

Perspectives on Public Power

A review of the public power model, its history, and its potential in Montana

**A Report to the 61st Legislature of the State of Montana
September 2008**

DRAFT



***Legislative
Services
Division***

**Energy and Telecommunications Interim Committee
2007-08 Interim**

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Energy and Telecommunications Interim Committee 2007-08 Interim

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This report is a summary of the work of the Energy and Telecommunications Interim Committee. The work is specific to the 2007-08 committee's study of public power. A complete collection of information, including written minutes and, in some cases, audio minutes, outlining the committee's efforts is available on the ETIC web site:
www.leg.mt.gov/etic

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Appendices

(Links to the appendices are provided in this report in an effort to save paper. The final draft will include hardcopies.)

Appendix A: LSD report on property tax and revenue implications

Appendix B: A legal opinion issued by LSD discussing language proposed for I-145

Appendix C: Ballot language for I-145 and IR-117

Appendix D: List of cooperatives in Montana

Appendix E: Interlocal agreement for the creation of MPPA

Appendix F: Ten largest U.S. publicly owned generator electric utilities

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Introduction

Public power, in a variety of forms, has a long history in Montana. In its simplest form, public power means that citizens own and operate their own public power utility. There are different forms of public power, depending on the governing body that owns and operates a public utility. In Montana there are electrical cooperatives and municipal power operations. Efforts to grant the state, or a board or authority attached to the state, the ability to own and operate utilities also have been pursued.

The 2007-08 Energy and Telecommunications Interim Committee (ETIC) dedicated 0.10 FTE to a study of public power, based on its Final Work Plan, adopted in October 2007. The study evaluated the public power model, its potential operation in Montana, and the role the state could and has played in a public power scenario.

At the close of the interim, the ETIC ultimately did not pursue public power legislation. However, the committee members felt it was appropriate to share the information they had gathered during the interim, as well as offer some general findings on the subject.

ETIC Study Tasks, Responses, and Findings

ETIC Response:

A staff report discussing actions of the 2007 Legislature, as well as a historical perspective on public power, was prepared for the ETIC in January 2008. The ETIC also hosted a public power panel discussion in January that included Ken Sugden, general manager, Flathead Electric Cooperative; Scott Sweeney, general manager, Fergus Electric Cooperative; Gary Wiens, assistant general manager, Montana Electric Cooperatives' Association; and Jim Morton, executive director, Human Resource Council. At the ETIC's May meeting, municipal power representatives, including Mike Kadas, Montana Public Power, Inc.; Alec Hansen, Montana League of Cities and Towns; and Clint Taylor, power manager for Troy Public Power, discussed the issue.

Study Task:

Review the regulatory framework in Montana in relation to the public power model.

ETIC Findings:

Finding: A variety of public power legislation, including voter-initiated activity, has been pursued in Montana during the past decade.

Finding: With the 2007 Montana Legislature's approval of House Bill No. 25, the Electric Utility Industry Generation Reintegration Act, Montana tailored customer choice options. Small customers who are presently receiving power from some utilities can no longer migrate, for example, to municipal utilities or buying cooperatives. Municipal utilities or public power utilities would not be able to provide electricity to those customers unless such a utility

was to acquire the existing utility.

Study task:

Review a summary of public power options utilized in the West.

ETIC findings:

Finding: There are 26 cooperatives operating in Montana, and the City of Troy Municipal Electric Utility serves as Montana's only municipal electric utility. **The City of Great Falls also is an active electricity supplier.**

Finding: There are a variety of different public power models that operate in the West. Most are tailored to meet specific state needs.

Overview

This report provides general background information on public power frameworks that have been discussed and pursued in Montana. In accordance with the ETIC's work plan, this report also includes an overview of other public power models employed in the West and Midwest.

Before delving into a look at the history of public power in Montana, a brief discussion of legislation considered by the 2007 Legislature is appropriate. With the approval of House Bill No. 25 (HB 25), the Electric Utility Industry Generation Reintegration Act, in 2007, Montana tailored customer choice options in favor of a framework that establishes a stable customer base for certain utilities. Small customers, those with an average monthly demand of less than 5,000 kilowatts, who are presently receiving power from a utility, for example, NorthWestern Energy, can no longer migrate to municipal utilities or buying cooperatives. Municipal utilities or public power utilities then would not be able to provide electricity to those customers unless such a utility was to acquire the existing investor-owned utility.

A Look Back at Public Power

2007 Legislation

Legislators also were introduced to at least two versions of public power legislation in the 2007 session. Senate Bill No. 558 (SB 558), sponsored by Senator Greg Lind, would have established a five-member Montana Electric and Gas Authority, attached to the Department of Commerce. Acquisitions of a utility by the Authority would have required the approval of the Public Service Commission. Members of the Montana Electric and Gas Authority would have originally been appointed by the Governor. However, once the Authority acquired a utility, legislation would have been required outlining the election of the five members by the customers of the acquired utility. The Authority would have had broad authority to purchase or sell electrical capacity and energy from suppliers and enter into contracts. It also could acquire, construct, improve, rehabilitate, maintain, and operate electrical generation facilities, transmission and distribution facilities, and related facilities. Provisions also were included to ensure that revenue lost by any

taxing unit was reimbursed. The bill failed on third reading on a 25-25 vote on the Senate floor.

House Bill No. 346 (HB 346), introduced by Representative Deb Kottel, would have allowed local governments with self-governing powers that owned or leased an electrical generation facility with a minimum of 50 megawatts of capacity to provide electricity services within its jurisdictional limits. Based on HB 346, a local government supply entity that adopted a plan to supply customers before July 1, 2011, also could have become a default supplier as long as specific conditions were met. The bill was tabled by the House Federal Relations, Energy and Telecommunications Committee.

A Retrospective

Both pieces of legislation discussed above were preceded by several similar bills that were aimed at establishing varying forms of public power. In 2005, House Bill No. 778, the Montana Hydroelectric Security Act, would have created a Montana Public Power Commission consisting of five elected members. The Commission was to conduct an assessment of existing hydroelectric facilities and determine whether or not the state should acquire those dams. The Commission would have had the authority to sell electrical energy at a retail or wholesale level to Montana customers. The Commission would have had the authority to use proceeds from the issuance and sale of revenue bonds by the Board of Examiners to purchase hydroelectric facilities.

The legislation, however, raised several constitutional questions, as did an initiative with essentially the same language that was proposed in 2001. The proposed legislation, applying only to hydroelectric facilities, raised concerns about special legislation, delegation of authority, impairment of contracts, and statutory conflicts.

The 2005 Montana Hydroelectric Security Act was modeled largely after language proposed in an initiative that was on the November 2002 ballot. Initiative 145 (I-145) was known as the "Buy Back the Dams" initiative. Under the proposal, a public power commission would have first reviewed existing dams to determine if it was in the state's interest to purchase them. The commission then could have negotiated to purchase them, issuing up to \$500 million in revenue bonds to finance a purchase. The bonds would have been repaid with revenue from power sales. If utilities refused to sell, the state would have been granted the power of eminent domain to condemn the dams and pay fair market value. Preference for the power would have gone to customers in the former Montana Power Co. electric territory prior to January 1, 1997, and customers with an average metered demand of less than 1 megawatt. Language in the initiative required that lost tax revenue be reimbursed, but I-145 opponents raised concerns about the amount of lost tax revenue. Attached in [Appendix A](#) is a report by Legislative Services Division Research Analyst Jeff Martin outlining property tax and revenue implications. A legal opinion issued by the Legislative Services Division's Director of Legal Services Greg Petesch discussing language proposed for I-145 is attached in [Appendix B](#). It outlines legal concerns surrounding

the initiative language.

Also on the ballot in November 2002 was Initiative Referendum 117 (IR-117). Both IR-117 and I-145 were on the ballot in response to a Montana electric utility deregulation law passed by the Montana Legislature in 2001. IR-117 was a referendum to repeal House Bill No. 474 (HB 474), which allowed the state to create up to 450 megawatts of electrical energy generation from new sources and purchase up to 120 megawatts of electrical energy from existing facilities. Based on HB 474, the Board of Investments was to review applications from new and existing generators for in-state investments. The bill established a consumer electricity support program with up to \$100 million a year from the revenue derived from an electrical energy excess revenue tax. A Montana Power Authority with seven members appointed by the Governor would have overseen the planning and purchasing of electrical energy.

Montanans defeated I-145 and, through IR-117, repealed the energy law, HB 474, passed by the 2001 Legislature. By rejecting HB 474 the voters eliminated the act and voided the action of the 2001 Legislature. The ballot language of both I-145 and IR-117, as well as statements from proponents and opponents, is included in [Appendix C](#). Additional efforts to create a Montana Public Power Board through an initiative process have been pursued in the state in the last 3 years; however, an insufficient number of signatures was filed to place the measure on the ballot.

Public Power Options

Cooperative Utilities

In Montana there are 26 nonprofit electric cooperatives that serve more than 150,000 customers. Cooperatives are locally owned and operated by cooperative members. Each cooperative's elected board makes pricing and policy decisions for the consumer's electricity. Three of the nonprofit electric cooperatives in Montana generate electricity for customers. Customers of electric cooperatives are considered part owners of a cooperative. Electric cooperatives elect a board of directors to set customer protection policies and establish rates for electricity distribution and supply. Cooperatives are not regulated by the Montana Public Service Commission. **The laws governing cooperatives in Montana are outlined in Title 35, chapter 18, the Rural Electric and Telephone Cooperative Act. The powers that a cooperative may exercise are explicitly stated as are the laws guiding incorporation. Additional exemptions and requirements are contained in Title 69, chapters 3 and 8, MCA.** A list of cooperatives in Montana is included in [Appendix D](#).

Municipal Utilities

Based on Montana law, a local government with self-governing powers has the authority to own and operate an electric and natural gas utility. A municipal electric utility regulates, establishes, and charges rates and classifications imposed on citizens. The City of Troy is a municipal utility in Montana, with the city's governing body making rate and policy decisions. In 2005, the City of Great Falls also established itself as a municipal utility, Electric City Power. The City is an electricity supplier but does not own distribution facilities. The Montana Public Service

Commission licensed the City as an "electricity supplier" in accordance with the Electric Utility Industry Restructuring and Customer Choice Act (now the Electric Utility Industry Generation Reintegration Act), Title 69, chapter 8, MCA. As of October 1, 2007, however, that approval will no longer be needed due to the enactment of HB 25, which was discussed previously in this report and tailored customer choice.

In 2004, the cities of Bozeman, Great Falls, Helena, and Missoula and the consolidated city-county government of Butte-Silver Bow entered into an interlocal agreement creating the Montana Public Power Authority (MPPA) for the purpose of acquiring and operating certain electric and natural gas systems. The interlocal agreement for the creation of MPPA is attached in [Appendix E](#). The MPPA incorporated Montana Public Power, Inc. (MPPI) to serve as the legal entity that would operate the electrical and natural gas transmission and distribution assets.

In July 2006, NorthWestern Energy's board of directors rejected MPPA's bid of \$2 billion, noting that it believed the offer was not in the best interests of NorthWestern's shareholders or customers. NorthWestern later accepted an offer of \$2.97 billion from Babcock & Brown of Australia. That offer, however was blocked by the Montana Public Service Commission in the summer of 2007.

In 2000, former Attorney General Joe Mazurek issued an opinion (48 A.G. Op. 14) holding that a local government with self-governing powers has the authority to own and operate an electric and natural gas utility. The opinion holds that operation of a utility is a public purpose and that municipal operation of a utility is not prohibited by Montana law. **The Montana Nonprofit Corporation Act, Title 35, chapter 2, MCA, also allows an authority, such as MPPA, to incorporate a public benefit nonprofit corporation to operate an electric and natural gas utility, according to an additional Attorney General's opinion.** In July 2005, Attorney General Mike McGrath issued an opinion (51 A.G. Op. 5) finding that:

1. Under the Montana Nonprofit Corporation Act, an authority created pursuant to an interlocal agreement among self-governing municipalities may incorporate a public benefit nonprofit corporation to operate an electric and natural gas utility.
2. An authority created by interlocal agreement between self-governing municipalities may exercise only those powers that any of the municipalities might exercise.
3. Operation of an electric and natural gas utility is a public purpose for which a self-governing municipality may grant funds.
4. Debt incurred through corporate bonds issued by a public benefit nonprofit corporation incorporated by an authority created by interlocal agreement between self-governing municipalities is not subject to laws regulating municipal debts or obligations if the municipalities are not legally obligated to appropriate money to pay the debt, and the debt is without recourse to the spending powers of the municipalities.

The opinion states that a self-governing municipality is not limited to providing electric and natural gas utility services through transmission and distribution assets owned and operated directly by the municipality. The opinion did not address whether the financing arrangements

that MPPI planned to use in acquiring a utility complied with the requirements of Title 69, chapter 3, part 5, MCA, which deals with investment and financing of public utility assets.

Public Power Examples -- Outside Montana

A total of 46 public power utilities have formed over the last 2 years, according to statistics compiled by the American Public Power Association. Many of these are focused on municipalities taking action. The 10 largest U.S. publicly owned generator electric utilities are included in a Department of Energy Report from 2000, which is contained in **Appendix F**. A couple of the most recently formed municipal public power organizations are in Oregon. The Hermiston, Oregon, Energy Services was formed in 2001, following a 4-year negotiation with the investor-owned utility (IOU) operating in the area. The effort started after the IOU closed its customer service office and citizens raised concerns about declining services. The utility fought the City of Hermiston's condemnation proceeding in court, but the court ruled in favor of the City. The utility later agreed to sell the system to the City. The Emerald People's Utility District was formed in 1983 in Eugene, Oregon. Citizens there approved a \$72 million bond issue to purchase a utility. The community bought the distribution system and all customer accounts. Formation of the district took 13 years and included 14 legal actions.¹

Washington

Washington public power laws provide for the establishment of municipal corporations that encompass elements of private corporations, rural electric cooperatives, and municipal utility systems. Public Utility Districts (PUDs) have a board of commissioners. There are now 28 PUDs providing electric, water, and/or sewer service. Each PUD is operated by an elected commission. The PUD law is outlined in Revised Codes of Washington, Title 54.²

Wyoming

A Wyoming Municipal Power Agency (WMPA) serves as the wholesale electricity provider for eight public power communities in Wyoming. Four additional communities are associate member that do not receive power from WMPA but are represented by the Agency. **The Agency's generation capacity comes from its ownership of the Missouri Basin Power Project, including the Laramie River Station. The WMPA also has agreements in place to purchase federal hydropower. WMPA serves about 15,189 meters, including commercial and residential meters.** The laws pertinent to Wyoming are included in Title 37 of the Wyoming Statutes.³

Colorado

In Colorado, the Platte River Power Authority generates and delivers electricity to its owner communities of Estes Park, Fort Collins, Longmont, and Loveland, Colorado, where it is

¹ <http://www.epud.org/hist.aspx>

² <http://apps.leg.wa.gov/rcw/default.aspx?Cite=54>

³ <http://legisweb.state.wy.us/statutes/statutes.aspx?file=titles/Title37/Title37.htm>

distributed by each municipal utility to residents and businesses. The Authority serves about 142,095 customers. To meet its obligations, the Authority uses federal hydropower purchased from the Western Area Power Administration (WAPA), coal-fired power, four natural gas-fired combustion turbines, 10 wind turbines, and purchases from the wholesale electricity market in the region. Platte River also jointly or wholly owns 700 miles of transmission line.

The Authority operates under a contract with the municipalities, acting as a wholesale electric utility that acquires, constructs, and operates generation and supplies electricity on a requirements basis. Platte River is a political subdivision and public corporation of the State of Colorado, established by the Colorado Legislature in 1973.⁴

Arizona

The Arizona Power Authority was created as a result of federal legislation allocating a portion of power produced from Hoover Dam. In 1944, the Arizona Legislature created the Authority outlined in Title 30, Arizona Revised Statutes. The Authority markets and schedules its share of the Hoover Dam power to 39 customers in Arizona, including cities and towns, irrigation and electrical districts, and the Central Arizona Water Conservation District. The law charges the Authority with the responsibility of acquiring and marketing Arizona's share of power from Hoover Dam.⁵

Nebraska

The Nebraska Public Power District (NPPD) is Nebraska's largest electric utility. It was formed in 1970 when several power districts merged. The NPPD is a public corporation and a subdivision of the State of Nebraska. It is governed by an 11-member elected board of directors. An annual budget is submitted to the Nebraska Power Review Board for review. Because the district serves both as a retail and wholesale provider, the district provides electricity to an estimated 1 million people in Nebraska. A mix of generation sources, including nuclear power, steam plants, a combined-cycle facility, wind generation facilities, nine hydroelectric facilities, nine diesel plants, and three peaking units, provide electricity. The district also purchases electricity from WAPA.

"Any public power district or public power and irrigation district may sell to any public power district, public power and irrigation district, irrigation district, city or village, any power plant, electric generating plant, electric distribution system, or any parts thereof, for such sums and upon such terms as the board of directors of such public power district or public power and irrigation district may deem fair and reasonable."⁶

In October 2007, the American Public Power Association compiled general information for the ETIC about new public power authorities and state power authorities established prior to 1950. That report is included in [Appendix G](#). It offers a much more in-depth look than the brief

⁴ Colorado Revised Statutes, 29-1-204.

⁵ <http://www.powerauthority.org/>

⁶ Nebraska Revised Statutes, 70-649.

synopsis listed above.

Conclusions

In the last 10 years, a variety of public power models have been pursued in Montana. This report offers only a snapshot and limited details on the public power model, as well as those models used in other states. In the years to come, public power will likely remain a topic brought before and contemplated by the Montana Legislature. The ETIC offers this report as a tool to assist lawmakers and the public in those continuing conversations.