MINUTES OF THE
SENATE COMMITTEE ON ENERGY, INFRASTRUCTURE AND TRANSPORTATION

Seventy-fifth Session
February 17, 2009

The Senate Committee on Energy, Infrastructure and Transportation was called to order by Chair Michael A. Schneider at 8:09 a.m. on Tuesday, February 17, 2009, in Room 2135 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Michael A. Schneider, Chair
Senator Maggie Carlton, Vice Chair
Senator Shirley A. Breeden
Senator Randolph Townsend
Senator Barbara K. Cegavske

COMMITTEE MEMBERS ABSENT:

Senator John J. Lee (Excused)
Senator Dennis Nolan (Excused)

STAFF MEMBERS PRESENT:

Matt Nichols, Committee Counsel
Scott Young, Committee Policy Analyst
Sandra Hudgens, Committee Secretary

OTHERS PRESENT:

Charles Benjamin, Ph.D., J.D., Director, Nevada Office, Western Resource Advocates
Joe Johnson, Sierra Club, Toiyabe Chapter
Stephen G. Wells, Ph.D., President, Desert Research Institute
Kyle Davis, Policy Director, Nevada Conservation League
Rose McKinney-James, Solar Alliance

Monica Brett, Southwest Energy Efficiency Project
Chris Brooks, Renewable Energy & Energy Conservation Task Force; American Solar Energy Society of Southern Nevada
Hatice Gecol, Ph.D., Energy and Science Advisor; Director, Nevada State Office of Energy
Bruce Kittess
Mary Fischer
Scott Jackson, Chief, Investigation Division, Department of Public Safety
Brian McAnallen, Director of Government Affairs, Embarq
Orrin Johnson, Deputy Public Defender, Washoe County Public Defender's Office

CHAIR SCHNEIDER:
The letter to U.S. Senator Harry Reid concerning renewable energy and energy efficiency in Nevada has been drafted (Exhibit C). An article from the *Las Vegas Review-Journal* (R-J) about the identification theft lab found in Nye County (Exhibit D) concerns the Real ID Act of 2005. Another article in the R-J is about the electric-rate increase from NV Energy (Exhibit E). The Public Utilities Commission of Nevada asked the Legislature to become involved in getting lower income people less of an increase in the cost of power. People are asking us for help with this. The Department of Motor Vehicles responded to the question on the timeline required to implement the Real ID Act (Exhibit F).

I will open the hearing on Senate Bill (S.B.) 114.

SENATE BILL 114: Makes various changes relating to systems for obtaining and using solar energy and other renewable energy resources. (BDR 58-380)

The legislative intent on energy statutes is extensive. We are asking for more renewable energy. The Legislature finds government and private enterprises need to accelerate research and deployment of sources for renewable energy. We established the Nevada State Office of Energy to promote the use of renewable energy. Senator Townsend spearheaded the creation of the Renewable Portfolio Standard (RPS), one of the most aggressive RPS programs in the Nation. Senator Townsend was instrumental in establishing a temporary renewable-energy development program to assist with the completion of renewable-energy products. The Legislature established an entire task force on renewable energy and energy conservation to create incentives for investments in use of renewable energy. We created the "Solar Energy System Initiative

Incentive Program" to provide rebates to enable more customers to install solar systems to homes and businesses. We grant tax abatements for renewable-energy systems. The Legislature placed a 30-kilowatt (kW) PV system on the State Printing Office across the street. The Legislature mandated building codes to allow the use of renewable resources. The Legislature has emphasized the support of renewable-energy systems.

Renewable energy of all types is contained in President Obama's stimulus package. Global warming is another concern for renewable energy. On February 4, 2009, Dr. Steven Chu, the new U.S. Secretary of Energy, warned global warming may end agriculture in California by the end of this century, because of changes in the Sierra snowpack. That snowpack also supplies us with drinking water. Nevada has enacted renewable-energy public-policy mandate, under Nevada Revised Statute (NRS) 111.239 prohibiting covenants, restrictions or conditions, contained in a deed, contract or other legal instrument, affecting real property from prohibiting or unreasonably restricting the owner of a property from using solar energy systems. The NRS 278.0208 contains the same prohibition directed at an ordinance, regulation or plan of a governing body. There is a need to strengthen and clarify the last two policy enactments to prevent them from being evaded by some common-interest communities. If the Legislature sets energy policy for the State, will a board of a common-interest community thwart the public policy? Senate Bill 114 clarifies NRS 111.239 and NRS 278.0208 and all legislative pronouncements on renewable energy to mean what we said they mean. "Renewables" are to be encouraged and not prohibited from being installed. This bill was created because a common-interest community refused to allow a resident to install efficient black solar panels. The terra-cotta panel that the resident was told she must use is 34 percent less efficient than the black panels, according to the National Renewable Energy Laboratory.

These systems are expensive. It can take up to 30 years, the lifetime of the system, to fully amortize the cost of the 1-kW system. It is essentially impossible to recoup the cost of the system for a customer who is trying to do the right thing. This terra-cotta system will create less power and the amount of emissions is reduced, compared to a better system. It will discourage a person from putting up a solar system. The number of common-interest communities in Nevada, as of October 2008, is 2,958. The number of residential units, in those homeowners associations (HOAs) is 467,185. This is too great a number of Nevada homes, potentially restricted on the use of solar, to allow an individual

association, overseen by boards of three to seven people, to impose their own subjective notions of what is reasonable based largely on their notions of aesthetics.

The abuse of HOAs was the reason for the preamble of S.B. No. 192 of the 70th Session. That was Senator Raymond D. Rawson's bill in 1999. The bill states "homeowner associations are quasi-governments."

> WHEREAS, Some unit-owners' associations in this state have a history of abuse of power; and
>
> WHEREAS, Unit-owners' association have power over one of the most important aspects of a person's life, his residence; and
>
> WHEREAS, Homeowners invest financially and emotionally in their homes; and
>
> WHEREAS, Homeowners have the right to reside in a community without fear of illegal, unfair, unnecessary, unduly burdensome or costly interference with their property rights; ... .

The Legislature created the Solar Rebate Program in 2003, but it has not created the results we intended. Under the rebate program each year, there are three categories: schools, public and other property and private residential and small business property. The total-capacity allotment for all the categories since the inception of the program is 34 megawatts (MW). We have installed only two MW. We need to see how the program can be more productive. I am adding an amendment to the bill, deleting the wind systems. The benefit of prefiling bills is for interested parties to study the bills and provide feedback before the bill is heard. The object of S.B. 114 is to increase solar systems in Nevada. Wind systems perform best on tall towers, which can present safety issues in dense-built urban areas, and also create noise problems. As amended, S.B. 114, page 3, line 30 and page 4, line 12, deems any restrictions on efficiency of more than 10 percent to be unreasonable by law.

A remark by the director of the Florida Solar Energy Center, a leading institution on solar energy, responded to the question, "Is a 9-percent decrease in efficiency significant?":

> Even something which causes, say a 9-percent reduction, is still a significant impact on the system's value to the environment. In fact, I would argue that even a 1-percent reduction in the output of a large residential array represents a significant amount of

fossil-fuel burn, carbon emission and other negative effects over a 30-year period. And, therefore, it is very significant.

The bill also prohibits restrictions on the use of solar systems using black glazing, because it is the most efficient color for solar collectors. That is in the bill on page 3, lines 35 to 37 and page 4, lines 17 to 19. On page 3, lines 19 - 22, and page 4, lines 1 - 4 states, "... and which prohibits or unreasonably restricts or has the effect of prohibiting or unreasonably restricting the owner of the property from using a system ... ." This language is significant because an HOA or a local government could impose restrictions that would not prohibit solar systems but make them costly and less efficient; the restrictions would act as a prohibition. The bill authorizes the director of the Office of Energy to determine if a particular restriction violates the statute if any dispute arises between a homeowner and the HOA board. We chose the Energy Office because we want an objective decision if there is any dispute. We do not want a homeowner to have to hire a lawyer and go through court to navigate the delays. We do not want the HOA board to make a determination on efficiency, because they would not have the skill or objectivity to do so. This is a scientific question, and the calculations should be made by a professional. There are not many solar systems available; therefore it would not be difficult for a qualified person to make a determination. A decision in one case would set the precedent for future, similar cases involving the same system. The director can request guidance from qualified institutions. The National Renewable Energy Laboratory in Colorado helped with some of the analysis behind this bill, and would be available for assistance. Dr. Boehm at the University of Nevada, Las Vegas (UNLV) would be available, also.

The national platform on renewable energy requires HOAs to allow solar packages on the roofs. Federal law prohibits HOAs to forbid residents from installing satellite discs. We should move forward on S.B. 114 before the federal government gets involved with energy efficiency.

CHARLES BENJAMIN, Ph.D., J.D. (Director, Nevada Office, Western Resource Advocates):
I have written testimony (Exhibit G). We, as an environmental advocacy group, operating only in the intermountain west and promoting sustainable policies of energy, water and land, support S.B. 114. We support distributive generation, meaning the ability to help individuals and businesses be able to generate their own electricity. Individuals and businesses should be able to install

renewable-energy devices on their homes and businesses in order to reduce the need for electricity, produced from large, centralized generations, of any kind. We are against unreasonable covenants contained in deeds, contracts or other legal instruments, interfering with property owners from installing renewable-energy devices on their property. Ordinances, regulations or plans passed by local governing bodies can also have a deleterious effect.

Individuals who generate their own electricity or create their own heat take the burden off large, centralized systems. These power companies increase rates, because of the burden. Solar systems operating during peak time can benefit cities like Las Vegas. People want to have control over their energy when they know it is going up in price. There will be federal incentives.

SENATOR CARLTON:
Are the wind generators being removed from S.B. 114?

CHAIR SCHNEIDER:
The portion of the bill that addresses wind energy remains. Solar energy is addressed separately.

SENATOR CARLTON:
Look on page 3 of the proposed amendment (Exhibit H), in the green language, "the following shall be deemed to be unreasonable restrictions: The placing of a restriction or requirement on the use of a system for obtaining wind energy which significantly decreases the efficiency or performance ... ." How is the wind being taken out?

CHAIR SCHNEIDER:
The existing statutes on wind do not change. Mr. Nichols, explain that to the Committee and audience.

MATT NICHOLS (Committee Counsel):
> Thank you, Mr. Chairman. The reason it's drafted in green, so that it looks like new language. Was just my attempt to do that for ease of reading, rather than going through with putting in orange, double lines, green italicized, red, blue and purple, so it would be easier for you to see. The intent behind the amendment, is to keep the wind-energy determinations the same as they are in existing law

now, and to amend only the portion of the existing language that affects solar energy.

SENATOR CARLTON:
Okay.

JOE JOHNSON (Sierra Club, Toiyabe Chapter):
I am representing the Toiyabe Chapter of the Sierra Club. We would like to go on record as supporting S.B. 114 with the amendments.

STEVE WELLS, Ph.D. (President, Desert Research Institute):
Desert Research Institute (DRI) is a resource to the State in terms of geothermal energy. All the Nevada educational institutions serve as a resource for renewable-energy programs, in research and outreach. The DRI has expertise in wind, solar and geothermal energy. Federal funding in 2003 which allows us to build a foundation was started by U.S. Senator Harry Reid. That has evolved into a work program between DRI and Truckee Meadows Community College due to U.S. Senator Ensign's appropriation. In fiscal year 2009, Senator Townsend encouraged a delegation from the Nevada Renewable Energy Integration and Development Center to integrate University of Nevada, Reno (UNR), UNLV and DRI in a statewide program focused on statewide initiative, enhancing our research, education and outreach and leading to the commercialization of our research products.

CHAIR SCHNEIDER:
Senator Townsend and I had a meeting on how to enhance what the universities are doing with renewable energy. Energy and "renewables" are contained in President Obama's stimulus package.

SENATOR TOWNSEND:
The focus on energy and national security has become more important. We are asked by the President to make sacrifices to stop being addicted to foreign oil. All of us must do what we can to control our own energy usage. Unplug your cell phone after you are through charging it, it continues to use energy if it is plugged into the grid, operational or not. I have discussed with Dr. Wells, the redirection of current resources, at the university level, into these projects. There is a collaborative program between UNLV and their solar program with DRI, and UNR and their geothermal program and DRI. There are other interdisciplinary programs between business schools, colleges of engineering

and DRI. We have great resources. We need to get back to the basics. Let us enhance the programs that we have. Let us show the world we are going to invest in research and development and the intellectual capacity we know is there. New companies will come here. Companies are not looking for tax breaks, they are looking for intellectual capacity and technological advancement. Organizations like DRI, UNR and UNLV will make it happen. The public must understand the importance of renewable energy and take advantage of the things we have available to us. We must develop the intellectual capacity available to develop economically.

KYLE DAVIS (Policy Director, Nevada Conservation League):
The Nevada Conservation League supports S.B. 114.

ROSE MCKINNEY-JAMES (Solar Alliance):
The Solar Alliance supports S.B. 114 as amended. The Solar Alliance consists of 30 photovoltaic developers, system integrators, manufacturers, financiers and installers. Our effort is to address and mitigate statutory and regulatory barriers to the deployment of solar technology. This bill will be consistent with our goals in this State.

MONICA BRETT (Southwest Energy Efficiency Project):
I represent the Southwest Energy Efficiency Project. We have read S.B. 114 and support it. A group has been formed to develop a new program at the College of Southern Nevada, called the Sustainable Construction Technology Degree with an emphasis on renewables and energy efficiency. It has been short-listed for funding by U.S. Senator Reid. It is due to begin in the fall of 2010.

CHRIS BROOKS (Renewable Energy & Energy Conservation Task Force; American Solar Energy Society of Southern Nevada):
Senate Bill 114 helps developers and homeowners avoid obstacles. As a member of the Renewable Energy and Energy Conservation Task Force and board member of the American Solar Energy Society of Southern Nevada, I support S.B. 114. It maximizes the dollar spent by homeowners and businesses and the dollar spent by ratepayers, through the Renewable Generations Rebate Program by getting the most efficient systems for the lowest price.

HATICE GECOL, Ph.D. (Energy and Science Advisor; Director, Nevada State Office of Energy):
We are hiring a renewable-energy analyst and will be able to handle this duty as described in S.B. 114.

BRUCE KITTESS:
I have no vested interest in either a solar or a wind company. I built common-interest subdivisions. Cities and counties were happy to have subdivisions with covenants, conditions and restrictions, because the homeowners had to pay for their private streets and street lights. My testimony (Exhibit I) today is from a homeowner's perspective. The photo that I gave you, Exhibit I, is an 80-foot wind turbine and it has 4 guy wires. I would not like to have that next door to my home. The Washoe County Planning Commission discussed adopting a Washoe County ordinance permitting a 90-foot turbine on a 1-acre site. The three NRS statutes, the bill and amendment entail many of the elements causing our national-financial crisis. I think those statutes should be voided and rewritten. What is the fiscal impact on the bill before you? I have no objection to solar systems anywhere, they are passive and quiet. I am opposed to freestanding wind turbines in residential zones. I do not object to wind turbines in agricultural zones and golf courses. Commercially operated wind farms are fine, but without government subsidy.

MARY FISCHER:
I would like to address wind power with the information I am furnishing (Exhibit J). In S.B. 114 under section 2, subsection 2, paragraph (a) and section 3, subsection 3, paragraph (a), there are unreasonable restrictions on wind energy. This is something that has to be dealt with by local entities. You have preempted the home rule of local entities to be able to determine where wind energies are to be sited and what the wind studies show. Is this the same 10-percent restriction you had in the original bill?

CHAIR SCHNEIDER:
Windmills cannot be unreasonably restricted. Cities and counties can put height restrictions and locations.

MS. FISCHER:
Can they still have the home rule?

CHAIR SCHNEIDER:
Yes. That is why we amended the bill and put the windmill provision back where it was.

MS. FISCHER:
We are paying a tax for renewable energy. I would like to see that tax go to people to insulate homes, replace light bulbs and help develop clean coal-generated plants for all of the citizens to benefit, and not just because of the cost-benefit ratio.

CHAIR SCHNEIDER:
This is just one piece of the overall energy plan. Lightbulbs in this State will be changed by 2012, and you will not be able to buy old-style lightbulbs. There are single bills addressing different energy efficiencies.

CHAIR SCHNEIDER:
I will close the hearing on S.B. 114.

SENATOR TOWNSEND MOVED TO AMEND AND DO PASS S.B. 114 WITH PROPOSED AMENDMENT 3157

SENATOR CARLTON SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS NOLAN AND LEE WERE ABSENT FOR THE VOTE.)

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CHAIR SCHNEIDER:
We have an amendment on Senate Bill (S.B.) 51.

SENATE BILL 51: Revises provisions governing the subpoenaing of public utility records by a law enforcement agency. (BDR 58-337)

SCOTT JACKSON (Chief, Investigation Division, Department of Public Safety):
The Investigation Division, Department of Public Safety introduced S.B. 51, which expands the language of NRS 704.201 and NRS 704.202, to make information available to law enforcement through subpoena to public utilities. Various law enforcement agencies are concerned about the availability of

records upon subpoena. The amendment proposes adding, "... to the extent available ..." to section 2. The Washoe County Public Defender's Office was concerned about privacy issues, protected by the Fourth Amendment of the U.S. Constitution. Nevada Revised Statute 704.201 mandates subpoenas be issued in the furtherance of a criminal or civil investigation. It requires the subpoena be authorized or issued by the chief executive of a law enforcement agency or his command designee. We follow that directive. The federal agency currently uses this same administrative authority, through an administrative subpoena, to obtain the same information. This complies with the Fourth Amendment requirement. The U.S. Supreme Court has not ruled on the issue of utility records. It has ruled on third-party business records. The U.S. Court of Appeals for the Ninth Circuit has ruled, *United States v. Starkweather* there is no legitimate expectation of privacy in third-party business records. These records are voluntarily disclosed, and there is an assumption of risk when a subscriber provides this information to a public utility. Law enforcement has access to sensitive records, personal records and confidential records with a push of the button. Any law enforcement officer can access driver's license information by telephone or by computer, for the same information we are asking for today, with the exception of utilities and telephone records. Senate Bill (S.B.) 51 serves a legitimate law-enforcement interest to pursue this information in furtherance of a criminal and civil investigation.

SENATOR CARLTON:
The addition of the four words does not change the bill. I do not see any significant adjustments in it. What do the four words do?

MR. JACKSON:
That language provides the utilities the protection they requested to provide the information to law enforcement.

SENATOR CARLTON:
Would you still refer a landlord to immigration, as we discussed previously?

MR. JACKSON:
If we discover information indicating a violation of a law, we are duly sworn to report that information to the appropriate authority, if we cannot enforce it ourselves.

SENATOR CARLTON:
Do you get the social security number or passport number when you ask for information, or do you just get the name and address? Are you now asking for more information?

MR. JACKSON:
Yes.

BRIAN MCANALLEN (Director of Government Affairs, Embarq):
We support the amendment to S.B. 51. We will be able to supply information, as we currently do, with subpoenas with our company.

SENATOR CEGAVSKE:
Is it difficult for you to give law enforcement information they need? Is there a time issue?

MR. MCANALLEN:
No. We comply with all subpoenas. Everything has to be cleared by our corporate office in Kansas City, Missouri. Subpoenas are forwarded to our legal and corporate security departments in Kansas City.

SENATOR CEGAVSKE:
The bill is adding more information. It is not prohibiting you from getting the information.

MR. MCANALLEN:
Correct. We do not have some information. Under section 2, subsection 1, paragraph (c), subparagraph (3), "A valid passport number" is not available to us. We do not keep logs for every phone call that is made for individuals. Because we do not charge customers for local calls, we do not track that information, unless requested by law enforcement with a subpoena. We do not have tracking information retroactively.

CHAIR SCHNEIDER:
The Las Vegas Police Protective Association and the Las Vegas Metropolitan Police Department support S.B. 51.

ORRIN JOHNSON (Deputy Public Defender, Washoe County Public Defender's Office):
The substance of S.B. 51 concerns us. We cannot be assured law enforcement will not overstep their authority. I am concerned with the small minority of police officers who will abuse their power. The check we have for the potential for abuse has been in place for centuries. A disinterested magistrate with a warrant can look at the facts and determine if society's needs outweigh the individual's needs to remain private in his own home, to not be harassed by the government and to keep his power usage private. It is not a certainty that S.B. 51 is constitutional or legal. If it is constitutional, should we do it? Do we want to give law enforcement power to dig into everyone's utility records, because it is allowed? The case Mr. Jackson discussed, *United States v. Starkweather* is not a published opinion and not intended to be used for legal authority. A published opinion from the United States Supreme Court, *Kyllo v. United States,* 533 U.S. 27 (2001), is as follows: The police parked their car on a public street outside Mr. Kyllo's home. They aimed an infrared heat gun at his house and were able to see heat emanations from his house. They got a warrant using the information from the heat gun. Mr. Kyllo moved to suppress that, saying it was a search violating his Fourth Amendment rights. The U.S. Supreme Court agreed with him. One justice's dissenting opinion noted this does implicate the use of public utility records being used for similar purposes. Not everyone has access to a heat gun. Only a specialized agency has this access, and that was the reasoning behind the case. Only the government, through the subpoena power, has access to utility records. Utility records are not available to the public. It is important to have an expectation of privacy.

This issue is unsettled. You cannot choose to go off the grid or to use a public utility. Only the government has access to utilities. If our goal is to only catch criminals, we should not have a Fourth Amendment. We have to balance the legitimate needs of law enforcement with the legitimate privacy rights of people to be secure in their own homes. Before intruding into the private lives and the private usages of people's property, you must show probable cause. The amendment on S.B. 51 is not an issue for us. The issue is the substance of the bill. When government can obtain all information about a person, without limitation, the danger of this bill becomes clear. There has been a process for this information for two centuries; let us keep using it.

SENATOR TOWNSEND:
The current law is in violation of the U.S. Constitution by your analysis of requiring an independent magistrate. The current law states:

> To further a criminal or civil investigation, the chief executive officer of a law enforcement agency of this State or a command officer designated by him may issue a subpoena to a public utility for the name, address of a person listed in the records of the customers of the public utility.

Are you saying, to get just the name and address with a subpoena is unconstitutional?

MR. JOHNSON:
No. Name and address is limited information and would be reasonable with a subpoena. All searches are fact-dependent analyses when limited to name and address. Use records and phone records and all other sources of information are unreasonable to search without a warrant. It goes too far.

SENATOR TOWNSEND:
Are you suggesting we leave the bill as it is, with name and address and additional information that would require a warrant issued by an independent magistrate?

MR. JOHNSON:
Yes. I do not think there is a legal problem with the current law. Others might disagree with that. The expansion of the law, as proposed, is not legal without a warrant.

SENATOR TOWNSEND:
If the law enforcement agency went to an independent magistrate and asked for the information listed in this amendment, do you think, if they made a case, they could get a warrant?

MR. JOHNSON:
Yes. It is not difficult for law enforcement to get a warrant on relatively short notice.

SENATOR TOWNSEND:
The real issue between law enforcement and your ability to defend your clients is a timing issue. Does criminality require an expeditious manner to get this information? Does that become law enforcement's driving force? They have to go to a judge to get a warrant.

MR. JACKSON:
The challenge for law enforcement, when we request that information, is we rarely ever have probable cause to apply for a warrant. The information we are requesting on a subpoena helps us build a case. It helps us develop probable cause that would require us to obtain a warrant to search a person's place and effects. This is normal information, during the course of an investigation, to help us put all the information together.

CHAIR SCHNEIDER:
This is a constitutional problem. Senator Amodei should look at this. We can act on it, or we can refer it to the Senate Committee on Judiciary. It is not an energy bill.

SENATOR TOWNSEND:
I would recommend the Committee consider a rerefer. It is not about a utility, it is about a debate on the Fourth Amendment and the access of law enforcement to certain records. We do not want to take jurisdiction away from another committee that has the expertise. Both sides made an articulate argument that could lead to more arguments. Talk to the chair of the Judiciary Committee to see if they want it, before we rerefer it.

CHAIR SCHNEIDER:
We will hold S.B. 51. There being no further business, the meeting is adjourned at 9:32 a.m.

RESPECTFULLY SUBMITTED:

Sandra Hudgens,
Committee Secretary

APPROVED BY:

Senator Michael A. Schneider, Chair

DATE: