



Energy and Telecommunications Interim Committee

58th Montana Legislature

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November 19, 2003

TO: Energy and Telecommunications Interim Committee (ETIC)

FR: Todd Everts, Legal Staff

RE: Universal System Benefits Funding Legal Opinion

The presiding officer of ETIC requested that I prepare a legal opinion on the following issue:

Can a utility carry forward universal system benefits program funds instead of annually depositing the unspent funds in certain state special revenue accounts?

Short Answer: Based on the applicable statutes, the answer is "no". However, the Department of Revenue's administrative rules potentially allow a utility to carry forward universal system benefits programs (USBP) funds if good cause is shown.

Legal Analysis: Title 69, chapter 8, part 4, MCA, establishes USBP to "ensure continued funding of and new expenditures for energy conservation, renewable resource projects and applications, and low-income energy assistance". In order to ensure continued funding of USBP, 69-8-402(2), MCA, requires that, beginning January 1, 1999, each utility contribute 2.4% of its 1995 retail sales revenue as its annual USBP funding level. Each utility receives credit toward the annual funding requirement for internal programs or activities that qualify as USBP (69-8-402(2)(b), MCA). If a utility's internal activities that qualify for USBP credit do not satisfy the annual USBP funding requirement, then the utility is required to make a payment to certain state special revenue funds for any difference between the utility's qualified credits and the utility's annual USBP funding requirement (69-8-402(2)(f) and (5)(b), MCA). It is interesting to note that a large customer, unlike a utility, is explicitly allowed in statute to carry forward credited expenditures (69-8-402(7)(b), MCA).

The Department of Revenue is required under 69-8-412(1), MCA, to establish special revenue funds if "there is any positive difference between credits and the annual funding requirement". The Department of Revenue is also required to review claimed credits of a utility under 69-8-402(2)(b) and 69-8-414, MCA. The Department, in its review, must

ensure that the credit claimed is consistent with the requirements of the Electric Utility Industry Restructuring and Customer Choice Act. The Department adopted administrative rules in December of 1999 under the Montana Negotiated Rule Making Act, as required by 69-8-413, MCA, that specify acceptable USBP credits and expenditures. The Department's administrative rules define the term "internal expenditure" to mean financial commitments made by a utility or large customer to a qualifying activity or program (ARM 42.29.101(5)). The Department's rules further articulate qualifying expenditures and timing:

42.29.111 QUALIFYING EXPENDITURES AND TIMING (1) A utility or large customer may be entitled to receive a credit against its universal system benefits obligation for the total cost of a qualifying expenditure. A qualifying expenditure by a utility or large customer shall be deemed to occur when resources or funds are financially committed by a utility or large customer to a program, project, or activity whether by payment, contract, or other obligation and *such credited funds or resources shall be expended by the end of the following calendar year, unless the department grants an extension for good cause shown. . . .* (emphasis added) (History: Sec. 69-8-413, MCA; IMP, Sec. 69-8-402 and 69-8-414, MCA; NEW, 1999 MAR p. 2927, Eff. 12/17/99; AMD, 2002 MAR p. 209, Eff. 2/1/02.)

Under the Montana Administrative Procedure Act, the Department, in promulgating an administrative rule, is required to indicate the statutory source of authority for the rule (2-4-305(3), MCA). For an administrative rule to be effective, the rule "must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law" (2-4-305(5), MCA). A rule is not valid unless it is "consistent and not in conflict with the statute" (2-4-305(6), MCA). It is unclear to me where in the applicable statutes cited as authority for ARM 42.29.111 the Department may grant an extension for expending committed USBP funds. It is also unclear to me that the Department has the authority to institute a time frame in rule that allows credited funds to be expended by the end of the following calendar year. The USBP statutes are explicit--if a utility's internal activities that qualify for USBP credit do not satisfy the annual USBP funding requirement, then the utility "shall" make a payment to certain state special revenue funds for any difference between the utility's qualified credits and the utility's annual USBP funding requirement (69-8-402(2)(f) and (5)(b), MCA).

The timing and extension language in ARM 42.29.111 was put into the Department's proposed rules at the request of the Negotiated Rules Committee that was convened by the Department in September of 1999. The Transition Advisory Committee in November of 1999 reviewed the proposed rules but did not raise the issue regarding the carry forward of USBP funds. The rules were subsequently adopted by the Department in December of 1999.

In conclusion, the applicable USBP statutes do not to allow a utility to carry forward USBP funds. The Department of Revenue's administrative rules potentially allow a utility to carry

forward USBP funds. The Energy and Telecommunications Interim Committee may want to clarify this policy issue.

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