

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

[LB822]

The Committee on Natural Resources met at 12:30 p.m. on Wednesday, March 7, 2018, in Room 1525 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on AM2191 to LB822. Senators present: Dan Hughes, Chairperson; Bruce Bostelman, Vice Chairperson; Joni Albrecht; Suzanne Geist; Rick Kolowski; John McCollister; Dan Quick; and Lynne Walz. Senators absent: None. [LB822]

SENATOR HUGHES: (Recorder malfunction) ...so we will call the hearing to order. Welcome to the Natural Resources Committee. I am Senator Dan Hughes; I am from Venango, Nebraska; and I represent the 44th Legislative District. I serve as Chair of the committee. The committee will take up the bills in the order posted. Our hearing today is your public part of the legislative process. This is your opportunity to express your position on the proposed legislation before us today. The committee members may come and go during the hearing, that is just part of the process as we have...we're all done introducing bills, but we are in session beginning at 1:30. So if there is a call of the house, we will recess, go vote, and then come back. I don't anticipate us going that long, but if that happens that will be what we'll use...what we'll go by. I ask that you abide by the following procedures to better facilitate today's proceedings. Please silence or turn off your cell phones. Please...introducers will make initial statements followed by proponents, opponents, and neutral testimony. Closing remarks are reserved for the introducing senator only. If you are planning to testify, please pick up a green sign-in sheet that is on the table at the back of the room. Please fill out the green sign-in sheet before you testify. Please print and it is important to complete the form in its entirety. When it is your turn to testify, give the sign-in sheet to the committee clerk or to the page. This will help us make a more accurate public record. If you do not wish to testify today but would like to record your name as being present at the hearing, there is a separate white sheet on the tables that you can sign in for that purpose. This will be part of the official record of the hearing. If you have handouts, please make sure you have 12 copies and give them to the page when they come up to testify. They will be distributed to the committee. When you come up to testify, please speak clearly into the microphone; tell us your name and please spell your first and last name to ensure that we have an accurate record. We will be using the light system for all testifiers. You will have three minutes to make your initial remarks to the committee. When you see the yellow light come on, it means you have one minute remaining, the red light indicates your time has ended and you need to wrap up. Questions from the committee may follow. No displays of support or opposition to a bill, vocal or otherwise, are allowed in this public hearing. The committee members with us today will introduce themselves beginning on my left. [LB822]

SENATOR KOLOWSKI: Good afternoon. I'm Rick Kolowski, District 31 in southwest Omaha. Thank you. [LB822]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

SENATOR GEIST: Hello, I'm Suzanne Geist, I am representative of...oh man...it's a long morning already, District 25, which is here in Lincoln, east side, Walton and Waverly as well. There you go. [LB822]

SENATOR WALZ: Usually I do that. I'm Lynne Walz, District 15. [LB822]

SENATOR HUGHES: And on my right. [LB822]

SENATOR ALBRECHT: Good afternoon, I'm Joni Albrecht, northeast Nebraska; Thurston, Wayne and Dakota Counties, District 17. [LB822]

SENATOR McCOLLISTER: John McCollister, District 20, central Omaha. [LB822]

SENATOR BOSTELMAN: Bruce Bostelman, District 23, Saunders, Butler, and a majority of Colfax Counties. [LB822]

SENATOR HUGHES: To my left is committee legal counsel, Laurie Lage. And to my far right is the committee clerk, Mandy Mizerski. Our pages for today are Lee-Ann Sims from Lincoln; she is a junior at UNL studying political science and global studies. And Rebecca Daugherty from Lincoln; she is a student at Doane, majoring in public and business administration. With that I will turn it over to the Vice Chair. [LB822]

SENATOR BOSTELMAN: Welcome, Senator Hughes. [LB822]

SENATOR HUGHES: Thank you, Senator Bostelman, members of the Natural Resources Committee, my name is Dan Hughes, D-a-n H-u-g-h-e-s; I represent the 44th Legislative District. I'm here to introduce AM2191 to LB822 for your consideration. As you know, LB822 is a committee shell bill which we have already held a public hearing on. The shell bill exists for situations like the one before us today. As Chair of the committee that oversees the subject matter of AM2191, it is my responsibility to bring this significant policy proposal to you on behalf of the state's public power industry. As you know, this amendment was introduced in response to a Nebraska Supreme Court case that was issued Friday, February 23. The Aksamit case involved a potential competitor of public power in Nebraska who was denied a public records request for records showing cost and revenue information and rate outlooks for each public power entity's generating facilities. The potential competitor sued, and the district court ruled that the public entity did not have to provide those records because the information being sought was proprietary or commercial and would give advantage to business competitors. Aksamit appealed and the state Supreme Court reversed the decision. I will let others explain the

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

details of why the Supreme Court reversed the lower court. What I do...what I want to say to you is this: the outcome of this decision could significantly impact public power in this state and its ratepayers. We have worked with the Speaker to ensure this is a valid way for the committee to address this important policy matter, and we are providing an opportunity for all parties to be heard. The district court's decision and the Supreme Court's decision interpreted the relevant statute so differently and both courts speculated on the Legislature's intention. I believe that the courts want the Legislature to clarify its intent as to whether we want public power in Nebraska to open its records to give an advantage to its competitors, not just in Nebraska, but its competitors in the Southwest Power Pool regional market as well. It is important for you to realize this policy question goes far beyond the Aksamit case. The statute is not clear. I introduced this amendment to allow the Legislature to be clear in its intent if it so chooses. With that I will close and leave the technical explanations to others who are here to testify. Thank you, Mr. Vice Chairman. [LB822]

SENATOR BOSTELMAN: Thank you, Senator Hughes. Do the committee members have any questions? Seeing none at this time, will you stay for closing? [LB822]

SENATOR HUGHES: Yes. [LB822]

SENATOR BOSTELMAN: I ask for the first proponent, please step forward. Welcome. [LB822]

SHELLEY SAHLING-ZART: (Exhibits 1, 2, and 3) Thank you. Good afternoon, Senator Bostelman, members of the Natural Resources Committee. For the record my name is Shelley Sahling-Zart, that's S-h-e-l-l-e-y, Sahling-Zart, S-a-h-l-i-n-g hyphen Z-a-r-t. I'm vice president and general counsel for Lincoln Electric System here in Lincoln; and also testifying today on behalf of the Nebraska Power Association. The Nebraska Power Association represents all of Nebraska's consumer-owned electric utility systems including public power districts, municipalities, public power and irrigation districts, rural public power districts and cooperatives. We are here today in support of AM2191 to LB822 and we appreciate Senator Hughes introducing this on our behalf to address what we believe is an immediate concern. And I know I'm going to run short of time, but I will try to get through as much as I can. You've got a lot of information that I put before you. I did give you copies of both the Platte County District Court Opinion, as well as the Supreme Court Opinion. Those are worth reading in their entirety to truly understand the issue here. But let's start with...we represent customers. It is our fiduciary responsibility to prudently manage our systems on behalf of those customers. And that's what this is about. This is about not putting our customers at a competitive disadvantage. So why is AM2191 necessary? Well, as Senator Hughes pointed out, we have a recent Supreme Court decision that reversed the district court decision, both interpreting the same statute. It's a section

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

of the public records act. Let's start with--we have lots of public records. We provide a lot of public records. Mr. Aksamit filed a public records request in March, 2016, with four of the utilities of the state. It was exhaustive. There were 20 or 22 different requests. We provided thousands of pages of records to Mr. Aksamit. It's not that we are not providing public records, it's not that most of our records are not public. There is commercial and proprietary information because we operate as proprietary functions of government which means we also operate much like any other private corporation in the state. So we have to have the ability to operate. We operate with private utilities and we have to have the ability to protect commercial and proprietary information on behalf of those customers. It keeps our rates low. And at the end of the day, it's about protecting them. So we complied with that request. Again, thousands of copies, hundreds of hours to comply with the request. It requested data over eight years. We went through that. So the district court, Mr. Aksamit, because of the information that was withheld and Mr. Aksamit filed three separate suits in district court. The district court looked at the exception. It's 84-712.05(3) which addresses trade secrets and commercial and propriety information. It says...the key part is propriety commercial information which if released would give advantage to business competitors and serve no public purpose. It's the answer "no public purpose" that's the key. Both courts...both courts found that Mr. Aksamit was trying to compete with us and that the information he was seeking would provide a competitive advantage. There is no argument about that. It went on to say the Supreme Court set it's two-prong test. And the second part is "and serving no public interest" because Mr. Aksamit had put on testimony that he had a need for it. They gave us, basically, an unworkable test. There is no way...and I see my time is up. I'll try and wrap up real quickly. But there is no way you could meet that test given the decision we now have. So we have come to with the identical language; we've narrowed it to Chapter 70. We have asked to put this exception in Chapter 70 which the Supreme Court, if you read their decision closely, clearly gives you guidance to do, and says that's an appropriate thing to do. So we've put it in there. We've made it the exact same language as exists in statute today, minus those five words "and serves no public purpose." And I'm out of time, but I would entertain any questions about what's in my testimony. [LB822]

SENATOR BOSTELMAN: Thank you very much. Questions from the members? Senator Albrecht. [LB822]

SENATOR ALBRECHT: I have lots of questions because you gave us a lot of information. Where is this gentleman from, the Aksamit Resource Management? [LB822]

SHELLEY SAHLING-ZART: Mr. Aksamit, I believe, lives in or around Houston. [LB822]

SENATOR ALBRECHT: Okay so... [LB822]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

SHELLEY SAHLING-ZART: He's lived here previously, but he's lived here, he's lived in Kansas City, but I think his business was headquartered, I believe, in Texas. [LB822]

SENATOR ALBRECHT: So would you have any idea who he would be requesting this information for? [LB822]

SHELLEY SAHLING-ZART: He was requesting it for himself. He is building...proposing to build some wind farms in Nebraska. He was also the sponsor last year of the retail choice legislation and he was looking to understand how to compete with us. [LB822]

SENATOR ALBRECHT: So if your companies that you are representing have wind energy, they don't usually disclose... [LB822]

SHELLEY SAHLING-ZART: No, they request that we do not. [LB822]

SENATOR ALBRECHT: So they've requested from you not to. But for anyone that you represent that actually has wind, would you disclose, or would they all ask that you not disclose? [LB822]

SHELLEY SAHLING-ZART: They all typically ask that you don't, because they'll also in business competing with one another. And we have provisions in our contracts that require that if we are...if we receive a public records request, they would come in and defend that. But they're going to have to defend it under the same statute. And frankly, under this Supreme Court opinion, once it's in our hands, I'm not sure under this opinion whether we could...whether they would still be able to withhold that information. And I think you have a letter from Daxtera (phonetic) that addresses that point. [LB822]

SENATOR ALBRECHT: Okay. And did you want to, on your own time here, on my time, would you like to elaborate on anything else within this information that's pertinent for us to understand and ask more questions? [LB822]

SHELLEY SAHLING-ZART: I would, because the Supreme Court, what they ultimately decided is that on...what you ended up with were two competing interests. You've got the competitive and proprietary information which, again, I said both courts agreed on. And then you've got the "serves no public interest." It's not the court's job to adopt policy. It's not the court's role to enact law. They very clearly in their opinion said that is the appropriate role of the Legislature to do. So they interpret the plain meaning of the words. I think they acknowledged there's competing public interest here. You've got the public purpose and you've got this

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

commercial and proprietary. But I have to tell you, with this decision, what they have done is this exception to the public records law, you know, we've got 20 categories by which custodians of public records may lawfully withhold records. This isn't about keeping things secret. We may lawfully withhold them because there's an overriding public interest for doing so. In this case, it's that commercial and proprietary interests that would put our customers at a disadvantage if it was released. So if you basically have a very simple test to prove public interest, then you've essentially nullified the exemption or the exception for proprietary and commercial information. So the court very clearly in its decision said a couple of things. It said it's the Legislature's role to balance those competing interests. They also said they looked to Chapter 70 to see if the Legislature already done that. It had not. But it said it certainly could. It could legislate it in the public records act; you could also legislate it in Chapter 70. So basically what AM2191 is asking you all to do is to balance the policy interest, the two policy interests here in favor of Nebraska's Public Power customer/owners and not public power competitors, many of whom are out of state, seeking an advantage which is to the detriment of our public power customer/owners. So I think I've addressed why I'm in Chapter 70. Our intent was, we recognized this decision really has far-reaching impacts for all public entities that may be in possession of commercial or proprietary information. It's a sweeping decision. We know because of our operation in the Southwest Power Pool, we know that the impact for us is immediate. And we know that we sit here as we speak today with competitive information that could be requested and put our customers at a disadvantage. So we know we have an urgent need. So our desire was to come in and address this situation very narrowly, that's why we looked at Chapter 70. And the other discussion, there will probably be a discussion next session or at some point about the public records categories that will probably need to be addressed. That's not what we're here today. We tried to have a very narrow focus. Why did we choose the language we did? Because it's exactly the language that is in the public records statute today, minus those five words "and serves no public purpose." So you're going to hear some testimony about why don't you narrow it to just the generation units specific language. That's not the only competitive information that we hold in our business. And to do that very narrowly, you start with...you've seen legislation here where you start to do a laundry list of the things that you...that fit within that, and you never have a long enough laundry list. But the big part that you need to understand is, any time we withhold records under any of those categories, any of those 20 categories in the public records law, it is on us, it is the burden of the custodian of those public records to establish that they fit within those categories. So if you are challenged as NPPD, OPPD, and NMPP were by Mr. Aksamit, if you were challenged in court, it was not Mr. Aksamit's burden, it was NPPD's burden to prove that that information would put competitors at a advantage. And I think they did that. So the language you might feel is broad, it's the exact language that is in statute today and the burden remains on us. [LB822]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

SENATOR ALBRECHT: So my question with us being a public power state, within the Southwest Power Pool, are we the only one that is a public power owned by the people? [LB822]

SHELLEY SAHLING-ZART: We are not the only ones that are public power, we are the only all-public power state. And I'd have to look at other states public records laws, but for us we're only looking at ours and we know that's a problem here. And you know, if I were to draw a simple analogy which I think everybody in this room can relate to is the Nebraska Athletic Department. So you've got lots of information of the university's athletic department that's public. You can look at their schedules, you can look at their budgets, you can look at rosters, you can look at coaches' salaries, you get all of that. You get that for us too by the way. But you know what you're not going to get? You're not going to get Coach Frost's playbook. How competitive would the Husker football team be if he was required to divulge the Husker playbook, but nobody else in the Big 10 had to divulge theirs? We probably would be very competitive. And what we're asking you to do is protect our playbook. [LB822]

SENATOR ALBRECHT: Thank you. [LB822]

SENATOR BOSTELMAN: Senator McCollister. [LB822]

SENATOR MCCOLLISTER: Yeah. Thank you, Senator. In other states where investor-owned utilities operate, has Aksamit made similar requests? Or what informations due from those private utilities (inaudible)? [LB822]

SHELLEY SAHLING-ZART: Well, if he's made the request of private utilities anywhere, they would be under absolutely no obligation to provide it. I have no idea if he's made it of other public entities. And it would be subject to whatever their public records statutes in their states are. But no private utility would be required to divulge it. That's kind of our point. [LB822]

SENATOR MCCOLLISTER: You currently disclose all your pension obligations and liabilities, do you not? [LB822]

SHELLEY SAHLING-ZART: There's a great deal of information; I mean, even the generation information, the aggregate information is in our annual reports and other financial reports that we put out. The aggregate generation information is there. It's that unit-specific sum of our specific pricing, capacity pricing, different things that are the competitive piece that would not be divulged. But the aggregate data is there and available for inspection. [LB822]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

SENATOR McCOLLISTER: How about the depreciated value of generating facilities? [LB822]

SHELLEY SAHLING-ZART: There would be certain information of that that would be in our official statements for example; and you'd know how much debt was still left on some of them. There's a lot of detail because we have to provide that to bond holders. [LB822]

SENATOR McCOLLISTER: It's my understanding that we're under a time crunch, are we not? [LB822]

SHELLEY SAHLING-ZART: We believe we are. We believe this is an imminent concern because without a fix we could be faced with lots of records requests that will divulge that information and put we and our customers at a competitive disadvantage. [LB822]

SENATOR McCOLLISTER: When generating facilities bid into the SPP for a generating supply contract, are those contracts ever published? [LB822]

SHELLEY SAHLING-ZART: No. [LB822]

SENATOR McCOLLISTER: What the results of the bid were? [LB822]

SHELLEY SAHLING-ZART: No, you put your bids in, I mean, those are confidential. I mean there wouldn't be much of a competitive market if those were disclosed. So you bid your resources in every day and you buy out what you need. But, no, that's not disclosed. [LB822]

SENATOR McCOLLISTER: Do they publish the winner? Do they indicate who the winner of that bid was? [LB822]

SHELLEY SAHLING-ZART: Well, it's basically you put your resources in and the power pool selects the resources...they select the lowest cost resources first, but you don't...you don't ever know necessarily how you compare. You know what price...whether your resources got picked up or not. [LB822]

SENATOR McCOLLISTER: And they never actually publish the winner and... [LB822]

SHELLEY SAHLING-ZART: You get some aggregate data, again, but you wouldn't get unit specific. [LB822]



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

SENATOR McCOLLISTER: Okay. Thank you. [LB822]

SHELLEY SAHLING-ZART: You'd get some averages and some aggregate data. [LB822]

SENATOR McCOLLISTER: Thank you. [LB822]

SENATOR BOSTELMAN: Other questions? Senator Geist. [LB822]

SENATOR GEIST: Yes, so, let's just suppose that the Legislature decides not to act on this...on your behalf with this. Do you have any other way to protect that proprietary information? [LB822]

SHELLEY SAHLING-ZART: No. I don't believe so, not with this Supreme Court Opinion. I know a lot of people have said, well, you could redact the information. Redacting is kind of like just withholding the record, which the Supreme Court has just say you can't do if somebody declares there's a public interest. Same with nondisclosure agreements. I think they have the same effect of withholding the record which the court has instructed we may not do under this language. [LB822]

SENATOR GEIST: Okay, thank you. [LB822]

SENATOR BOSTELMAN: Senator Kolowski. [LB822]

SENATOR KOLOWSKI: Thank you. Thank you, Mr. Chairman. You mentioned the Husker playbook. I want to talk about the players. From the prospective of the union members and all employees within the company, did the lawsuit...or the court decision address the union members or workers within the ranks of the company? Was there anything on that at all? [LB822]

SHELLEY SAHLING-ZART: No, it was not specific to that. And I'm not sure any of the union-related information would fall within the commercial and proprietary. Now there might be some...there might be some withholding of records under some of those other 19 categories. [LB822]

SENATOR KOLOWSKI: Okay. [LB822]

SHELLEY SAHLING-ZART: But I can't necessarily think of anything just off the top of my head that would necessarily put union information within this particular category that we're

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

talking about. There may be something that's not coming to me right now, but. I mean I know there was a case in Omaha that you might be referring, but that was actually with regard to one of the other categories of exceptions. [LB822]

SENATOR KOLOWSKI: The individual from Texas that you mentioned, is there a history and a record there of behaviors of union versus nonunion participation? [LB822]

SHELLEY SAHLING-ZART: I'm sorry, can you repeat that? I didn't hear the first part. [LB822]

SENATOR KOLOWSKI: The individual in Texas that you mentioned in the court case, is there a record of his work with union and nonunion associations? [LB822]

SHELLEY SAHLING-ZART: Oh, I have no idea. [LB822]

SENATOR KOLOWSKI: Okay. [LB822]

SHELLEY SAHLING-ZART: I don't know. [LB822]

SENATOR McCOLLISTER: Just (inaudible). Thank you. [LB822]

SHELLEY SAHLING-ZART: As a private entity, it would probably be difficult to find some of that information on him. [LB822]

SENATOR McCOLLISTER: Thank you. [LB822]

SENATOR BOSTELMAN: Any other committee members' questions? I do; I have one at least. Who does the Supreme Court decision, who does it apply to? Just public power? [LB822]

SHELLEY SAHLING-ZART: No, it applies to any public entity. [LB822]

SENATOR BOSTELMAN: So any public entity this would... [LB822]

SHELLEY SAHLING-ZART: Yeah, they address the public records statute and that category of public records would apply to any custodian of public records. [LB822]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

SENATOR BOSTELMAN: Okay. Any other questions? Thank you for your testimony. Next proponent, please. [LB822]

TIM BURKE: Good afternoon, Senator Bostelman... [LB822]

SENATOR BOSTELMAN: Good afternoon. [LB822]

TIM BURKE: (Exhibit 4)...and members of the Natural Resources Committee. My name is Tim Burke, T-i-m B-u-r-k-e; I'm the president and CEO of Omaha Public Power District. I also provided to the page a letter of support from the Omaha Chamber of Commerce on AM2191 and LB822. And I'm here to testify in support of AM2191 to LB822. Reliable, affordable electricity service and low economic development costs are among the reasons companies choose to do business here in Nebraska. They also trust public power utilities with sensitive confidential information regarding their operations as we partner with economic development groups to bring them to the state. In 2017 alone, in OPPD service territory we saw over a billion dollar in capital investments. These projects bring jobs, tax revenue to Nebraska, and the utility's ability to protect propriety information is really a key to those relationships. The recent ruling by the Nebraska Supreme Court could have, and I would say would have a chilling effect on these beneficial economic development efforts that could cause companies to eliminate Nebraska from consideration because of the lack of protection for such sensitive information. Requiring public power utilities to disclose this information would put Nebraska utilities and the state at a distinct disadvantage when pursuing economic development. Investor-owned utilities in other states are not bound by such requirements. It would not be required to disclose similar information. Putting public power utilities at a competitive disadvantage would ultimately affect the customer owners in which we serve. By working to expand economic development in Nebraska, public power utilities are attracting new customers and ultimately expanding our customer base. And as you know, companies that really want this information are most likely profit driven and they would be more than willing to put our own customers at risk. We do not have a profit motive that benefits shareholders alone. That is why public power is under attack. Our customers and shareholders are one in the same, and I do not want to give our critical and proprietary information to companies in our surrounding states for their benefit at the cost of our Nebraska customer owners. OPPD is committed to transparency and providing information on its operation for our customer owners and for other stakeholders, but there has to be a balance that creates a level playing field as we strive to create new economic development growth for our region. Public power utilities already are set up to act in the public interest because they are governed by publicly-elected board of directors. Members of these bodies are advised about confidential matters all the time, especially as they relate to economic development and at no time are the cost in question withheld. These elected officials represent our customers and continually work to make decisions in the customers' best interest. Requiring public power utilities to disclose proprietary information will negatively impact the strides utilities have made here in Nebraska in

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

attracting new business and could considerably hamper our future efforts. I want to thank you for your time and I would welcome any questions that you may have. [LB822]

SENATOR BOSTELMAN: Thank you. Are there questions from the committee members?  
Senator McCollister. [LB822]

SENATOR McCOLLISTER: Yeah, thank you, Senator Bostelman. When OPPD conducts a board meeting, you keep minutes of that meeting, including all the documents that were made public, is that correct? [LB822]

TIM BURKE: That is correct. We even expand that. All of our committee meetings are streamed and our board meetings are streamed to the Web and there is a history of those meetings for a year period of time, and maybe even longer, that people can go back to and reference. [LB822]

SENATOR McCOLLISTER: Under the open meetings law, there are certain documents you can retain and keep them private, isn't that true? [LB822]

TIM BURKE: Well, it was until this case. [LB822]

SENATOR McCOLLISTER: Okay. [LB822]

TIM BURKE: So that's the concern and the issue why OPPD and I and the Nebraska Bar Association is here today. That is calling into question whether or not any of those items can certainly be held confidential. Certainly legal and some of those other 19 categories that Ms. Zart talked about earlier, you know, could be withheld for those reasons. But there are a lot of information that we share with our board that may not be able to be held confidential--pricing of contracts. Another partner that wants...we may limit our ability to have partners or service providers because we can't keep their contracts or the proprietary confidential information in their contracts confidential. And so we may limit our ability to do business with people who would provide a better economic solution for us. [LB822]

SENATOR McCOLLISTER: According to the first testifier, there's what, 19 or 20 areas that you can be...maintain privacy, is that right? [LB822]

TIM BURKE: I believe that's correct. [LB822]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

SENATOR McCOLLISTER: And that governed what documents you made public before this court case, isn't that correct? [LB822]

TIM BURKE: That is correct. [LB822]

SENATOR McCOLLISTER: I think that's it. Thank you very much. [LB822]

TIM BURKE: Okay, thank you. [LB822]

SENATOR BOSTELMAN: Are there...Senator Albrecht. [LB822]

SENATOR ALBRECHT: Thank you, Senator Bostelman, not someone else. Okay, just a quick question then. So if a company comes to the state of Nebraska and they would like to know what type of a deal you can give them, do you submit the proposal to them and they may very well be taking other proposals from somebody else within the Southwest Power Pool? Is it like a request for a proposal and they just take care of it that way? And if you do do that, how do you...is there a team of people that figure out for that particular company what you would do for them? Let's say it's Facebook, and you put it all together, present it to them, and they say, yes, this should work for us, or, no, we're going elsewhere. [LB822]

TIM BURKE: It is very broad. It may not be that kind of simplistic. We work very closely with our economic development organizations in the state of Nebraska very clearly. And our teams are typically part of the negotiation that's part of the whole package. And certainly an example of a Facebook or any other customer that we've seen move their operations or build operations in Nebraska, it could be anything from, you know, what's the reliability of that circuit to what's the cost of that transmission infrastructure, the cost of that service to that customer. And certainly when we see economic development projects, they may be looking at four or five different states. And our concern in this example, because of this Supreme Court ruling, is that we could be one of the folks that says, you know, we're not able to keep information confidential, and so therefore we may not be part of the list that they come to the state of Nebraska. And I think it does put the state of Nebraska at risk because the utility infrastructure is so critical to any new development, specifically the heavy industries and certainly those that are heavy users of power across the state. And so that's why the utilities are so deeply entrenched in economic development; and many cases really lead economic development. We have two employees that are chairs of county economic development organizations, one in Washington County and one in Sarpy County that are members of our economic development team. I'm on the executive committee of the Greater Omaha Partnership and serve on the board of directors as well, used to be the chair of the economic development committee. So we are getting...typically when we are working on a

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

project, we get a lot of information from that client. And the risk is, all that information, if it's in our hands could be held in the public light. [LB822]

SENATOR ALBRECHT: Right, needs to be. [LB822]

TIM BURKE: And I think that creates the risk that I'm speaking of the day and I think you'll hear others speak of as well. [LB822]

SENATOR ALBRECHT: Very good. Thank you. [LB822]

SENATOR BOSTELMAN: Other questions from the committee members? Could you give me...go ahead, Senator McCollister. [LB822]

SENATOR McCOLLISTER: Yeah, thank you, Senator. Confidential court settlements, I can recall my MUD days where we would keep confidential all the settlements we made for folks that had damage to their house or something like that. Now would that be...would you be obligated to give that information as well? [LB822]

TIM BURKE: I believe we would. Today there's a statute that really requires us to provide any settlements in excess of \$50,000, wherever that may be, that we provide that in a public setting and we report those to our board of directors currently today. There's a right of other settlements that may be in the \$200, or \$300 or \$500 or whatever that may be, I think those could potentially be exposed in this. They may fall underneath that legal kind of requirement, but that's really...that legal requirement is based on how we may go into a closed session is to talk about legal strategy or legal capability. But I think it's that continuum that concerns us with this. I think Ms. Zart spoke about the SPP market. It may not just be about generating prices and generating fuels, but it's about how we actually bid into the market. What are the algorithms that we use? What are the market analysis that we use to determine whether we bid in 250 or 300? And by the way this court case was determined and the opinion of that, we could potentially have to give that information up to entities that want to know how we bid in the market so that they can make sure their unit gets into the market and our unit doesn't get into the market. And when that happens, I don't get revenue from the market, but I still have fixed costs. And that's not in the long-term best interest of our customer owners. Because any of those dollars that we make in that market, essentially comes to a really "levelized" rates, certainly in OPPD and it's case with the other generators in the state as well. [LB822]

SENATOR McCOLLISTER: Thank you, Mr. Burke. [LB822]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

TIM BURKE: Very good. Thank you. [LB822]

SENATOR BOSTELMAN: Question I have, you spoke of a billion dollars worth of infrastructure you put in. Could you kind of give us an idea generally what type of projects, what those build outs are, or that... [LB822]

TIM BURKE: Well, obviously, I would talk about the ones that are public...(Laugh) [LB822]

SENATOR BOSTELMAN: All right, that's fine. [LB822]

TIM BURKE: ...that have been in the newspaper. Obviously, you know, Facebook, and I think we've seen Novozymes and Evonik up in the Cargill campus. We've seen Oxbow in Sarpy County that has expanded. We've seen, I would say, there's over a hundred-plus different projects that created economic jobs. I just read some market analysis that it was...we might have a billion dollars in assets, but it really created a \$3.2 billion economic value to the region. The Omaha Chamber is just publishing their market analysis on that and I just saw it for the first time today. But that's the value and the benefit of these economic development projects very clearly, not only on electric customers, but on property taxpayers, homeowners, school districts, and others as well. [LB822]

SENATOR BOSTELMAN: Sure. We spoke a lot about pricing and competition there, but also you spoke about it a little bit about just general design build and work within your facilities, within your generation facilities. That could be anywhere from benefits of how you...the fuel was used, optimizing fuel; a contractor coming in with proprietary information as to maybe safety protocols, those types of things. Can you speak to that just a little bit. [LB822]

TIM BURKE: Well, I would say it's really interesting as we've kind of driven our innovation, kind of, activity at OPPD. It's been very clearly, we've looked at ways where we can reduce costs and maybe even increase reliability. That's certainly beneficial for our generating facilities. And if there was a request for us to share all of those innovation ideas before they may be ready for the market or before we decide what we want to do with them, I think we'd be at risk at sharing all of those kind of beneficial things that are either lowering our costs, improving our reliability, or improving our economics in the market. And we would be at risk at having to share those with others that are competing with us and to, you know, what the previous speaker talked about, it's kind of our playbook. And we each may have different playbooks in different parts of the business. For us, it's really the algorithm work that we've done on bidding into the market and how we have analyzed kind of what that market does and how we need to move our generation in and out of that market to maximize the value for our customer owners. And when we do that,

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

we lower our costs, lower our risks, and improve that revenue stream for our district and our customer owners. [LB822]

SENATOR BOSTELMAN: Very good. Thank you, sir. Thank you for your testimony. [LB822]

TIM BURKE: Thank you. [LB822]

SENATOR BOSTELMAN: Thank you. [LB822]

TIM BURKE: Thank you. [LB822]

SENATOR BOSTELMAN: Next proponent to AM2191. Welcome. [LB822]

CHRIS DIBBERN: (Exhibit 5) Good afternoon, Senator Bostelman. Members of the committee, my name is Chris Dibbern, C-h-r-i-s D-i-b-b-e-r-n; I'm the general counsel for the Nebraska Municipal Power Pool and MEAN, the Municipal Energy Agency of Nebraska. We are the wholesale public political subdivision supplier to over 70 communities in the Midwest. And I want to thank Senator Hughes for giving us this opportunity to explain why this bill is urgently needed. We appreciate the committee's support and the questions that you've had about this important topic. Here are some facts from MEAN. A competitor asked...requested thousands of documents with 20 public records requests and then sued MEAN for not producing records regarding three of those requests. We did not give him our forward-looking rate projections, our profit center data, we don't even use that concept, we don't use the computer system that calls it profit centers; and certain generation costs. And we also had some sealed agreements that were under confidential nondisclosure agreements. MEAN produced approximately 2,000 pages of documents, incurred over 100 hours of nonattorney time in responding to this competitors request. MEAN is now in Lancaster County District Court under a stay, requested by this competitor, while the Supreme Court made this decision, and also while you're pending...the Legislature is pending. MEAN answered that it was an active participant in SPP. And we are the wholesale power market so we have communities that sell at retail that work with economic development purposes. We submit competitive and confidential offers into SPP always in the day ahead offer. Also this competitor is also in the SPP as a participant. Confidential electric power generation parameters and cost information it's critical to fair and competitive bidding and you pick the least cost. So that makes that...what our prices are very important. FERC, the Federal Energy Regulatory Commission recognizes the importance of protecting such competitive information by its tariff and its rules. And it expressly prohibits market participants from receiving or reviewing certain documents, data, or other information from another market participant. They have something called the market monitor so that there's not collusion, so that there's not...so that it is an open fair bidding process. If the committee and the body doesn't



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

advance this measure, competitors would gain advantages over public power. And I want to tell you one thing about what the court said; and you've got the opinion in front of you, the court determined they were not an activist court. They determined that the Legislature needs to tell the court whether or not public power information, if it would give advantage to a competitor, is publicly available or not. Simply put, ratepayers would be harmed, communities would be harmed, and the Nebraska Supreme Court turned back to you, the lawmakers, to clarify this situation. So we ask you to help us continue with public power's mission. And I'm available for any questions that you have. [LB822]

SENATOR BOSTELMAN: Thank you very much. Do the committee members have any questions? Senator McCollister. [LB822]

SENATOR McCOLLISTER: Yeah, thank you, Senator Bostelman. Aksamit made public record requests we know to NPPD and OPPD. What other places did he request information? [LB822]

CHRIS DIBBERN: We know he made it to MEAN. We didn't have 22, we had 20. We know he made it to LES, Lincoln Electric System. He also...we compete in Iowa, with MidAmerica, and we compete in Colorado with Public Service of Colorado. I'm not...those entities would not have to give up any of these records. So an investor-owned utility does not have to give that up. They're not under that public records law. So the 20 exclusions that you heard about, that applies to everybody. That is whether you're a state agency, whether you're public natural gas, which we represent; public power. But private investor owned utilities are not under public records law. I'm not sure that...so there's nobody else in Nebraska that he requested. But he did ask for our wind contracts, and those are with private entities. We did not give up the wind contracts if we had a confidentiality agreement with a private wind producer. [LB822]

SENATOR McCOLLISTER: Did the court ask that you provide that information as well? [LB822]

CHRIS DIBBERN: The Lancaster County District Court has not ruled on our case. We are...MEAN is still in front of that case. But this...your decision and the Supreme Court is determinative. So they will listen to the Supreme Court and the Legislature. [LB822]

SENATOR McCOLLISTER: Did the public power board get a request? [LB822]

CHRIS DIBBERN: Interesting, we did have some of this information in front of the Power Review Board, and the Power Review Board had sealed our information and had kept it sealed. We have a contract with an investor-owned utility that is under a confidentiality agreement. That

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

was...we did produce that in the Lancaster case to tell them it was under seal. So that was something we had done seven or eight years ago with that contract. [LB822]

SENATOR McCOLLISTER: Did that give you any protection? [LB822]

CHRIS DIBBERN: We still don't have a ruling from that court, but it's the same statute. So we are being...we're under the same statute, so I don't think we have the protection at all. [LB822]

SENATOR McCOLLISTER: Wow. Okay. [LB822]

CHRIS DIBBERN: And we thought it was a balancing test. We thought the court would consider an adverse interest to competitors versus a public interest. The court came back and said it's not a balancing test. It means any public...it serves any public purpose. So that's our concern is the way the court has determined it, it wasn't weighing the two interests, it was...they thought the Legislature meant "and serves no public purpose." So any...to my opinion, and I've lived this case, not just read it, in my opinion it means anybody who asks for this could say I have a public purpose. I'd like to see it. I'd like to compete. [LB822]

SENATOR McCOLLISTER: Thank you. [LB822]

CHRIS DIBBERN: Thank you for that question. [LB822]

SENATOR BOSTELMAN: Any other questions from board members? Seeing none, thank you. Next proponent. [LB822]

JOHN McCLURE: (Exhibit 6) Vice Chairman Bostelman, members of the Natural Resources Committee, my name is John McClure, J-o-h-n M-c-C-l-u-r-e; I'm vice president and general counsel for Nebraska Public Power District in Columbus, Nebraska. NPPD supports AM2191 to LB822 and appreciates Senator Hughes' leadership on this issue. I'm going to do you all a favor and not read all my testimony. It's short, but there's been incredible testimony before me laying out these issues. I don't want to replicate that. There have been some great questions and I hope I have an opportunity to respond. I want to focus in on just some key things here. We've talked a lot about this Supreme Court decision and this balancing issue. When you look at the statute, the way it was interpreted by the Supreme Court, two separate provisions. The one, are these...would this be an advantage to business competitors if released? And two, is there no public purpose in releasing it? And the court said we can't balance that. The district court did; the trial court did and said we have to balance this in favor of the public power entities to protect this, to make sure the public power entities are successful for their customers. The Supreme Court looked at it and

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

said, we just have to look at the plain meaning of these words and we read it this way. And so in essence, we have to prove a negative; that there could be no possible public interest. And it doesn't even have to be from a competitor. If we release this information to anybody, then it's out in the public domain and a competitor can get it. So it's not just who is requesting it, it is that information valuable to a competitor? Let me hit some key things. Again, looking at the Supreme Court's decision, and I want to quote from it, it stated, and I quote: if presented with the opportunity to exclude a public power district's competitive information from public scrutiny, the Legislature might well do so. But thus far it has not. If the Legislature had done so, we would not hesitate to apply the other statute exception. End of quote. And they're referring to had it been addressed in Chapter 70. What this means is, the requirements of the public records act can be modified by other statutes outside the public records act. The Supreme Court specifically referenced the statutes governing public power. Those who claim that this subject cannot be addressed by this committee or outside the public records statutes are ignoring the express language in the public records act and in the Supreme Court's Opinion. Again, we see this as having immediate and adverse impact for economic development, for our competitiveness in the market, and for our ability to procure goods and services from vendors who want to keep certain information in those contracts proprietary, including pricing. And with that I'm going to stop and again urge your support for this. The conversation this afternoon, I think, has been excellent. I'd be happy to try to answer any questions. [LB822]

SENATOR BOSTELMAN: Thank you. Are there questions from the committee members?  
Senator Albrecht. [LB822]

SENATOR ALBRECHT: Thank you, Senator Bostelman. Mr. McClure, so I'm looking at this, I wish I would have had time to read over it, not that I'm an attorney or could probably figure anything out without asking questions, anyway, but...so they had Dr. Ernie Goss in to testify. But before his testimony, they were talking about this gentleman that is suing, that he had an interest in examining documents as part of its marketing program to educate Nebraska's ratepayers and elected rate officials. So then Dr. Goss goes on to say he explained that the trajectory of the electricity prices was larger than the national average and that the trajectory of rate changes was and is unsustainable. I mean, is this just a company that is trying to figure out, you know, like we are too high? I mean, there's got to be more than he just might want to come in with wind. I mean, when you ask for that many documents, why would...why would this have come about in your opinion? [LB822]

JOHN McCLURE: Well, there was testimony at that hearing. But that was not a hearing...that was a hearing on whether we had to release this information. Dr. Goss came in and made his observations. There's a lot more to the story than what he has said. In the case of NPPD, we haven't had a rate increase in our retail division in five years. There was a period where rates escalated for all power entities in the state. That has stabilized. So he was saying--I have this

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

concern if this goes on forever and so I need to know this. It cites in the opinion that he wanted to compare us to MidAmerican Energy, but it's been pointed out, you can't compare our power plants to MidAmerican Energy's power plants because you can't get the information on what their power plants cost. [LB822]

SENATOR ALBRECHT: Because they're private and... [LB822]

JOHN McCLURE: Because they're private. They're not subject to a public records act. [LB822]

SENATOR ALBRECHT: Okay. And so this public records...this is for the public, but what if the media wanted to know? [LB822]

JOHN McCLURE: The media has a right to ask for public records and they do that... [LB822]

SENATOR ALBRECHT: So would they still have that right if we do this? Or is this just for companies that want to come in and make (inaudible) public? [LB822]

JOHN McCLURE: The challenge, and again the point I made earlier, we don't want to release something to anybody whether it's directly to a competitor or someone else if it is proprietary information, which if it's released it gives an advantage to a business competitor regardless of who we give it to. We all know, if you release information today, it often shows up on the Internet. So someone could provide something to us very confidential, very unique to their business, and we're utilizing something, and if the case is now we can't protect that, their information is out on the Internet. That's not a good result. Companies will not do business with us in Nebraska if that's what's going to happen. [LB822]

SENATOR ALBRECHT: Thank you. [LB822]

SENATOR BOSTELMAN: Other questions from members? A couple of questions, one would be if this provision is adopted, would NPPD be able to exclude rate information from the public? [LB822]

JOHN McCLURE: Absolutely not. Our rates have to be, by statute, Chapter 70-655, rates have to be fair, reasonable, and nondiscriminatory. We have no ability in this state to create secret rates with customers. [LB822]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

SENATOR BOSTELMAN: So if a generation-specific information were to be released, will that tell the public how well a plant is being operated? [LB822]

JOHN McCLURE: Not really, because...let me give you an example. I would guess our most expensive power plant is a peaking turbine. That is a facility that we have no really dedicated labor there. Some of them are like a jet engine. And you use that to meet peak demands or respond at times when you need a very quick response unit. Those can be fuel oil, they can be natural gas, and they can be expensive to operate. But they're critical to make sure you have power at those limited times when you need a very quick-response unit. So if someone sees that and says, that's costing you \$150 a megawatt hour; you should shut that down. Absolutely not. The other thing, the only comparison we'll have with generating units would be among public power entities in this state because we cannot get this information for private entities, for investor-owned utilities or cooperative generators who are also private corporations, we cannot get that information. And it was pointed out earlier, not only the Southwest Power Pool, but all of the power pools that have these competitive integrated markets take great care to make certain that this kind of pricing information and cost information is kept confidential. Because if it's not, it destroys the truly competitive nature of these markets. [LB822]

SENATOR BOSTELMAN: So if I understand right, if there's a contract with a wind company...or renewables, wind company, a solar company, a biofuels company, whatever it might be for generation, that's not yours, you contract that with a private entity. What benefit of this information does this provide someone since we're a public power state? Because outside of renewable energy, any other energy sources that are being built in the state has to go through the Power Review Board. So what benefit, if any, does this provide? [LB822]

JOHN McCLURE: Well, I was at the trial and there were three witnesses. And all of them for different reasons said, I would be interested in knowing this. And that was enough to make it so that at least in the view of the Supreme Court, and they make the final decisions in this state for judicial matters, that we could not meet that standard on the second part of "and serve no public purpose." And I would also mention, in the public records act, these 20 exceptions or so that have been mentioned, I don't think any of them are qualified by something similar to the answer of "no public purpose." In fact, when Alan Peterson, who represented Media of Nebraska, testified at a hearing on the original public records legislation in 1979, he went through each of the exceptions and he talked about how cooperative public power had been, singled out NPPD specifically. And when he got to this specific exception, he said we realize that some of these...you're going to need some common sense to apply. And he was talking about the specific language about proprietary and commercial information. Unfortunately, we're...the situation we find ourselves in right now is a challenge. And we appreciate your engagement, your taking this up as a very important issue for our industry, and I know you're going to hear another perspective

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

on it, but I think the power industry has given you very sound reasons why this is a very appropriate amendment to put into the law of the state of Nebraska. [LB822]

SENATOR BOSTELMAN: Thank you. Senator McCollister. [LB822]

SENATOR McCOLLISTER: Yeah, thank you, Senator. Do you provide proprietary information to the Power Review Board? [LB822]

JOHN McCLURE: I don't know that we've ever been requested. I think the closest has been alluded to. There have been applications in front of the Power Review Board to approve the purchase of wind facilities. And in several instances, the pricing was made available to the Power Review Board, basically under seal. It was put in an envelop, here's the contract, here's the price. If you want to look at it, you can, but utility represented to them that this is very competitive pricing and they had no reason to disagree with what (inaudible). [LB822]

SENATOR McCOLLISTER: Media of Nebraska would claim that the amendment we're looking at is overly broad. Could that be made...could we narrow that amendment such that...would maintain that those 19 or 20 areas that were heretofore confidential? [LB822]

JOHN McCLURE: Well, realize that a number of those exceptions in the public records act don't have anything to do with public power, it's things like architectural, artifacts, there's medical issues in there, law enforcement, and a number of other things. There are a handful that apply to public power. But we're not changing the fundamental notion that was agreed to back in 1979 that proprietary and commercial information which if released would give an advantage to business competitors should not be released. I think that's common sense. And again, public power is in a proprietary function. We're in a competitive business world compared to other sectors that are governmental. We're still subject to this act. But we think this is a place where addressing this unique situation with public power in Chapter 70 makes sense right now because of the Supreme Court decision. [LB822]

SENATOR BOSTELMAN: Senator Albrecht. [LB822]

SENATOR ALBRECHT: Thank you, Senator Bostelman. Is this management company already in Nebraska? [LB822]

JOHN McCLURE: Aksamit Management Company--I believe they have...they have representatives here. I know they...one of the witnesses at the trial is a resident of Lincoln and I

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

believe they had...I don't know if they have...what kind of office facilities they have. As Shelley Sahling-Zart testified, their official place of business, I believe, is in Houston, Texas. [LB822]

SENATOR ALBRECHT: Well, I just went on-line and in Milligan they have some power, and they also have some in Friend that they'll be connecting to. So they're obviously already here in our state. [LB822]

JOHN McCLURE: They are...they have been involved in the development of wind facilities, that is correct. [LB822]

SENATOR ALBRECHT: And I'm just going to say to this committee, this is where we need to be a little bit more prudent on what happens with wind in our state because when it affects us all personally, I think that we have decisions to make on how things come in and how things go out of our state. You know, if they're already here and they're obviously wanting to make it known to everyone in our state that there might be a better way, but you know when we publicly own our own utilities and we've invested so much in our state, I think that we do have a responsibility to take care of what we currently have here. And whether we need more of this wind, I think we should play caution to the wind if you will, because there's a lot going on in our state with a lot of people looking to take what we have had for a long time away from us. So that's just my two cents. [LB822]

SENATOR BOSTELMAN: Any other comments or questions from committee members? If not, thank you very much for your testimony. [LB822]

JOHN McCLURE: Thank you. [LB822]

SENATOR BOSTELMAN: (Exhibits 7 through 25) Next proponent. Are there any other proponents who would like to testify on AM2191 to LB822? Any other proponents? Seeing none, I have several letters...we have several letters proponents: Richard Ray, Burt County Public Power District; Clay Gibbs, Cornhusker Public Power District; Chuck Fuhrer, Loup Valleys Rural Public Power District; Mark Kirby, Butler Public Power District; Robert Beatty, KBR Rural Radio Public Power District; Brian Lukasiewicz, Howard Greeley Rural Public Power District; Gwen Kautz, Dawson Public Power District; David Custer, Twin Valleys Public Power District; Craig Cox, South Central Public Power District; John Hoke, Niobrara Valley Electric Membership Corporation; Chet McWhorter, Cuming County Public Power District; Curtis Kayton, Southwest Public Power District; Pat Haverty, Nebraska Economic Developers Association; Michael Lammers, Cedar-Knox Public Power District; Phil Burke, Polk County Rural Public Power District; Bruce Vitosh, Norris Public Power District; Barry Kennedy, Nebraska Chamber of Commerce and Industry; and Wendy Birdsall, Lincoln Chamber of

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

Commerce; Kim Christensen, Nebraska Rural Electric Association; and David Levy, Baird Holm Attorneys at Law. That we would ask anyone who is in opposition, opponents to please step forward. [LB822]

KORBY GILBERTSON: (Exhibit 26) Good afternoon, Vice Chair Bostelman, members of the committee. For the record my name is Korby Gilbertson, it's spelled K-o-r-b-y G-i-l-b-e-r-t-s-o-n; appearing today as registered lobbyist on behalf of Media of Nebraska, Incorporated. Just to give all of you a little background on what Media of Nebraska does, it is an association of both print and broadcast media, but they do not discuss business matters for those entities; it's basically just for open meetings, public records, First Amendment issues. When we first saw that this proposed amendment, we discussed it and talked about whether it should be opposed or try to figure out a way to fix this. Obviously, we reviewed the Supreme Court case and talked a lot about the background of the public records act, why we have things the way we have them, and then the predicament that this ruling put public power in in Nebraska. So because of that, I reached out to NPPD early yesterday morning, and LES, I also reached out to your legal counsel with a proposed amendment to try to start a discussion about what we could do to address this issue without having an amendment which we feel is very broad in that the word "commercial" can mean business. It is very broad in nature and we fear that by eliminating the two-pronged process the Supreme Court discussed, this creates a bigger issue in that you will be giving power...no pun intended...to the power companies to decide what they want to disclose and what they don't without a stronger reason not to do it when it's commercial information. We understand the proprietary information. I wanted to address a few things that were said by the proponents. Number one, the discussion about whether or not settlements with power companies would have to be made public. There's already a specific exemption in the public records act, it's (8) of Chapter 74-712.05 (sic 84-712.05). The other one that they talked about is any of the safety information, things like that, that also is specifically dealt with in the statute. So in order to be able to just kind of get to the crux of this because I think we've all talked about the issues. In the decision...or in the Supreme Court decision, they quote Mr. Kent from NPPD numerous times talking about the real problem with the generation unit specific costs and revenue information being...giving advantage to business competitors. We understand that and are willing to work to try to narrow this to make sure that you're protecting the information that they held up as being information that is important to protect. If there is additional information, I heard Ms. Dibbern talk about market monitor that outlines different information that should be withheld between competitors and is not made public, we think we should look at that. If the real issue is that there should be a balancing test, I can tell you that I...Mr. Alan Peterson is kind of my mentor on public records and taught me a lot about them, and so if we need to look at the balancing test, let's do that. Let's not just make a sweeping exemption to public records. I'd be happy to take any questions. [LB822]



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

SENATOR BOSTELMAN: Thank you very much. Are there questions from committee members? My question would be private companies, are they operate...when facilities in Nebraska, and we've heard some testimony on this already. And they contract with public power entities and they sell the power produced to those facilities. Should the public utilities have to disclose proprietary and commercial pricing information with these private companies? [LB822]

KORBY GILBERTSON: I think that it...I think...we don't think they should have to disclose everything, or we would agree they shouldn't have to disclose everything. Our concern is that when you lump in the word "commercial" with this, that's what causes us heartburn. [LB822]

SENATOR BOSTELMAN: So could you talk a little bit more about the term "commercial," what that... [LB822]

KORBY GILBERTSON: The definition of commercial is a business transaction. And so any time they have any type of business transaction, that is broadening what this...what the intent of the public records act does. We would maintain there's a reason why there is a list of only 20 exceptions to the public records act. And I understand what they read in Chapter 70 where the district court said, well, they didn't address this in Chapter 70; it's not addressed in the public records act, so it should be addressed here. We just have a different way of looking at it. If it's a public records exemption, it should be in the public records act. But if that is a tipping point, put it in Chapter 70; we don't care. We want to help them be able to protect specific information. We just want to make sure it's not broad, so broad that they lose their accountability to the citizens of Nebraska. [LB822]

SENATOR BOSTELMAN: Senator McCollister. [LB822]

SENATOR McCOLLISTER: Yeah, thank you, Senator. According to Mr. McClure, we've been operating on the current public records request for around 35 years, correct? [LB822]

KORBY GILBERTSON: Yes. [LB822]

SENATOR McCOLLISTER: Okay. Were those statutes insufficient in any way that gave the media the feeling that they weren't getting the information they should be provided? [LB822]

KORBY GILBERTSON: No, I think Media of Nebraska has been very involved in drafting and working through all of the different public records act throughout those years. I don't think there's a complaint of that. I think there's a concern with the proposed amendment that it will create more records that aren't accessible to the public. [LB822]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

SENATOR McCOLLISTER: So those former statutes were sufficient, right? [LB822]

KORBY GILBERTSON: We believe so. [LB822]

SENATOR McCOLLISTER: Okay. According to the proponents of this bill, there's a clear and present danger to their competitive situation with this reading...or this ruling by the Nebraska Supreme Court. It's probably not going to be possible for us to do a comprehensive change of this statute in this short amount of time. [LB822]

KORBY GILBERTSON: Right. [LB822]

SENATOR McCOLLISTER: Would it be possible for us to make somewhat of an overly broad situation now and then come back in another year and fine tune the statute? [LB822]

KORBY GILBERTSON: I've only been doing this...working around this for about 27 years, so I haven't been around quite as long as that, but I have always noted that once you do a broad stroke, you aren't going to get it narrowed. It's going to be very hard to take something back that you've given someone. So I don't think...I think if you can address...if you can have AM2191, we can have a different amendment that does the same...that reaches their goals that doesn't provide this broad of an alternative. [LB822]

SENATOR McCOLLISTER: Do you have an amendment with you today? [LB822]

KORBY GILBERTSON: It's on the last page of your handout. What I did was I took the specific language from Mr. Ken's testimony and just connected it to the specific unit information. Obviously, I did not hear anything back from NPPD. I did hear back from LES that they did not want to discuss anything about the amendment. So I'm not aware of anything else they'd be willing to look at. But in listening to Ms. Dibbern's testimony, obviously, if there's information we can glean from the market monitor or anything else, of if there's other specific information that should be included in that, we would be very open to discussing that. And I don't think it would be time prohibitive that it would cause any problems. [LB822]

SENATOR McCOLLISTER: Thank you. [LB822]

SENATOR BOSTELMAN: Other questions from the committee members? On your amendment, I guess I have a question for you on...it would be the...I believe the Supreme Court, where it was, was the balancing where it says business competitors and serve no public purpose. [LB822]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

KORBY GILBERTSON: Right. [LB822]

SENATOR BOSTELMAN: Is there an "or" that could be placed in with "and." [LB822]

KORBY GILBERTSON: And that's something we could talk about. I know that...I mean there is a rule that when the court looks at something, if it's plain on its face, that's how they will read it. But if we need to discuss whether there's a balancing test, I know that we've always kind of looked at it as if the holder of those public records will look at it and kind of decide openly whether or not they're going to do anything. But if we want to look at that, I think that's something we can discuss. I don't know if we want it to be necessarily an "or" or have it...or specifically say it has to be a balancing test, but it would outweigh that. [LB822]

SENATOR BOSTELMAN: What other information in the amendment here, it says: generation unit specific cost and revenue information...I guess if this was not...if there was nothing done now, there was no amendment, what other information outside of this that you see that's now proprietary that would be...or would be covered under the current law with those 20 exceptions that's there that's not...that's releasable? [LB822]

KORBY GILBERTSON: I'm not sure I understand your question, but if you're asking me under current law what the risk is of different information being released because of the Supreme Court... [LB822]

SENATOR BOSTELMAN: Well, yeah, here in your amendment you're specifically identifying generation specific to cost and revenue information maintained by public power districts. [LB822]

KORBY GILBERTSON: Right. [LB822]

SENATOR BOSTELMAN: Those are two key areas. But what are the other areas that would be then releasable that you're talking about, because you say it's too... [LB822]

KORBY GILBERTSON: And, Senator, I wish I could tell you, but nobody would converse with me about it. So I can't give you any more information. [LB822]

SENATOR BOSTELMAN: Okay. Thank you very much. Other questions? Thank you for your testimony, appreciate it. [LB822]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

KORBY GILBERTSON: Thank you. [LB822]

SENATOR BOSTELMAN: Other opponents, please, AM2191. Welcome. [LB822]

DAVE BUNDY: (Exhibit 27) Welcome. Thank you, Vice Chairman Bostelman, committee members. I'm Dave Bundy, D-a-v-e B-u-n-d-y. I'm the editor of the Lincoln Journal Star and I'm chairman of the board of Media of Nebraska, testifying in opposition to AM2191, an amendment related to the public power open records contained in LB822. Nebraska's heritage of public power is singular in the United States. For well more than a century, Nebraskans electricity has been generated and distributed by community-owned, community-governed entities. It's the "public" part of the phrase public power that's truly powerful. Long before there were power grids and surplus capacity, power company...public power companies were partners in their communities. They were accountable to their shareholders, all of us, through open meetings laws and public records. AM2191 makes public power companies less public by exempting from public records statutes any information that would give advantage to business competitors without regard for the possibility that access to the information might serve a public purpose for us as stakeholders. As guardians of the public record, we media outlets typically have an aversion to any effort to encroach on public records. In this instance, we've taken the rare position of trying to help craft a compromise. We understand the need for our public power providers to be competitive. We want to help them do it in a way that does minimal harm to the transparency and accountability that is required of all kinds of government agencies in Nebraska. My computer, my blender, and the blow dryer that I don't need for my hair anymore all work the same wherever my electricity comes from. What sets Nebraska's public power system apart and it's part of the story the utilities tell proudly is how it's run and by whom. It's run publicly and ultimately by us. We respect the role of the executives, administrators, board members and employees we have placed this trust in. Their work translates into reliable service and affordable rates. But an erosion of these public records moves these public power providers or at least creates the appearance of a move further from the public and closer to a private profit-driven operation, driving a wedge between themselves and the communities that they were expressly crafted and created to serve. It's as true here as it's been every other time we've fought to keep public records public. Democracy and transparency are not always the most efficient way to run things, but they have served us well in the area of public power for more than a century. We ask you to reject AM2191 as it's currently worded. Our goal isn't to hamper the cause of public power in Nebraska. We have proposed and seek a more precisely worded amendment that's responsive to the core concerns of providers while keeping public power truly public. Thank you. I'd be glad to answer any questions. [LB822]

SENATOR BOSTELMAN: Thank you very much. Are there questions from the committee members? Senator Geist. [LB822]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

SENATOR GEIST: Yes, thank you. And thank you for your testimony. So do you have any pushback on the word "commercial"? [LB822]

DAVE BUNDY: I guess I share Korby's concerns about the broad definition of that because there are commercial...as I could see it, that there are things would fall under the broad topic of commercial that we as a media outlet, we as the public would be concerned with. So I think that that bears...you know, that would bear some further discussion. [LB822]

SENATOR GEIST: Okay. So just to be clear, then you would object to both commercial and anything that would give advantage to business competitor so both of those things? [LB822]

DAVE BUNDY: Again, I think that there's...this may not be the right answer. This is closer. I think that the amendment she has mentioned brings us nearer to something we would feel as compromise. But trying to foresee all of the potential, you know, records requests that we might make. The word "commercial" gives me heartburn... [LB822]

SENATOR GEIST: Okay. [LB822]

DAVE BUNDY: ...to put it bluntly. [LB822]

SENATOR GEIST: Thank you. [LB822]

SENATOR BOSTELMAN: Senator Albrecht. [LB822]

SENATOR ALBRECHT: Thank you, Senator Bostelman. So, Mr. Bundy, you're here with some media friends. Do you have a proposed amendment that you would like us to consider? [LB822]

DAVE BUNDY: Well, the amendment...I was part of the discussion that Korby mentioned. [LB822]

SENATOR ALBRECHT: Okay. [LB822]

DAVE BUNDY: So what...you know, if that did not seem that that went over particularly well with the people that she got feedback from in public power. So we would, you know, we'd like to continue the discussion and figure out if there's a way to narrow it beyond what we've done here that would be satisfying to both sides. [LB822]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

SENATOR ALBRECHT: So what do you think that the public really wants from you, the media, to be able to...if there were...if you were just talking to someone, what would be most important to them to know? [LB822]

DAVE BUNDY: I think that they'd want to know that public power providers were good stewards of their resources. [LB822]

SENATOR ALBRECHT: So the trust issue has to be there. [LB822]

DAVE BUNDY: I believe the trust issue would have to be there. Are we operating efficiently? Are people getting, you know, are people following the rules that are set forth for them? [LB822]

SENATOR ALBRECHT: So, you know, I'm just trying to dig into this as I'm sitting here. So we currently, this company that has gone to take the electric companies on in the state of Nebraska has obviously already landed in our state. And to me, you know, I don't know if I was sitting on the board that I'd probably want to be doing business with them knowing that they've taken us through all of this. So, you know, and being good stewards, if I'm sitting on one of those electric boards and I've had to go through all of this record check, if in fact they found something that we weren't doing right. But then when I read their articles and how they're selling their particular project that they can take care of 150,000 homes or 127,000 homes or...so I hope that, you know, we're here for a reason. I mean, this is to me very serious in that, you know, we already have it here in our state. And I want to trust that they are doing the right thing. And I want to know that if somebody is not going to do business with the public power and they decided to change, which in my neck of the woods they have, I want to see a reduction. I want to see a major reduction in the contract that that company decides to do for the people that are in my district. I mean if...I mean, so while I understand that this public record request, I mean, I've sat on enough boards to know that's a lot of information to ask of someone. You almost need a full-time person just taking care of that if it gets to be like this. And if you wanted to be a good partner, these people had to hook up with these different electric companies to go on the grid. And it's the same people that took them to court. That I'd have a little bit of heartburn with if I'm in that particular district that took on their wind project. [LB822]

DAVE BUNDY: I... [LB822]

SENATOR ALBRECHT: So how much is enough to keep covered up and not...I mean, I would have to say that I would want to protect this. I would want to protect the interest of what we currently have. If we've laid the grid down for all of this, we're all paying for it, everyone in this room. But for a company to be able to come in and do what they have done and taken us to court, I don't know that I'd want to break bread with them. [LB822]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

DAVE BUNDY: And that strikes me as falling under the competitive part of this... [LB822]

SENATOR ALBRECHT: Um-hum. [LB822]

DAVE BUNDY: ...which we don't have an issue with. And I do think, you know, that there is an element of common sense that's going to have to go into this. We, you know, in the media we make requests all the time for open records. And we're well aware that there are people that make nuisance requests that, you know, this... [LB822]

SENATOR ALBRECHT: There's a fine line. [LB822]

DAVE BUNDY: Exactly. And, you know, the people who make those nuisance requests make it harder for everybody else who we're trying to get information that we think is useful to the public. In the instance that you described, though, I do feel like that that very clearly calls into the not necessarily the commercial but definitely into the competitive element to this... [LB822]

SENATOR ALBRECHT: Um-hum. [LB822]

DAVE BUNDY: ...which is an element that we acknowledge is something that needs to be addressed in whatever form the amendment takes. [LB822]

SENATOR ALBRECHT: I appreciate your feedback. Thanks. [LB822]

SENATOR BOSTELMAN: Thank you. Senator McCollister. [LB822]

SENATOR McCOLLISTER: Yeah, thank you, Senator Bostelman. The lobbyist for your organization was our first speaker this afternoon. But as chairman of the board, you represent the rest of the members clearly. [LB822]

DAVE BUNDY: I'm an amateur at this though. [LB822]

SENATOR McCOLLISTER: Are you? At any rate, we talked about the statutes, the public records statutes have existed for 25 to 30 years. [LB822]

DAVE BUNDY: Um-hum. [LB822]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

SENATOR McCOLLISTER: And those were sufficient for your purposes, were they not? [LB822]

DAVE BUNDY: By and large, yes. And when we've fallen into a gray area, we make a request to the Attorney General's Office and we get a ruling and then we either accept it or we fight it another way. [LB822]

SENATOR McCOLLISTER: So if we could find a way to replicate those statutes and put those into a bill, would that be sufficient for your needs? [LB822]

DAVE BUNDY: You mean, for example, the 20 exceptions? [LB822]

SENATOR McCOLLISTER: Yeah. [LB822]

DAVE BUNDY: I would think so. [LB822]

SENATOR McCOLLISTER: Thank you. Thank you, Mr. Bundy. [LB822]

SENATOR BOSTELMAN: My questions would be we have a difference...my understanding of what we're talking about here, private entity, public entity. Private entity this same request would not apply. They would not have to answer. Public entity, when we have public entity, we have elected officials, board members, whatever it might be, people that are there to, if you will, watch over, ensure that entity is conducting business the way it is in the best interest of those constituents, those people who they represent. So do they...I guess my question really comes down to is they're providing the oversight already in a sense for public in general to look at the information, make sure things are being done right, rules are being followed, those type of things. Why is it that this same information would not be required to be given up by a private entity that doesn't have that same type because we...it seems...I guess, you know, it seems to me that we already have some of those safeguards, if you will, in place by having our elected officials there where on the private we don't. So why is it that it applies...you feel it applies to one but not the other? [LB822]

DAVE BUNDY: Well, I feel that it applies legally to a publicly owned and operated utility. And if we could talk the private folks into giving us that information, that would be wonderful. But that's beyond our ability right now. [LB822]

SENATOR BOSTELMAN: Understand, all right. Any other questions? Thank you very much for your testimony. [LB822]



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

DAVE BUNDY: Thanks. [LB822]

SENATOR BOSTELMAN: Other opponents to AM2191? Welcome. [LB822]

MIKEL LAUBER: (Exhibit 28) Good afternoon. My name is Mikel Lauber. It's M-i-k-e-l L-a-u-b-e-r. I'm a news director for 10/11 News in Lincoln and also help oversee KSNB-TV in Hastings, KNOP-TV in North Platte, and KNEP-TV in Scottsbluff. Much like government, in local TV we rely heavily on the trust of the people that we serve. Last year, our station conducted research of our viewers to find out the issues they find most important to our local communities. One finding that I think is relevant today, 64 percent of the people we surveyed said they have an extremely high interest in reporting that shows how proposals and decisions being made by state government could affect them. Sixty-eight percent said they had an extremely high interest in reporting that reveals potential waste or inefficiency. There was a higher interest in reporting on state and government issues than there was on Husker sports. And I don't have to tell you, that is saying something in Nebraska. But I believe it says a lot about the people of Nebraska. They want to be informed and they want to be involved. They have a strong desire for information that helps them and their representatives to make good decisions. The only way they can get that information is through public agencies that are as transparent as possible. This amendment would remove the words "and serve no public purpose" to the description of information that can be withheld from the public. So the amendment would very clearly allow information that could serve a public purpose to be withheld. That's concerning for us and I think it would be for our viewers too. Any restriction of information that is in the public interest, at the very least, creates an appearance of less transparency and cannot be good for trust. The people of Nebraska are ultimately responsible for the way the public utilities are run. And I think that's one of the differences from the question you asked before is privately held companies with investors have investors that are the watchdogs that get to see all the numbers and get to see all the information and make sure that their money is being taken care of. In Nebraska, that's the taxpayers. This amendment, as written, could limit the public's ability to make those informed decisions. So we ask for a carefully worded amendment that would protect Nebraskans while also preserving as much transparency as possible. And happy to answer any questions you have. [LB822]

SENATOR BOSTELMAN: Thank you very much. What questions any of the committee members have? Senator Walz. [LB822]

SENATOR WALZ: Okay. I just had a quick question. [LB822]

MIKEL LAUBER: Sure. [LB822]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

SENATOR WALZ: My husband happens to be in media so I'm just kind of curious how many new stories have you done regarding public power and public interest. I'm just curious. [LB822]

MIKEL LAUBER: Yeah. Public power specifically I would say honestly I've been at 10/11 News for about nine months. And in that time, not a whole lot. There haven't been...you know, maybe the individual issue that somebody had but not on a broad scale that required us to do any significant records requests. You know, I think the rates here have been very competitive. There haven't been...you know, one thing that's always a reason for us to do a story is if we're hearing feedback from our viewers that, hey, what's going on; hey, there's a problem. We seem out of line to other states. That hasn't been an issue with public power. [LB822]

SENATOR WALZ: Yeah. So you're saying...you really you haven't had...you haven't heard from the general public about concerns. [LB822]

MIKEL LAUBER: No. No. That's true. [LB822]

SENATOR WALZ: All right. [LB822]

MIKEL LAUBER: But I guess our fear always is... [LB822]

SENATOR WALZ: Sure. [LB822]

MIKEL LAUBER: ...if we get those concerns, if those sort of things start to crop up and, you know, part of our role is to go looking for that information that a broad change amendment like this could lead us to not be real clear on why we're unable to access information that might be important to the public. [LB822]

SENATOR WALZ: Or it could lead to a lot more concerns of the public. [LB822]

MIKEL LAUBER: Yeah, yeah, exactly. [LB822]

SENATOR WALZ: All right. Thank you. [LB822]

SENATOR BOSTELMAN: Other questions from the committee? Seeing none, thank you very much for your testimony. Next opponent, please. Welcome. [LB822]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

MICHAEL O'HARA: (Exhibit 29) Hello, Vice Chair Bostelman. My name is Michael O'Hara, O-'H-a-r-a. I'm appearing for the Sierra Club. We're in opposition to the amendment as drafted and we strongly support public power. Since this is the first time many of you will see me in this chair, although I've been in it many times, I'll give you a bit of my history. I used to be legislative staff to this committee and I left to write my economics dissertation on public power, then served a term on the Power Review Board, then a term on OPPD, and on the legislative committee LR455 studying deregulation. You have a serious problem. The concern they're expressing about Southwest Power Pool is exposing you to risk of somewhere between ten to hundreds of millions of dollars. You need an emergency clause. But this is a very bad way to go about it. Cutting to the chase, in the handout I gave you, on the back you have indented near the top the existing statutory language. In "(3) Trade secrets, academic and scientific research work which is in progress, and unpublished, and other proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose;" I would suggest you amend that. After the word "released" insert "clearly" and then delete "and serve no public purpose." "Clearly" is legal term of art. The ordinary civil burden of proof is preponderance of the evidence. "Clear and convincing" is much higher. So this would protect that we're going to mostly release information. The "no public purpose" creates a real problem in terms of being able to prove that there is a public purpose, that no public purpose is served. The public purpose that was proved in this case was largely specious and the consequence is far from specious. The power pools were set up to do reliability and now they're often engaged in for economic transactions. This is a very confused area because you're at the intersection of public records, public power, antitrust, and intellectual property. One area I very much disagree with the prior testifiers from industry. If a trade secret is delivered to the public power district as opposed to originates in the public power district, the public power district lacks the authority to dispense...to release that information. OPPD won a suit on that issue when they had uncovered through their efforts a trade secret of Burlington Northern when hauling coal. So I don't think that...they cannot protect the secrets of others, but they do have a real problem here in terms of getting access to that information that allows people to bid. To give you an idea of the value of that information, this is precisely information that Enron was bribing utility dispatchers for in California that caused the collapse of the California electric system. So when this information goes out, it's not going to have a small consequence here. If you have any questions, I'll be glad to answer them. [LB822]

SENATOR BOSTELMAN: Thank you very much for your testimony. Senator Geist. [LB822]

SENATOR GEIST: I'm a bit slow, but would you repeat what your suggestion was to make sure that I wrote it correctly? [LB822]

MICHAEL O'HARA: I do talk fast. [LB822]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

SENATOR GEIST: No, I listen slow. [LB822]

MICHAEL O'HARA: On top of page 2, you have the indented language "The following records" and that's quoting from 84-712.05(3). And the (3) part is the trade secrets. When it gets to the second of the last line, the last line ends "which if released would", between "released" and "would" insert "clearly." I hate splitting the infinitive. And then delete the concluding "and serve no public purpose." [LB822]

SENATOR GEIST: Okay. I did it correctly. [LB822]

MICHAEL O'HARA: All you got to do is allege a public purpose and then the utility had to release and that is accessible. [LB822]

SENATOR GEIST: Thank you. [LB822]

SENATOR BOSTELMAN: Thank you. Other questions? No other questions? Seeing none, thank you very much for your testimony. [LB822]

MICHAEL O'HARA: I do think you need the emergency clause. [LB822]

SENATOR BOSTELMAN: (Exhibits 30-32) Yeah, okay. Thank you. Next opponent. Do we have any other opponents to AM2191 of LB822? Seeing none, we do have some letters in opposition: Spike Eickholt from the American Civil Liberties Union Foundation Nebraska; Twyla Gallino from Valentine, Nebraska; Mark Salerno from International Brotherhood of Electric Workers IBEW #1483. At this time, I would open it up for anyone who would like to testify in the neutral capacity. Welcome. [LB822]

TIM TEXEL: Vice Chairman Bostelman, members of the committee, my name is Tim Texel, first name is T-i-m, last name is T-e-x-e-l, and I'm the executive director and general counsel for the Nebraska Power Review Board. As the committee is aware, the Power Review Board is the agency with primary jurisdiction over electric suppliers operating in the state of Nebraska. The Supreme Court case that is the driving force behind AM2191 to LB822 was issued on Friday, February 23, during the board's monthly meeting. So my board as a result has not had any opportunity to consider this issue. And that's why I'm here testifying neutral. I can't say what the board in its entirety would take, if any position, other than neutral. I have spoken with my board chair and vice chair, but I specifically did not speak with the other members so I didn't speak with a quorum about this other than I did prepare a legal brief for them to make them aware of the case and distributed that. But I have not actually discussed it with them. Although the board

Natural Resources Committee  
March 07, 2018

---

takes no specific position on the amendment, my board chair, vice chair, and I did want to point out some issues for the committee's consideration. In the Aksamit v. NPPD decision, the Supreme Court acknowledged that the entity requesting the pricing and cost information on specific generation facilities seeks to compete with NPPD. I think it's been said previously it's not, I don't think, in contention here that they were a competitor or wanted to be a competitor. The court also acknowledged that the information requested is proprietary and commercial information that could provide an advantage to NPPD's business competitors in the facts in this case. But the court ruled that the separate and distinct prong in the evaluation is that if the disclosure of the records serves any public purpose, the records have to be disclosed. So setting that out. Also mentioning that the Southwest Power Pool operates as a regional market where member utilities bid into the market their generation resources. And our larger utilities--I won't go through which ones those are but obviously NPPD--bid into that market competitively against all the others bidding in. Given that scenario, it's easy to see why the Supreme Court acknowledged that the pricing and cost information requested was proprietary and commercial information that could give an advantage to the competitors. For the committee's consideration, I just wanted to point out a statute and some language in the PRB's statutes and that says it's the policy of the state of Nebraska that public power utilities "provide the citizens in this state with adequate electric service at as low overall cost as possible consistent with sound business practices." That's from 70-1001. So requiring public power entities to engage in generation to provide specific pricing and cost information about their facilities might have a tendency to put those public power entities at a competitive disadvantage. Now in the Supreme Court case they were just dealing with does it have a public purpose and not this. So I did want to point out that given that the Legislature has taken that policy already, it may be a factor you want to take into consideration the Legislature has already stated that as its policy for the state of Nebraska. And whether there should be or what the language would be in any amendment, of course, is entirely up to the Legislature. I would like to mention that I have seen the amendment that Media Matters proposed. I would like to mention on that, and I see my time is up, but I just mention that it only deals with public power districts very narrowly because of what the case stated, but it does not deal with protecting information for municipalities like Lincoln Electric System or interlocal entities such as MEAN, Municipal Energy Agency of Nebraska. So you'd at least need to broaden that from just public power districts because it would only help a portion of our public power industry, and we wouldn't want to expose the others if the Legislature decided to move forward on that. And also public power and irrigation districts I think you'd need to be very careful given how the court construed the language narrowly what entities are involved if you start listing them specifically. So with that, I'd be glad to answer any questions. [LB822]

SENATOR BOSTELMAN: Are there any? Senator McCollister. [LB822]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

SENATOR McCOLLISTER: Yeah. Thank you, Senator Bostelman. It's my understanding that this ruling by the Supreme Court has much broader application than just the electric utilities in our state, may influence MUD and any other public body. Is that correct? [LB822]

TIM TEXEL: I would think so, yes. Certainly for my records could be implicated...I think a lot of other state agencies could have records implicated by this. I don't have an exact handle on which ones, though, this would be. But I would think...it has much broader application to just the public power industry because it deals with the Administrative Procedure Act, not specific to public power. So, yes, all state agencies, political subdivisions would be subject to that same language or that same decision by the Supreme Court. [LB822]

SENATOR McCOLLISTER: Thank you very much. [LB822]

SENATOR BOSTELMAN: Senator Geist. [LB822]

SENATOR GEIST: Again, I think I was listening slowly. Would you again just repeat where that statute, where that policy is? [LB822]

TIM TEXEL: 70-1001. It's in the first sentence, the part that I read of our introductory statute that sets out our...the policy for the state and then it goes into why...kind of sets out why the Power Review Board is doing what it does to avoid conflict in competition between our public power entities. That's a broader statement at the very beginning that says the overall policy of the state. So I just picked out that portion of that statute. It's a little bit longer statute. I didn't have time to read the entire thing. It goes into, you know, that we don't want public power competing against itself. In this case, it's other entities that are getting that information so. [LB822]

SENATOR GEIST: Okay. Thank you. [LB822]

SENATOR BOSTELMAN: Senator McCollister. [LB822]

SENATOR McCOLLISTER: Yeah. Thank you. You did say in the statute that you quoted that the price should be an objective... [LB822]

TIM TEXEL: Low cost... [LB822]

SENATOR McCOLLISTER: Low cost should be an objective. Thank you very much. [LB822]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

SENATOR BOSTELMAN: Other questions from committee members? I would ask if there was anything else you had at the end of your testimony that you would like to expand upon. [LB822]

TIM TEXEL: I guess I would probably say if you're going to make a change to this it makes sense to make it where it is in the amendment and not to the APA. I think the Administrative Procedure Act is a broad statute that sets out the broad statement of policy and some of the specifics. But the court was, I think, very clear that it looked to the...it cited the lengthy statutes dealing with public power and it looked to see if there was any specific exemption for these types of records there. Regardless of what it says, I think if you're going to put it somewhere, the court expected it would be in, I would think, Chapter 70, Article 6. And the court looked to those statutes and said there wasn't an exception there so the Legislature could put one there if it so chooses or if it had chosen and it didn't do so. And I think the court said thus far it has not chosen to do so. So clearly the court was pointing out if the Legislature wants to change this it's your prerogative. The court is not obviously lobbying to do that, but I think let the Legislature know if you want to change it if we didn't...the court, if the court didn't make the decision the Legislature likes, it's up to you to write the new one. It's reading it as it is. [LB822]

SENATOR BOSTELMAN: Thank you. Any further questions from the committee? Seeing none, thank you very much for your testimony. [LB822]

TIM TEXEL: Thank you. [LB822]

SENATOR BOSTELMAN: (Exhibit 33) Anyone else would like to testify in the neutral capacity? Anyone else like to testify in the neutral capacity on LB822...of AM2191 of LB822? Seeing none, we have one letter of neutral for us from Michael Matheson of Wind is Water Foundation. With that, I'd ask Senator Hughes to please come and close on AM2191 of LB822, please. [LB822]

SENATOR HUGHES: Thank you, Vice Chairman Bostelman, members of the committee. This has been probably one of the best hearings I've ever attended. Everybody who came was very clear that we have a problem in Nebraska. They're all coming at it from a different angle. I think we heard from everyone that time is of the essence. That we need to get this done sooner rather than later because of the time constraints in the Legislature. I'm certainly going to encourage testifiers on all sides to try and come together and see if we can't get the right language that protects the public interest, protects public power so we can move as a committee and get this out on the floor. The one thing that I do want to emphasize that, you know, this is about power. This is not about coal versus wind versus nuclear versus solar. This is about power as a commodity regardless of where it comes from. And the commodity that Nebraska public power produces is the same commodity that is produced in other states in the SPP. So we are competing

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Natural Resources Committee  
March 07, 2018

---

against power generated from Texas to North Dakota. And I believe it is our responsibility that we protect the ratepayers of the state of Nebraska because they are the investors. They are the owners of the power that is generated in the state. So it is not where it comes from. I guess with that, I'll close and answer any questions. [LB822]

SENATOR BOSTELMAN: Thank you, Senator Hughes. Are there any further questions from committee members? Seeing none, this will close the hearing on AM2191 to LB822. Thank you all for coming today and... [LB822]