LEGISLATIVE PROPOSALS

Respectfully submitted to ETIC by Roger Koopman

(prepared with no involvement by PSC staff)

Eliminate NWE Preapproval Process (69-8-421.)

Among regulated public utilities in Montana, NorthWestern Energy enjoys the exclusive privilege of being able to seek PSC preapproval of major asset purchases. The advantage provided to NWE is enormous. While other public utilities are expected to shoulder the business risk of a new asset acquisition, and come before the Commission for evaluation of that asset at their next general rate case, NorthWestern's "preapproval" sheds that risk and places it squarely on the ratepayer's back. When NWE comes before the Commission with their rate case, it is with the knowledge that the asset has ***already*** received the PSC's risk-free seal of approval. Needless to say, NWE has much less incentive to perform the traditional due diligence of a corporate acquisition -- necessary to guarantee their purchases will be prudent and cost-effective -- when they are assured that the capital asset will receive full Commission compensation for O&M costs and return on equity, accomplished ***before*** the acquisition was made and before its prudence could be tested on the record. It's the perfect "no-risk win" for the utility and "all-risk lose" for the NWE customer.

There can be no logical justification for the special dispensation NorthWestern Energy receives. Because it occurs ***before*** the asset is in the utility's use, it does not allow for a proper vetting of that asset in the light of the utility's actual operation – including energy and capacity needs, asset costs and financial performance. If the purchase ends up being unwise, the ratepayer bears ***all of the burden*** for the utility's mistake. The benefit falls entirely on the monopoly utility, and the potential multi-million dollar losses entirely on the consumer. A case could be made, for example, that the two large preapproval acquisitions in recent years, the hydros and 30% of CU4, resulted in a combined overpayment of $300-400 million – placing a huge extra expense on ratepayers, while perversely, NWE's 9.8% ROE produced a major boost to company profits. Under preapproval, the utility has the perverse incentive to spend ***more***!

I propose legislation that removes this special privilege NWE now enjoys, and places them on an even playing field with other Montana utilities. This not only protects NWE customers from asset purchases over which they have no control, but it also helps NorthWestern become a far better company in the long run, by having them accept full responsibility for the business decisions and capital expenditures they make. Preapproval not only unjustly burdens the utility consumer, but it works against the utility itself, by fostering weakness and risk-avoidance, rather than the strength and business wisdom a major private enterprise should exhibit.

Reinstate PCCAM Deadband.

While well-intended no doubt, SB 244 – heavily lobbied by NorthWestern Energy – took a literal wrecking ball to the PSC's well-crafted Power Costs and Credits Adjustments Mechanism (PCCAM) process. By removal of the incentive-based deadband component, PCCAM was – from both a consumer and a competitive enterprise standpoint -- largely gutted. I would go so far as to say that NWE's histrionics misled a great many busy legislators on the actual impact of the bill. The ultimate effect was to remove a ***powerful incentive*** for Montana's electric utility monopolies to operate more efficiently and cost-effectively, to the combined benefit of their customers and shareholders. That's the way competitive private enterprise works. Where competition does not exist, it is up to lawmakers and regulators to craft regulatory policies that approximate that missing competitive component. The PCCAM deadband did exactly that. This is why deadbands are so widely used by state commission jurisdictions all across the country.

In the original PCCAM rules (authorized by HB 193), utilities enjoyed the benefit of a 10 percent revenue enhancement for any cost adjustments above or below the PCCAM base. Thus, they were responsible for 10 percent less of underrecoveries, and gained 10 percent more of any overrecoveries (i.e., cost savings.) ***The deadband amplified that cost-saving incentive*** by creating a narrow zone, extending above and below the previous year's PCCAM base. This "band" needed to be reached by the public utility before the 90/10 incentive kicked in.

What a shame that before any results from this innovative policy could be quantified and brought before the legislature, NorthWestern had already launched a full court press to have the deadband stricken from the PSC toolbox in the very next session. So confusing, misleading and exaggerated were the arguments of their six lobbyists that many legislators had a skewed idea of what they were actually voting on – persuaded that the existing PSC rules were were somehow "punishing" NWE and the other electric utilities. This general malaise struck home with me when I tried to reach out to a large number of legislators to discuss the effects of SB 244 from an informed PSC perspective. I did not receive a single returned phone call or email. It seemed no one really wanted to talk about it.

The PSC needs to be able to return to its original policy, and the legislature needs to give the deadband incentive ***a chance to work***. If you want a post-SB 244 example of what can otherwise happen, you need look no further than the current PCCAM docket before the PSC. If, in fact, the deadband is fully removed for this PCCAM review period (a question under legal review), it could cost NorthWestern's ratepayers another $5 million or more.

In terms of bill language, one suggestion would be to amend **69-3-331 (2)** to read: *a cost-tracking adjustment shall include a deadband of equal amount, above and below the PCCAM base, not to exceed 5 percent.*

Repeal Class D Carrier (Garbage) "Convenience and Necessity" Certification.

There is probably no single area of government monopoly creation that is more harmful and less logical than in the Class D garbage collection industry. In the name of "consumer protection," monopolies and near-monopolies are effectively – and I would suggest intentionally – being established in virtually every Montana community, by slamming the door to market entry and abrogating Montanan's fundamental right of private enterprise. It is government protectionism at its worst, inevitably resulting in ***much higher prices and lower quality service*** than would exist in an active, open, competitive marketplace. Every consumer suffers, while a small number of coddled and protected companies reap inordinate profits, while shedding normal business risk. Some people would call it a racket. I would tend to agree.

As a Public Service Commissioner, I can speak to this travesty with much personal and professional experience. Watching one small entrepreneur after another, coming before my commission seeking "permission" to buy some garbage trucks and receptacles, hire ten or twenty people and begin offering competitive garbage services in a given monopolized community -- only to be confronted by a bevy of corporate lawyers protesting their very freedom to exist, and forcing them down the gauntlet of extended PSC hearings and hagglings – this is one of the most pathetic spectacles you could ever witness. Most of these budding businesses give up before the process even starts. Who can afford to spend $100,000 or more in legal fees, before you even open your doors, knowing that in most cases you will never be allowed to open anyway, or will have to endure many more months of legal challenges and appeals by Big Garbage and its corporate giants? This is the true and accurate human picture of very, very bad public law that needs to go away. And who suffers? Everyone.

What are the trade-off public benefits? ***There are none.*** The protected industry, benefitting with its often obscene profit margins, will bring forth a flood of sophisticated arguments, of course – like that "uncontrolled competition" destabilizes the market and threatens the quality and reliability of service to the public. They will also insist that the public (read: the existing garage services) needs protection from unhampered competition that "promises much but delivers little." They will tell us that the financial investment required to build and maintain high-quality garbage collection requires the assurance of a "decent return", and that this is threatened by "low quality" competition and by having too many operators in a given market.

These, of course, are the standard arguments of ***every*** industry that thinks it has a special "right" (or the political power) to be encircled by a hedge of government protection that keeps the competition out. If we accepted these claims as valid, we would be rejecting the entire idea that the rigors of competition benefits ***any*** industry, and we would be embracing the belief that all industries should be government-designated monopolies! I say this because there is truly ***nothing*** about garbage hauling in particular that makes them a unique or natural monopoly, and thus, nothing about the nature of that industry that justifies guaranteeing its markets and eliminating its competition.

If you wonder how a simple state certification process can create anti-consumer monopolies, consider the kinds of hurdles a new Class D garbage collection applicant faces before being

certified. This includes ***proving*** to the commission that there is a need for their service, ***proving*** that the existing operator cannot supply that need, and ***proving*** that their competition will not somehow "harm the existing carrier against the public interest." These are almost impossible propositions. Note that they are taken not from Montana state statute or administrative rule, but rather from so-called "common law", i.e., from language developed in ***other*** states (with the industry's help) now in common usage there.

Removing these ridiculous requirements would be a step in the right direction, but the real question that needs to be asked is whether there is ***any*** public benefits and therefore, ***any*** public policy justification for convenience and necessity certification of new garbage collection companies. This is why a clean repeal bill is the most prudent course of action. The existing garbage companies and their state association, being strongly vested in the status quo, will wage a vigorous effort to maintain their privileged position by defeating this legislation. But that's no reason to retreat from doing the right thing here. In fact, it's all the more reason to move ahead with boldness. (Refer to **69-12-314, etc.**)

Reform of Election of Public Service Commissioners

I owned and operated a professional employment and recruitment agency in Bozeman for 37 years. Known affectionately as "Career Koopman", I was considered to be pretty darn good at my trade. Always, the key to making a good and successful job placement was the careful matching of the skills and personality traits of the individual to the opportunities and specific requirements of the position itself. When I look at the individuals – past and present – filling the all-important commissioner positions at the PSC, and make note of how they approach and perform their jobs, I am very tempted to ask myself, "if I were asked by the state to send candidates for Public Service Commissioner, would I refer any of the men and women (including myself) who have been recently elected?" Answer: ***I seriously doubt it.***

Okay. We all agree that democracy is a beautiful but "messy" process, that cannot (and should not) be managed, and certainly cannot guarantee "good results" by any standard you wish to apply. It's still the best system on earth. However, in the case of electing Public Service Commissioners, democratic elections face a particularly unique and vexing challenge. Democracy presupposes an ***informed electorate***. You cannot gain good results from an uninformed electorate. That said, there is no position on the ballot where voters are less informed about the qualifications of the candidates (or for that matter, the requirements of the job) than PSC Commissioner. There are no doubt many reasons for this that I needn't go into at this time. But one of the obvious outcomes of uninformed voters choosing commissioners is that invariably, the people who run for and get elected into these positions are well-known political personalities with extensive name ID and campaign experience – none of which has the slightest correlation to actual qualifications. It just happens to make them better known, more politically savvy and thus, more electable.

From my personal observation, commissions comprised of practiced politicians tend to make for a poor – or shall I say "inappropriate" -- work environment that does not well serve the independent, open-minded, inquisitive, deliberative process of an effective commission – particularly one that carries ***major quasi-judicial responsibilities***. Politicians act like politicians. Does that surprise us? Certainly, not all politicians are created equal. But generally, it can be said that political personalities tend to be advocates by nature, and have a very strong inclination to "choose up sides" and form political loyalties and alliances. It is, as they say, the nature of the beast. And this is not the stuff of which a thoughtful, respectful, unbiased and deliberative commission is made. For 7 ½ years on the PSC, I can attest to this unfortunate truth. I believe – for the public good -- that has to change.

The legislature should begin a very careful process of considering fundamental change in the way Montana chooses its Public Service Commissioners. No doubt many ideas will be brought forward for discussion. The following is one such idea that I submit for your consideration:

Reduce the commission size from five to three members. Two members will be appointed by the governor, and serve 6-year terms with the possibility of reappointment to one additional term. One member each is referred by the state central committees of the two major political parties, who will present three names for the governor's consideration. Before being referred, each "candidate" is first interviewed and vetted by a "qualifications vetting board" made up of 8 to 10 highly experienced individuals (former PSC commissioners and staff, MCC staff, retired utility executives, etc.) who will assign each candidate a "rating" based solely on their pertinent and relevant qualifications for the job. After making his selection, the governor must then receive an approval vote of a minimum of 100 of the members of the combined State House and Senate. (Note: geographical diversity of candidates should be a consideration. No more than one commissioner should be from any given county, nor should all three be from east or west of the divide.)

Although not directly elected, these two commissioners will appear on the primary ballots of their respective parties every two years, and must receive a "vote of confidence" (i.e., a minimum of 50% + 1) of the total primary votes cast. If they fail to attain this, they will serve out the remainder of that year, and a new commissioner will be referred, selected and approved to serve out the remainder of their 6-year term.

The Commission chairman shall be elected statewide, on a nonpartisan basis – candidates appearing on all party primary ballots and the top two vote getters advancing to the general election. These candidates will also submit to the evaluation of the qualifications vetting board, and that rating will be made public in the state Voter Information Guide. The chairman will also serve a 6-year term with opportunity for one re-election.

A specific and realistic citizen recall process applying to all three commissioners should be made a part of this law.