

**Pennsylvania House  
Consumer Affairs Committee**

**Senate Bill 168  
August 11, 2010**

**Testimony of John W. Bentine, Esq.**

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**on behalf of American Municipal Power, Inc.**

Good morning Mr. Chairman and members of the committee and thank you for the opportunity to be here today. My name is John Bentine. I am a partner of the Columbus, Ohio law firm of Chester Willcox & Saxbe, LLP and Chair of our Energy and Utility Practice Group. I have served as general counsel for American Municipal Power, Inc. ("AMP") for nearly 30 years. My practice includes representing numerous entities, including municipalities, consumers and others in various proceedings at state and federal regulatory commissions. I am not admitted to practice law in Pennsylvania, so I do not address you as such. Additional biographical material is attached.

I am pleased to have the opportunity to appear before you this morning to offer testimony on Senate Bill 168 – legislation designed to allow Pennsylvania boroughs to participate in electric power generation projects that are being undertaken by AMP. Several AMP member boroughs in Pennsylvania are advocating enactment of this bill, as well as the Pennsylvania Municipal Electric Association and the Pennsylvania State Association of Boroughs.

By way of background, AMP was founded in 1971, and is currently the nonprofit wholesale power supplier and services provider for 128 community-owned and-operated municipal electric systems in six states – Ohio, Pennsylvania, Michigan, Virginia, West Virginia and Kentucky. 30 of our member systems, often called "public power" communities, are located here in Pennsylvania, making this state our second largest delegation. The first member community – Ellwood City – joined AMP in 1998, and the Borough of Goldsboro just joined last year. Ohio has 81 members. Our members serve more than 570,000 customers in these six states. AMP is governed by an active Board of Trustees consisting of 19 member municipalities elected by our members. Pennsylvania is represented on the Board by Gary Nace, borough manager for Ephrata.

Nationwide, there are more than 2,000 public power systems, which provide electricity to approximately 40 million Americans (about 15 percent of all electric sales). Some of the nation's largest cities – Los Angeles, Orlando, San Antonio and Seattle – operate publicly owned electric utilities. However, the majority of public power communities are small-to-medium sized, serving 3,000 or fewer customers.

As non-profit entities, municipal electric systems exist to provide reliable, affordable, environmentally sound electric service to their customer-owners. Municipal electric systems are locally owned, managed and governed. They are primarily distribution utilities, do not own significant transmission facilities, and are often referred to as being "transmission dependent."

Members of AMP have access to a variety of services from AMP that may otherwise be unavailable to them, or uneconomic, because of their relatively small size. These include line worker training programs, a newly expanded, comprehensive energy efficiency program, safety and OSHA training, power supply planning and other technical and engineering related services to assist our members in maintaining a safe, reliable distribution system. Our members also participate in a mutual aid program, which again came into action only recently, when the remnants of Hurricane Ike blew through our region and caused significant damage and power outages. In Ohio, we were proud to note that we had 100% restoration in our communities before any of the investor-owned utilities. Service crews were literally crisscrossing the state assisting

each other to bring full restoration to residents and businesses. And when complete, they turned to assist the private utilities in their efforts as well.

### **Current Power Supply**

AMP uses a combination of AMP and member owned generation assets and purchased power arrangements to secure reliable wholesale power for member utilities. The organization sells power to its members at cost-based rates with only small service and dispatch fees added. Unlike some joint action agencies in other regions, AMP members can pick and choose which projects or power supply arrangements they want to participate in.

AMP's member communities receive their power supply from a diversified resource mix, resulting in an economic, reliable dispatch of energy. These resources include: wholesale power purchases through AMP and on the open market, and energy produced by AMP and member owned-or controlled resources, which includes coal, landfill gas, wind, hydro and distributed generation resources. While I won't go into detail about our assets, below is a brief summary of our current generating resources.

●The run-of-the-river *Belleville Hydroelectric Plant*, located on the Ohio River at the Belleville Locks and Dam, provides 42 MW of renewable energy to 42 Ohio participating municipal electric communities and is backed up by local distributed generation. Several members also own and operate local hydroelectric facilities that total more than 80 MW.

●The *AMP Wind Farm* located at the Wood County Landfill near Bowling Green, Ohio began producing power in November 2003. It was the first, and to date is the only, utility-size wind farm in the state. Ten municipal electric communities participate in the project, which consists of four turbines, each of which has a rated capacity of 1.8 MW.

●The *Richard H. Gorsuch Generating Station*, a 213 megawatt ("MW"), coal-fired power plant in Marietta, Ohio, which supplies power to 47 participating municipal electric systems. The Gorsuch Station employs approximately 95 workers although this nearly 60 year old facility is scheduled to close by December 15, 2010.

●*Landfill gas generating facilities* provide up to 31.5 MW of power to participating member communities across Ohio. Located at four landfills around the state, the projects use recovered methane gas as fuel.

●*Distributed generation resources* that provides up to 190 MW of power for use during peak times by participating communities. The projects, which include natural gas and diesel peaking units placed strategically inside our members' systems, also provide emergency back-up for those members systems.

### **Wholesale Market Forces**

As previously noted, our member municipal electric systems are primarily distribution utilities, meaning they operate and maintain the electric lines and equipment that deliver electricity to their customers' homes and businesses. The overwhelming majority of our member municipal electric systems work through AMP to secure their power on the wholesale electric market to

meet their customers' retail energy needs. AMP contracts for the delivery of that electricity to its member systems over the transmission lines owned by private entities and run by Regional Transmission Organizations ("RTO"), such as PJM Interconnection, L.L.C. ("PJM") here in Pennsylvania.

Within the past few years, municipal electric system leaders have become increasingly concerned about the changes taking place in the wholesale electric market. On the whole, AMP member communities are currently over-exposed to the volatile wholesale electric market, with 62 percent of base load power needs coming from market purchases. In recent years, AMP has averaged more than \$500 million in annual wholesale power purchases. For a variety of reasons, including the impact of regulatory rules at the state and federal levels, an increasing demand curve for wholesale electric power and a lack of new generation coming online, the wholesale electric market has become increasingly dysfunctional. This has led to extreme volatility in the market and a sharp rise in wholesale rates. This situation is projected to continue into the future and, indeed, some have predicted generation shortages for this region by 2016.

In the past, municipal electric systems would be able to secure their power supply needs for terms of 20 or even 30 years. In recent years, power supply contracts longer than about five years are extremely hard to come by. The dysfunction of the wholesale market has led to significant cost increases for our member communities. Resolving these issues rests with the Federal Energy Regulatory Commission ("FERC"), the federal agency responsible for ensuring that rates charged for using the transmission system are "just and reasonable." We have and continue to express our frustration with FERC, and have joined like-minded interests, including a diverse group of large and small energy consumers, to relay our concern to federal regulators.

### **Looking Forward**

As we noted earlier, the wholesale electric market has become increasingly dysfunctional, leading to extreme volatility in the market and a sharp rise in wholesale rates. This situation is projected to continue into the future. For that reason, and following up on a strategic plan AMP completed in 2002 which included a 20-year power supply needs analysis that identified the need for new base load generation capacity, AMP is embarking on an aggressive generation asset development plan, to provide its members with increased control over power costs through assets that they own or control, through the organization. This asset development plan includes partial ownership of a clean-burning coal-fired facility in Illinois and significant investments in renewable energy resources, including the largest deployment of new run-of-the-river hydro power in the United States and the addition of up to 300 MW of solar power to our portfolio. In addition, AMP is undertaking an energy efficiency program that is designed to save 70,000 megawatt-hours ("MWh") of participating member utilities' energy needs within three years.

We are also aggressively pursuing a portfolio that includes other generating resources. As noted earlier, our members have ownership in several hydroelectric facilities, including two along the Ohio River. We have since secured the FERC licenses for additional development opportunities at existing locks and dams along the Ohio River, and are currently developing projects at three sites. In fact, we are working with Voith Hydro of York, Pennsylvania on these projects, having signed a more than \$400 million contract with the firm earlier this year to manufacture bulb turbines and generators for the projects. In addition: (i) our member Hamilton, with our support,

secured the license for which AMP was recently approved as co-licensee, for a fourth project along the Ohio River to develop for Hamilton and our members; (ii) AMP has secured the rights for another timed-release hydro project in West Virginia; (iii) with our members Wadsworth and Oberlin, we are the lead applicants for a fifth and sixth license, respectively, along the Ohio River. Full development of these projects will result in more than 400 MW of new clean, renewable electricity.

We also have an approximately 23% interest in the 1,600 MW Prairie State coal-fired project currently under construction in Illinois, with several other public power joint action agencies and cooperatives as partners – 68 of our members from Ohio, Michigan, Virginia and West Virginia are participating in that project.

We are working with Berlin, Pennsylvania on a wind project here in Pennsylvania and are involved in a number of other renewable projects such as landfill gas, solar and additional wind.

In June, we announced an agreement to develop up to 300 MW of new solar energy generation capacity. The 30-year agreement has the potential to yield one of the largest groups of solar electric development in the country, and construction is expected to begin this year.

The end goal through the pursuit of these assets is to reduce the current over-exposure AMP member communities have on the volatile wholesale market.

### **Take-or-pay and take and pay contracts**

As a non-profit, when AMP undertakes major construction projects that require AMP to borrow significant sums in the capital markets or from lending institutions, AMP, in order to get the most attractive terms and pricing, will offer participation in these projects on the terms of “take-or-pay” contracts. As noted above, participation is always at each member’s option. Some power purchases from third parties and purchases of existing assets where there is no construction risk may be accomplished with “take and pay” contracts where payment only needs be made if power is “available”.

AMP has been advised by its financial advisor, bond counsel, special financial and tax counsel, a host of investment and commercial bankers and others such as bond insurers and rating agencies, that its access to funding for major construction projects on favorable terms is dependent on AMP, and not the lenders, taking the construction and operating risk of these projects – the risk that some unanticipated calamity or the application of some unanticipated law or regulation or site limitations, soil conditions or other circumstances will force AMP to terminate construction of a Project before completion or to shut down or reduce the operation of a completed Project. These contracts are referred to as “Take or Pay.

These take-or-pay contracts confer on the participants a substantial basket of contractual rights akin to rights of ownership in the projects in which they receive, at AMP’s cost, the right to shares of the project’s electrical output. In exchange for their receiving the benefits of “quasi-ownership” of the projects, the take-or-pay contracts place the risks of ownership – that the projects are not completed, fail to perform as projected or are destroyed and cannot be rebuilt – with the participants. These risks are basically the same as a participant would assume were it to

issue revenue bonds payable from the net revenues of its electric system to build an electric generating facility and hired AMP or another entity as its general contractor. Were the project to be a failure for any reason, the participant issuing its revenue bonds would nonetheless be liable on those bonds the same as if the project were a success.

Take and Pay contracts often confer similar rights.

Collectively, through joint participation in these major projects, members of AMP can have access to virtual ownership of a diverse mix of right-sized participations in large, efficient electric generating facilities with all the economies of scale, and spread their risk across multiple projects. Participants, collectively, will enjoy in these contracts many of the rights associated with ownership, including a say in many of the major decisions respecting the financing, construction and operation of the projects, and the lowest cost financing available in the capital markets.

Electric generating facilities are very capital intensive projects, and securing the necessary financing is a substantial undertaking. Utilizing the take-or-pay contractual arrangement is not unique to AMP. In order to achieve the best possible financing arrangement, and thus the lowest cost, take-or-pay contracts have become the norm and legal backbone for large electric generation projects across the nation developed by public power systems.

Lenders will provide construction financing at attractive rates where states have authorized their use, because the participants, and not the lenders, are assuming the risks (and receiving the benefits) of ownership. This explains why most states have granted explicit statutory authority to municipal electric systems to enter into take-or-pay contracts or have court decisions or constitutional provisions that affirm that authority. Although a bit dated at this point, I have attached a partial list of such states.

### **SB 168**

AMP members in five of the six states in which we serve are currently participating in one or more of the projects I've noted above. Their ability to do so is contingent on their ability to finance projects using what is called "take-or-pay" contracts. Currently, Pennsylvania law does not explicitly allow for this type of contractual arrangement. As such, the interest of our member communities in Pennsylvania to participate in any of AMP's proposed generation projects has led a number of them to pursue this legislation.

AMP members participating in our asset development projects are all participating under the take-or-pay contractual arrangements. In addition, previously built projects, including the Belleville Hydro project and the AMP Wind Farm, both utilize take-or-pay type agreements, with project costs ending up below projected levels. The question posed by this legislation is why should not Pennsylvania boroughs be able to participate in such projects if they so choose.

## **Conclusion**

As noted previously, our member communities electric rates are subject to significant market pressures. The adoption of clarifying language as proposed in SB 168 will allow Pennsylvania municipal electric communities the option to participate in asset based projects, whether offered by AMP or others. The legislation does not require communities to participate; it simply provides them the option to join fellow public power communities in Pennsylvania and other states in pursuit of generation resources that they would collectively control. Securing “quasi-ownership” in generating assets helps minimize public power communities exposure to the volatile wholesale electric market and this legislation could play a key role in helping to meet that objective and assuring stable, lower electric rates for the participating Pennsylvania boroughs’ consumers for years to come.

Thank you again for the opportunity to appear before you this morning. I would be happy to answer any questions.

Attachments

# **Attachment A**



**Take-or-Pay Statutes/Court Decisions**  
**(As of 4/17/07)**

Arizona:	Ariz. Rev. Stat. Ann. s. 45-1708
Delaware:	Del. Code Ann. Tit. 22 s. 1307
Florida:	FL. Statutes s. 163.01
Georgia:	Ga. Code Ann. s. 46-3-110
Indiana:	Ind. Code s. 8-1-2.2-10
Louisiana:	La. Rev. Stat. Ann. s. 33:1321-1337
Maine:	Me. Rev. Stat. Ann. Tit. 35-A s. 4133
Massachusetts:	Mass. Gen Laws ch. 164, ss 1-5
Michigan:	Mich. Comp. Laws Ann. s. 460-843(1) [further revisions enacted in 2007]
Minnesota:	Minn. Stat. Ann. s. 469.153 and s. 463.155
Mississippi:	Miss. Stat. Ann. s. 77-5-7298
Missouri:	State v. S. Kestown 555 SW2 <sup>d</sup> 281 (1977)
Nebraska:	Neb. Rev. St. s. 70-1412
North Carolina:	N.C. Gen Stat. Ann. s. 159B-12
North Dakota:	N.D. Cent. Code s. 40-33.2-08
Ohio	“plenary power” under Ohio Constitution, Article XVIII and cases cited
Oregon	DeFazio v. WPPSS 679 P. 2 <sup>d</sup> 1316
South Carolina:	S.C. Code Ann. s. 6-23-110
Tennessee:	Tenn. Code Ann. s. 7-39-316
Texas:	Tex. Utilities Code s. 163.051-163.102; Tex. Government Code, ch. 1371
Virginia:	Chapter 612, 2007 Acts of the Assembly; Va. Code Ann. 15.2-5408
West Virginia:	SB 615 (March 8, 2007)
Wisconsin:	Wis. Stat. Ann. s. 66.0825

# **Attachment B**



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*Energy and Regulated  
Industries Chair*

## Energy, Communications, Utilities, and Local Government

*Represents clients in all aspects of electric, natural gas, communications, and water/wastewater industries, local government law, and related litigation.*

### Representative Experience

- Has over 30 years experience before the Public Utilities Commission of Ohio, Ohio Power Siting Board and various federal and other states' regulatory commissions, as well as Ohio and federal courts, including numerous successful cases before the Ohio Supreme Court
- Served as lead counsel in hundreds of regulatory commission and court proceedings involving billions of dollars
- Pioneered unique joint ventures of local governments to jointly finance, construct, own and operate electric, water and wastewater facilities
- Advises numerous public and private clients in energy, communications, and water/wastewater related matters, including facilities financing, construction and operation, as well as long term purchase and sale contracts
- Issuer's Counsel for client bond issues and other financings totaling billions of dollars

### Other Professional Experience

- Served on the technical staff of the PUCO (1973-1975)
- Assistant Attorney General and counsel to the PUCO (1975-1978)
- Assistant City Attorney and Senior Assistant City Attorney for the City of Columbus, Ohio (1978-1981)
- Served as Chairman of Executive Committee/Managing Partner of Firm (1997-2008)

### Education

- Marshall University (B.B.A., 1970)
- The Ohio State University (J.D., cum laude, 1975)

### Bar Admissions

- Ohio
- U.S. District Court, Southern District of Ohio

### Professional Memberships and Community Service

- Columbus Bar Association, Chair, Public Utilities Committee (1993-1994)
- Ohio Bar Association, Chair, Public Utilities Committee (1994-1996)
- American Bar Association
- Ohio Veterinary Medical Licensing Board (2004 - 2006)
- Active leader in several charitable/educational fundraising endeavors including Hope Street Kids (pediatric cancer research) and Rebuilding for the Future (\$2 million campaign to rehabilitate community high school stadium and field)
- Recipient, 2003 Upper Arlington Community Enrichment Award

# CHESTER WILLCOX SAXBE

ATTORNEYS & COUNSELORS AT LAW

**John W. Bentine**  
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#### **Achievements and Awards**

- AV® Peer Review Rated\*
- Named one of Columbus law firm's top managing partners by Columbus CEO Magazine in its 2005 Best CEO's issue
- Listed in Best Lawyers in America, Communications Law, Energy Law, Municipal Law, Oil & Gas Law and Water Law
- Listed in Ohio Super Lawyers, Utilities

#### **Speeches and Publications**

- A frequent lecturer and panel member in continuing legal education and other seminars
- Numerous appearances as a witness before various committees of the Ohio Legislature regarding electric, natural gas, communications and water/wastewater matters

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