

MINUTES

Electric Services in an Annexed Area



Senator Alan Solano, Chair

Representative Thomas Brunner, Vice Chair

**Third Meeting, 2019 Interim
Wednesday, November 06, 2019**

**Room 414 – State Capitol
Pierre, South Dakota**

The third interim meeting of the 2019 Electric Services in an Annexed Area Committee was called to order by Senator Alan Solano, Chair, at 10:08 a.m. (CST) on Wednesday, November 6, 2019.

A quorum was determined with the following members answering roll call: Senators Lee Schoenbeck, Alan Solano (Chair), Susan Wismer, and Jordan Youngberg; and Representatives Shawn Bordeaux (via phone), Thomas Brunner (Vice Chair), Kirk Chaffee, Spencer Gosch, and Tim Reed.

Staff members present included Alex Timperley, Legislative Attorney; and Rachael Person, Senior Legislative Secretary.

NOTE: *For the purpose of continuity, the following minutes are not necessarily in chronological order. Also, all referenced documents distributed at the meeting are attached to the original minutes on file in the Legislative Research Council office. This meeting was web cast live. The archived web cast is available on the LRC website at sdlegislature.gov.*

Opening Remarks

Senator Solano welcomed everyone to the meeting and drew attention to the drafts for the proposed legislation. He discussed his intentions for the process of the meeting and how the various proposals grouped together related to subject matter.

Approval of Minutes

A motion was made by Representative Brunner, seconded by Representative Chaffee, to approve the minutes of the Electric Services in an Annexed Area meeting held Wednesday, August 28, 2019. The motion prevailed on a voice vote.

Discussion of Drafts

Senator Schoenbeck asked that Senate Bill (SB) Draft 184/A and SB Draft 190/C be set aside.

Senator Schoenbeck introduced SB Draft 189/B, stating he brought the draft forward to address the concern of whether enough planning information was shared to allow utilities the ability to know where expansions are expected to happen and plan accordingly for the future. This bill would require utilities to share the plans they have for their service areas.

Representative Brunner asked what the outcome would be if information was specifically withheld by any of the utilities. Senator Schoenbeck responded the utilities have been working together for the last 45 years. However, one of the points made in testimony was that sometimes a utility is not aware of planned expansions making it difficult for the affected utility to plan accordingly for the future. SB Draft 189 requires that information to be shared and withholding it would be against the law.

Representative Brunner said he opposed the draft because it did not address the issue of municipal takings. As was mentioned, the utilities have 45 years of experience working through problems when they arise and adding a requirement that they meet does not solve any of the current problems. Senator Schoenbeck conceded if Representative Brunner, being on South Dakota Rural Electric Association State Board of Directors, did not agree the bill was needed, he would not vote it through.

Senator Solano commented that during session the need for communication was discussed and SB Draft 189 is a step in that direction. However, Senator Solano voiced concern over the draft being able to accomplish what was needed as a stand-alone bill. He proposed letting the draft move forward in the discussions and see if other drafts introduced could work in conjunction with SB Draft 189.

A motion was made by Senator Schoenbeck, seconded by Representative Reed, that SB Draft 189/B move forward into the second phase of discussion. The motion failed on a roll call vote with 1 voting AYE and 8 voting NAY. Voting AYE: Solano. Voting NAY: Schoenbeck, Wismer, Youngberg, Bordeaux, Chaffee, Gosch, Reed, and Brunner.

Representative Reed introduced House Bill (HB) Draft 182/D. Representative Reed said the bill results from the lack of notification or discussion at a council level within the city where annexation happens. HB Draft 182 creates an avenue of making sure the current electrical provider has the ability to talk to the city and the council when annexation decisions are being made and provides notice to all parties involved.

A motion was made by Representative Reed, seconded by Representative Gosch, that HB Draft 182/D move forward into the second phase of discussion. The motion prevailed on a roll call vote with 6 voting AYE and 3 voting NAY. Voting AYE: Schoenbeck, Wismer, Youngberg, Gosch, Reed, and Solano. Voting NAY: Bordeaux, Chaffee, and Brunner.

Senator Youngberg introduced SB Draft 183/E to address bare ground annexations and exempt nonprofit organizations from having to pay the compensation rates. Senator Youngberg referenced the Madison Hospital and the 25% fee the hospital pays which was discussed in testimony in previous meetings.

Representative Brunner and Senator Wismer both commented on the fee resulting as a choice the city of Madison made.

Senator Wismer voiced concern over the bare ground exemption and the infrastructure that is already in place. Senator Schoenbeck said the bill defines compensation for services and does not affect the infrastructure. He added the only organization the compensation for service rights is expected would be nonprofit organizations.

Senator Solano commented that he was opposed to the draft due to the business planning process and how many exemptions nonprofits already receive in the state of South Dakota.

A motion was made by Senator Youngberg, seconded by Representative Reed, that SB Draft 183/E move forward into the second phase of discussion. The motion failed on a roll call vote with 3 voting AYE and 6 voting NAY. Voting AYE: Schoenbeck, Youngberg, and Reed. Voting NAY: Wismer, Bordeaux, Chaffee, Gosch, Brunner, and Solano.

A motion was made by Senator Youngberg, seconded by Senator Schoenbeck, to table SB Draft 183/E. The motion prevailed on a roll vote with 6 voting AYE and 3 voting NAY. Voting AYE: Schoenbeck, Wismer, Youngberg, Reed, Brunner, and Solano. Voting NAY: Bordeaux, Chaffee, and Gosch.

A motion was made by Representative Brunner, Seconded by Representative Reed, to table SB Draft 189/B. The motion prevailed on a roll call vote with 5 voting AYE and 4 voting NAY. Voting AYE: Wismer, Chaffee, Reed, Brunner, and Solano. Voting NAY: Schoenbeck, Youngberg, Bordeaux, and Gosch.

Representative Brunner introduced HB Draft 214/H stating it would give affected rural electrics options and the right to appeal. Representative Brunner said it also allows the co-ops to keep territory but pay for some of the infrastructure that may be lost by the municipal electrics. It would follow the same compensation formula the rural electrics receive now when annexation occurs in their territories.

Senator Schoenbeck emphasized that HB Draft 214 is a freeze bill. He brought attention to the ways it would freeze the opportunity for future growth for the municipal utilities and would bring about further contention which is what the legislators of the 2019 Legislative Session were trying to avoid by creating the summer study. Senator Schoenbeck also pointed out that rural electrics currently experience growth due to ag developments such as dairies and hog operations and encouraged the committee not to move HB Draft 214 forward.

Representative Brunner said this bill does not freeze territory but allows relief to affected co-ops and gives them a chance to go to arbitration or an appeal process which they are not currently allowed to do. By passing the bill co-ops would be afforded the chance to put the current law in reverse and compensate municipalities in the same fashion they have been compensated for the last 45 years.

Senator Schoenbeck warned that it would not be a reverse of the current formula because rural electrics have growth in other areas. This bill would remove any chance for growth for the municipal utilities.

Senator Wismer pointed out that not all rural electrics experience the same amount of growth, especially those around municipal communities. She asked that the bill move forward so the committee could hear testimony from both the rural electrics and the municipal utilities on the merits of HB Draft 214.

Senator Youngberg commented on the arbitration process outlined in the bill and said the utilities already have discussions between them when a problem occurs. If no agreement is made, the discussion is taken to the Public Utilities Commission (PUC). He said adding an arbitration process would only serve to add an unnecessary step in the process that will not help the process.

Senator Schoenbeck highlighted Section 2 of the bill draft and the tax imposed. He stated that over the course of the interim, the committee never heard testimony or discussed tax laws that relate to annexations and utilities, and municipal tax laws are beyond the scope of the summer study. He stressed the contention the bill would create, that it would not pass in the legislature, and would end any discussion or credibility about what the committee provided.

Representative Gosch mentioned the current structures and parameters set up for businesses to enter the state and voiced concern over putting something into effect that may cause the state to lose economic development opportunities.

Senator Solano agreed that the rural electrics paying a compensation if they have the opportunity to keep ground has validity. He echoed Senator Schoenbeck's concerns about the tax language present in the bill and said the committee does not have a handle on the subject as it relates to the tax.

A motion was made by Representative Brunner, seconded by Senator Wismer, that HB Draft 214/H move forward into the second phase of discussion. The motion passed on a roll call vote with 6 voting AYE and 3 voting NAY. Voting AYE: Wismer, Bordeaux, Chaffee, Gosch, Brunner, and Solano. Voting NAY: Schoenbeck, Youngberg, and Reed.

Senator Solano introduced SB Draft 228/G to address bare ground annexations. Senator Solano said he did not want to propose anything that would remove the ability for a municipal utility to annex, however, if annexation of bare ground takes place, development should start as soon as possible so the compensation window is not exceeded without payment to the incumbent utility.

Representative Reed said this bill could be difficult because there is no guarantee on how long development could take. Too many issues can arise that could impede development on the land.

Senator Wismer asked why developmental delays should penalize the incumbent utility's opportunity to participate in the lost revenue. She agreed with Senator Solano's suggestion of creating a time frame for development.

Senator Schoenbeck cautioned that economic development is land owner driven and does not rest in the power of the municipal utilities.

A motion was made by Senator Solano, seconded by Representative Brunner, that SB Draft 228/G move forward into the second phase of discussion. The motion prevailed on a roll call vote with 5 voting AYE and 4 voting NAY. Voting AYE: Wismer, Bordeaux, Chaffee, Brunner, and Solano. Voting NAY: Schoenbeck, Youngberg, Gosch, and Reed.

Representative Brunner introduced HB Draft 215/I to provide for a negotiation and arbitration process. He stated the option of picking arbitrators is an option that should be available.

Representative Reed remarked that the idea of arbitration does not work for a municipal government nor would it be binding.

Senator Solano said this bill draft is similar to SB Draft 227/F that he would be bringing forward and spoke on his draft in relationship to HB Draft 215. He stated the ability to call on the PUC was discussed during session and he suggested allowing the PUC to become involved as the commission has the expertise in the area. Senator Solano added that involving the PUC should not become a continual process and to ensure it would only be used when necessary, he recommended a penalty be fined to each party for the arbitration process. He also mentioned he would be opposed to HB Draft 215 as there are no time constraints defined within the bill and time limits need to be included in order to accomplish the process in an efficient and timely manner.

Senator Schoenbeck stressed that HB Draft 215 was designed to create lawsuits and deter economic development, and what would happen if it is put into place would be the same thing that happens now when rural electrics challenge investor-owned utilities and their biddable loads. He asked the committee not to give the rural electrics another avenue of creating litigation and frustrate economic development. Beyond that, Senator Schoenbeck said, there are no standards for how the arbitrators decide defined in the bill, and no description of remedy options available.

Senator Youngberg agreed that the arbitration process serves to hinder economic development. He stated that if a company is looking at developing in South Dakota, the company will not want to wait for an arbitration process to take place. If an arbitration process is required, it only serves to give the company more time to look elsewhere for an available site to develop.

Senator Wismer voiced frustration over the suggestion that rural electrics were hindering economic development. She agreed that the PUC would be an option for arbitration due to their expertise, timeliness, and uniformity. She also suggested exploring other alternatives than just the PUC.

A motion was made by Representative Brunner, seconded by Senator Wismer, that HB Draft 215/I move forward into the second phase of discussion. The motion passed on a roll call vote with 5 voting AYE and 4 voting NAY. Voting AYE: Wismer, Bordeaux, Chaffee, Gosch, and Brunner. Voting NAY: Schoenbeck, Youngberg, Reed, and Solano.

A motion was made by Senator Solano, seconded by Representative Brunner, that SB Draft 227/F move forward into the second phase of discussion. The motion passed on a roll call vote with 5 voting AYE and 4 voting NAY. Voting AYE: Wismer, Bordeaux, Chaffee, Brunner, and Solano. Voting NAY: Schoenbeck, Youngberg, Gosch, and Reed.

Second Phase of Discussion

Representative Reed reiterated the purpose behind HB Draft 182/D which instructs municipalities that they need to notify the current electric service provider in an area they are planning to annex.

Ms. Yvonne Taylor, Executive Director, South Dakota Municipal League, spoke as a proponent for HB Draft 182. She stated the bill could be an answer to the lack of communication between the municipal electrics and the rural electrics.

Ms. Darla Pollman-Rogers, SD Rural Electric Association (SDREA), testified as an opponent for HB Draft 182. She pointed out that the bill requires notice to the electric utility in the even of annexation by petition, but there can also be annexation by resolution. She suggested that if notification is going to be required it should be applied to all types of annexation and not just annexation by petition.

A motion was made by Representative Reed, seconded by Representative Gosch, that HB Draft 182/D be recommended and referred to the Executive Board. The motion prevailed on a roll call vote with 5 voting AYE and 4 voting NAY. Voting AYE: Schoenbeck, Youngberg, Gosch, Reed, and Solano. Voting NAY: Wismer, Bordeaux, Chaffee, and Brunner.

Representative Brunner asked to move to testimony on HB Draft 214/H.

Mr. Ed Anderson, General Manager, SDREA, agreed with Senator Schoenbeck's earlier comments and said that HB Draft 214 does freeze the territories. Mr. Anderson highlighted the sunset date included in the bill and said the rural electrics would provide compensation to the municipal utilities under the same formula they have been compensated for the last 40 years. He also pointed out the bill would encourage the option for utility systems to have open discussions which can be productive with two willing parties.

Mr. Drew Duncan, Heartland Consumers Power District, spoke in opposition, and in depth, on the negative aspects of the bill. Mr. Duncan stated the bill not only freezes territory but dictates municipal tax policy until July 1, 2031 to the detriment of the 35 communities that have municipal power. He emphasized that it would have negative effects on municipal utilities because it will never allow them to spread out any of their costs for infrastructure or anything else amongst additional rate payers.

Mr. Brad Lawrence, Utility Director, Madison, said the bill does not require good faith negotiations and the rural electrics automatically get the territories, it does not include an appeals process, and there is a sunset date for the compensation which does not exist right now for the rural electrics.

Mr. Al Heuton, Director of Economic Development Corporation, Brookings, spoke in opposition from an economic development standpoint. Mr. Heuton said when he is working with businesses, they want certainty. HB Draft 214 not only freezes municipal property but also the ability to provide certainty to business prospects.

Ms. Patty Bacon, Brookings City Council, reiterated what Mr. Heuton brought forward and spoke about some of the bigger businesses in Brookings. She stated none of the businesses were interested in setting up outside of city limits. Being able to annex and provide service is critical to major economic development and growth for the state of South Dakota.

Mr. Anderson offered rebuttal to the opponent testimonies. He mentioned the appeals process, saying there is no appeals process for the rural electrics under the current statutory framework. In regard to economic development, Mr. Anderson said certainty can be provided under a number of different frameworks and South Dakota does not need to have municipal utility systems in place to bring business into the towns.

Representative Reed touched on the sunset date and said it would not provide a soft landing for communities that have worked hard and built out utilities to be ready for economic development.

Senator Solano said his concern with HB Draft 214 was that it creates a freeze, it is a modification of SB 66, and if the Legislature wanted to move forward with a freeze, they would have kept SB 66 moving during the last legislative session. The goal of the committee was to move beyond an all-out freeze and negotiate something that provides for more give and take from both sides.

Senator Schoenbeck commented that the rural electrics benefit when communities build jobs. The consumers exist only because of the city growing, so this bill does create an economic development issue. He stressed that the rural electrics do experience growth as the legislation stands now. What they do not get is every piece of growth in the state of South Dakota. The system currently in place has been working for 45 years.

Senator Youngberg reiterated that rural electrics were set up to serve rural South Dakota and not the cities. He asked that the committee remember the reason for the summer study was because the Legislature did not want a bill like HB Draft 214, and that the committee respect the legislators who put the summer study into effect and not allow HB Draft 214 to move forward.

A motion was made by Representative Brunner, seconded by Representative Chaffee, that HB Draft 214/H be deferred. The motion failed on a roll call vote with 4 voting AYE and 5 voting NAY. Voting AYE: Wismer, Bordeaux, Chaffee, and Brunner. Voting NAY: Schoenbeck, Youngberg, Gosch, Reed, and Solano.

A motion was made by Representative Brunner, seconded by Representative Chaffee, that HB Draft 214/H be recommended and referred to the Executive Board. The motion failed on a roll call vote with 4 voting AYE and 5 voting NAY. Voting AYE: Wismer, Bordeaux, Chaffee, and Brunner. Voting NAY: Schoenbeck, Youngberg, Gosch, Reed, and Solano.

A motion was made by Senator Schoenbeck, seconded by Representative Reed, to table HB Draft 214/H. The motion failed on a roll call vote with 4 voting AYE and 5 voting NAY. Voting AYE: Schoenbeck, Youngberg, Reed, and Solano. Voting NAY: Wismer, Bordeaux, Chaffee, Gosch, and Brunner.

Senator Solano told the committee that SB Draft 189/B brought forward by Senator Schoenbeck would be a nice addition to SB Draft 227/F so the process would start with the annual communication and be followed by good faith negotiations. He covered his intent behind the bill and moved the discussion on to testimonies.

Mr. Anderson said the rural electric rise in support of SB Draft 189/B. He remarked that they understand and agree with Senator Solano's reasoning for including the PUC in the process and from an expediency perspective, they support it.

Mr. Chris Nelson, Commissioner, PUC, said the PUC has tried to stay out of the process but the commission is here to serve the people of South Dakota if the committee believes they can be a part of the solution. Mr. Nelson rose in opposition of the bill in its current form and outlined the sections that would need to be amended if the committee chose to move forward with the legislation.

Mr. Duncan spoke in opposition of the bill for the municipal utilities. He stated that SB Draft 227 and the following arbitration bills create a significant amount of regulatory uncertainty, delay, and other negative effects for rate payers, potential economic development projects, and utilities with regards to planning. Mr. Duncan agreed with Mr. Nelson's suggested amendments to the bill draft and offered the committee additional suggestions for amendments.

Mr. Heuton reminded the committee that time frames are extremely important when it comes to recruiting businesses and this bill creates obstacles to providing information to potential businesses within an appropriate time frame.

Senator Solano offered a rebuttal to comments made in opposition to the bill. He disclosed that he drafted the bill without pulling the PUC in.

Representative Gosch asked to hear from representatives from the investor-owned utilities (IOUs) on their thoughts regarding the use of the PUC in these instances.

Mr. Brett Koenecke, SD Electric Utility Companies, said Commissioner Nelson and Mr. Duncan summarized the thoughts of the IOUs very well. He agreed the bill was well intended but there were problems that needed to be fixed and the IOUs opposed the bill as it was currently written.

Senator Schoenbeck asked Mr. Koenecke if the IOUs thought the 60-day time frame allotted in the bill could work, as they are in front of the PUC all the time. Mr. Koenecke responded there are things that could be fixed within the bill to help timelines. He then listed some suggestions for changes in the bill that could help address the timeline issues.

Senator Solano asked the representatives from the municipal utilities and the rural electric rise if there was interest and desire to continue working on SB Draft 227 and amending it with the suggestions made by all parties. Mr. Duncan and Mr. Anderson both agreed to the negotiations.

A motion was made by Representative Reed, seconded by Senator Solano, that SB Draft 189/B be added to SB Draft 227/F. The motion prevailed unanimously on a roll call vote.

A motion was made by Senator Solano, seconded by Representative Gosch, that SB Draft 227/F as amended be recommended and referred to the Executive Board with the caveat of continued discussion by the interested parties on the points provided by the committee. The motion passed on a roll call vote with 8 voting AYE and 1 EXCUSED. Voting AYE: Wismer, Youngberg, Bordeaux, Chaffee, Gosch, Reed, Brunner, and Solano. EXCUSED: Schoenbeck.

A motion was made by Senator Solano, seconded by Representative Reed, to table SB Draft 228/G. The motion passed on a roll call vote with 8 voting AYE and 1 EXCUSED. Voting AYE: Wismer, Youngberg, Bordeaux, Chaffee, Gosch, Reed, Brunner, and Solano. EXCUSED: Schoenbeck.

A motion was made by Representative Brunner, seconded by Representative Chaffee, to table HB Draft 215/I. The motion passed on a roll call vote with 8 voting AYE and 1 EXCUSED. Voting AYE: Wismer, Youngberg, Bordeaux, Chaffee, Gosch, Reed, Brunner, and Solano. EXCUSED: Schoenbeck.

Closing Remarks and Adjournment

Senator Solano thanked the committee for their participation and the participants from the rural electrics, the municipal utilities, and the investor-owned utilities who came forward. He thanked everyone for their time and said he is hopeful the committee has the start of something that will show the investment made by everyone involved was worth it.

A motion to adjourn was made by Representative Gosch, seconded by Representative Chaffe. The motion prevailed on a voice vote.

The meeting adjourned at 3:49 p.m.