not being adequately protected. Ms. Wolfe thought that while economic development is important, it should not be at the expense of public health and safety.

UPDATES

- **EQC Energy Policy Subcommittee Activities - Todd Everts**

Mr. Everts reported the EQC Energy Policy Subcommittee has finished its work and issued a final report. The subcommittee is creating a pocket guide on state bonding, will be updating the publications "Understanding Electricity Law" and "Understanding Energy."

- **ETIC Budget Update - Todd Everts**

Mr. Everts reported before the September meeting, the ETIC had a remaining budget of \$8,260.01. Mr. Everts estimated the ETIC will have a remaining budget of approximately \$6,000 after the September meeting, which will provide enough money to kick off the next interim.

- **Other Updates**

Chairman Olson stated he would withdraw his tax proposal since it is already in effect.

Sen. Stonington commented she is uneasy with what is happening with the USB program. Sen. Stonington was hopeful the ETIC would have an opportunity to discuss the overriding philosophy and policy of the USB and the balancing act with the needs of society. Ms. Stonington stated that she believes the future of renewables has a place within the USB program. Sen. Stonington expressed concerns that the proposed definition of "cost-effectiveness" does not address the accountability issue. Sen. Stonington suggested that during the session, as legislators consider the USB program, to try to reconstruct bigger thinking and offer guidance to NWE and the co-ops on the best use of the money. Sen. Stonington agreed with Chairman Olson that the solar panels on the Roundup school may not have been a wise use of the money, but to narrow the definition in response to that may not be the right answer either. Sen. Stonington stated she would like to see the Legislature adopt a policy that requires projects to contribute to the research and development of renewable energy resources and add to the competitiveness of those types of energy resources for the future of the state.

Sen. Thomas wondered if the ETIC's work on USB included a provision that would require more data on renewables to be reported back to ETIC for evaluation. Chairman Olson recalled that Mr. Corcoran had said the information is available. Mr. Everts stated that in the reporting provisions adopted by the ETIC, there is a requirement for the Department of Revenue to report to ETIC with information on specific credits as they apply to specific USB activities.

Sen. Thomas asked for clarification on what the USB charge is for natural gas. Mr. Everts explained there is a rolling mechanism in law based on revenues. Sen. Thomas asked if it is a growing value with price increases or if it is a specific number set back in time. Mr. Everts replied the provision says the Commission shall establish the charge. Mr. Everts recalled the

percentage for low-income weatherization and low-income assistance is established at .42 percent of the natural gas utility's annual revenue.

Sen. Thomas stated he would like the ETIC to send a memo to the PSC requesting them to put as much default supply in place, as reasonably possible, this year. Sen. Thomas was concerned about a new PSC not being able to make any major decisions while simultaneously dealing with the upcoming Legislature and getting settled in.

Sen. Stonington asked for clarification and whether Sen. Thomas was suggesting settling 200 megawatts of baseload with new energy proposals. Sen. Thomas explained he was suggesting the PSC encourage the process to come to a head, so they could consider authorizing some default supply contracts on the baseload going out in the future. Sen. Thomas stated he was looking for contracts similar to the Basin Creek project and would be focused on new construction and long-term contracts. Sen. Thomas would like to create more competition in the state, and would like to see action taken by the current PSC.

Chairman Olson asked how the current RFP process would be affected. Sen. Thomas replied that he hopes it would move the process forward rapidly. Sen. Stonington wondered if the PSC had the incentive to move rapidly, and Sen. Thomas stated that Comm. Bob Rowe had advised him it would be difficult.

Sen. Thomas moved the ETIC request Mr. Everts to draft a letter to the PSC to be signed by the ETIC Chairman and Vice Chairman, encouraging the PSC to act on the default supply load as much as practical this year. The motion carried.

INSTRUCTIONS TO STAFF

There were no further instructions to staff.

ADJOURNMENT

There being no further business to come before the ETIC, the meeting adjourned at 12:27 p.m.