AMENDMENTS TO THE INTERLOCAL COOPERATION ACT

2003 GENERAL SESSION

STATE OF UTAH

Sponsor: Leonard M. Blackham

This act modifies the Interlocal Cooperation Act including making technical changes. The act adds definitions and modifies provisions related to project entity and generation output requirements. The act modifies provisions related to powers and duties of interlocal entities. For purposes of the payment of fee in lieu of ad valorem property tax, this act provides that a fee base for a project can be determined by agreement. This act provides for valuation by the State Tax Commission if a fee base is not determined by an agreement. Portions of this act have retrospective operation to January 1, 2003.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

11-13-103, as renumbered and amended by Chapter 286, Laws of Utah 2002

11-13-204, as enacted by Chapter 286, Laws of Utah 2002

11-13-301, as enacted by Chapter 286, Laws of Utah 2002

11-13-302, as renumbered and amended by Chapter 286, Laws of Utah 2002

11-13-310, as renumbered and amended by Chapter 286, Laws of Utah 2002

11-13-311, as renumbered and amended by Chapter 286, Laws of Utah 2002

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **11-13-103** is amended to read:

11-13-103. Definitions.

As used in this chapter:

(1) "Additional project capacity" means electric generating capacity provided by a generating unit that first produces electricity on or after May 6, 2002 and that is constructed or installed at or adjacent to the site of a project that first produced electricity before May 6, 2002, regardless of whether:

(a) the owners of the new generating unit are the same as or different from the owner of

the project; and

(b) the purchasers of electricity from the new generating unit are the same as or different from the purchasers of electricity from the project.

(2) "Board" means the Permanent Community Impact Fund Board created by Section 9-4-304, and its successors.

(3) "Candidate" means one or more of:

(a) the state;

(b) a county, municipality, school district, special district, or other political subdivision of the state; and

(c) a prosecution district.

(4) "Commercial project entity" means a project entity, defined in Subsection [~~(11)~~] (12), that:

(a) has no taxing authority; and

(b) is not supported in whole or in part by and does not expend or disburse tax revenues.

(5) "Direct impacts" means an increase in the need for public facilities or services that is attributable to the project or facilities providing additional project capacity, except impacts resulting from the construction or operation of a facility that is:

(a) owned by an owner other than the owner of the project or of the facilities providing additional project capacity; and

(b) used to furnish fuel, construction, or operation materials for use in the project.

(6) "Electric interlocal entity" means an interlocal entity described in Subsection 11-13-203(3).

(7) "Energy services interlocal entity" means an interlocal entity that is described in Subsection 11-13-203(4).

(8) (a) "Estimated electric requirements," when used with respect to a qualified energy services interlocal entity, includes any of the following that meets the requirements of Subsection (8)(b):

(i) generation capacity;

(ii) generation output; or

(iii) an electric energy production facility.

(b) An item listed in Subsection (8)(a) is included in "estimated electric requirements" if it is needed by the qualified energy services interlocal entity to perform the qualified energy services interlocal entity's contractual or legal obligations to any of its members.

[~~(8)~~] (9) "Interlocal entity" means:

(a) a Utah interlocal entity, an electric interlocal entity, or an energy services interlocal entity; or

(b) a separate legal or administrative entity created under Section 11-13-205.

[~~(9)~~] (10) "Out-of-state public agency" means a public agency as defined in Subsection [~~(12)~~] (13)(c), (d), or (e).

[~~(10)~~] (11) (a) "Project":

(i) means an electric generation and transmission facility owned by a Utah interlocal entity or an electric interlocal entity; and

(ii) includes fuel or fuel transportation facilities and water facilities owned by that Utah interlocal entity or electric interlocal entity and required for the generation and transmission facility.

(b) "Project" includes a project entity's ownership interest in:

(i) facilities that provide additional project capacity; and

(ii) additional generating, transmission, fuel, fuel transportation, water, or other facilities added to a project.

[~~(11)~~] (12) "Project entity" means a Utah interlocal entity or an electric interlocal entity that owns a project.

[~~(12)~~] (13) "Public agency" means:

(a) a city, town, county, school district, special district, or other political subdivision of the state;

(b) the state or any department, division, or agency of the state;

(c) any agency of the United States;

(d) any political subdivision or agency of another state or the District of Columbia including any interlocal cooperation or joint powers agency formed under the authority of the law of the other state or the District of Columbia; and

(e) any Indian tribe, band, nation, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(14) "Qualified energy services interlocal entity" means an energy services interlocal entity that at the time that the energy services interlocal entity acquires its interest in facilities providing additional project capacity has at least five members that are Utah public agencies.

[~~(13)~~] (15) "Utah interlocal entity":

(a) means an interlocal entity described in Subsection 11-13-203(2); and

(b) includes a separate legal or administrative entity created under Chapter 47, Laws of Utah 1977, Section 3, as amended.

[~~(14)~~] (16) "Utah public agency" means a public agency under Subsection [~~(12)~~] (13)(a) or (b).

Section 2. Section **11-13-204** is amended to read:

11-13-204. Powers and duties of interlocal entities -- Additional powers of energy services interlocal entities -- Length of term of agreement and interlocal entity -- Notice to State Tax Commission.

(1) (a) An interlocal entity:

(i) may:

(A) adopt, amend, and repeal rules, bylaws, policies, and procedures for the regulation of its affairs and the conduct of its business;

(B) sue and be sued;

(C) have an official seal and alter that seal at will;

(D) make and execute contracts and other instruments necessary or convenient for the performance of its duties and the exercise of its powers and functions;

(E) acquire real or personal property, or an undivided, fractional, or other interest in real

or personal property, necessary or convenient for the purposes contemplated in the agreement creating the interlocal entity and sell, lease, or otherwise dispose of that property;

(F) directly or by contract with another:

(I) own and acquire facilities and improvements or an undivided, fractional, or other interest in facilities and improvements;

(II) construct, operate, maintain, and repair facilities and improvements; and

(III) provide the services contemplated in the agreement creating the interlocal entity;

(G) borrow money, incur indebtedness, and issue revenue bonds, notes, or other obligations and secure their payment by an assignment, pledge, or other conveyance of all or any part of the revenues and receipts from the facilities, improvements, or services that the interlocal entity provides;

(H) offer, issue, and sell warrants, options, or other rights related to the bonds, notes, or other obligations issued by the interlocal entity; and

(I) sell or contract for the sale of the services, output, product, or other benefits provided by the interlocal entity to:

(I) public agencies inside or outside the state; and

(II) with respect to any excess services, output, product, or benefits, any person on terms that the interlocal entity considers to be in the best interest of the public agencies that are parties to the agreement creating the interlocal entity; and

(ii) may not levy, assess, or collect ad valorem property taxes.

(b) An assignment, pledge, or other conveyance under Subsection (1)(a)(i)(G) may, to the extent provided by the documents under which the assignment, pledge, or other conveyance is made, rank prior in right to any other obligation except taxes or payments in lieu of taxes payable to the state or its political subdivisions.

(2) An energy services interlocal entity:

(a) except with respect to any ownership interest it has in facilities providing additional project capacity, is not subject to:

(i) Part 3, Project Entity Provisions; or

(ii) Title 59, Chapter 8, Gross Receipts Tax on Certain Corporations Not Required to Pay Corporate Franchise or Income Tax Act; and

(b) may:

(i) own, acquire, and, by itself or by contract with another, construct, operate, and maintain a facility or improvement for the generation, transmission, and transportation of electric energy or related fuel supplies;

(ii) enter into a contract to obtain a supply of electric power and energy and ancillary services, transmission, and transportation services, and supplies of natural gas and fuels necessary for the operation of generation facilities;

(iii) enter into a contract with public agencies, investor-owned or cooperative utilities, and others, whether located in or out of the state, for the sale of [~~the~~] wholesale services provided by the energy services interlocal entity; and

(iv) adopt and implement risk management policies and strategies and enter into transactions and agreements to manage the risks associated with the purchase and sale of energy [~~in competitive markets~~], including forward purchase and sale contracts, hedging, tolling and swap agreements, and other instruments.

(3) Notwithstanding Section 11-13-216, an agreement creating an interlocal entity or an amendment to that agreement may provide that the agreement may continue and the interlocal entity may remain in existence until the latest to occur of:

(a) 50 years after the date of the agreement or amendment;

(b) five years after the interlocal entity has fully paid or otherwise discharged all of its indebtedness;

(c) five years after the interlocal entity has abandoned, decommissioned, or conveyed or transferred all of its interest in its facilities and improvements; or

(d) five years after the facilities and improvements of the interlocal entity are no longer useful in providing the service, output, product, or other benefit of the facilities and improvements, as determined under the agreement governing the sale of the service, output, product, or other benefit.

(4) (a) The governing body of each interlocal entity created under Section 11-13-203 on or after May 4, 1998, shall, within 30 days of the creation, file a written notice of the creation with the State Tax Commission.

(b) Each written notice required under Subsection (4)(a) shall:

(i) be accompanied by:

(A) a copy of the agreement creating the interlocal entity; and

(B) if less than all of the territory of any Utah public agency that is a party to the agreement is included within the interlocal entity, a plat that delineates a metes and bounds description of the area affected or a map of the area affected and evidence that the information has been recorded by the recorder of the county in which the Utah public agency is located; and

(ii) contain a certification by the governing body that all necessary legal requirements relating to the creation have been completed.

(5) Nothing in this section shall be construed as expanding the rights of any municipality or interlocal entity to sell or provide retail service.

Section 3. Section **11-13-301** is amended to read:

11-13-301. Project entity and generation output requirements.

(1) Each project entity shall:

(a) before undertaking the construction of a project or of facilities to provide additional project capacity, offer to sell or make available at least 50% of the generation output of or electric energy produced by the project or additional project capacity, respectively;

(b) establish rules and procedures for an offer under Subsection (1)(a) that provide at least 60 days for a prospective power purchaser to accept the offer before [~~it~~] the offer is considered rejected; and

(c) make each offer under Subsection (1)(a):

(i) under a long-term arrangement that may be an undivided ownership interest, a participation interest, a power sales agreement, or otherwise; and

(ii) to one or more power purchasers in the state that supply electric energy at wholesale or retail.

(2) (a) The generation output or electric energy production available to power purchasers in the state from a project shall be at least 5% of the total generation output or electric energy production of the project.

(b) (i) Subject to Subsection (2)(b)(ii), at least a majority of the generation capacity, generation output, or electric energy production [~~of~~] facilities providing additional project capacity shall be:

(A) made available as needed to meet the estimated electric requirements of entities or consumers within the state; and

(B) owned, purchased, or consumed by entities or consumers within the state.

(ii) (A) As used in this Subsection (2)(b)(ii), "default provision" means a provision authorizing a nondefaulting party to succeed to or require the disposition of the rights and interests of a defaulting party.

(B) The requirements of Subsection (2)(b)(i) do not apply to the extent that those requirements are not met due to the operation of a default provision in an agreement providing for ownership or other interests in facilities providing additional project capacity.

Section 4. Section **11-13-302** is amended to read:

11-13-302. Payment of fee in lieu of ad valorem property tax by certain energy suppliers -- Method of calculating -- Collection -- Extent of tax lien.

(1) [~~A~~] (a) Each project entity created under this chapter [~~which~~] that owns a project and [~~which~~] that sells any capacity, service, or other benefit from it to an energy supplier or suppliers whose tangible property is not exempted by Utah Constitution Article XIII, Section 2, from the payment of ad valorem property tax, shall pay an annual fee in lieu of ad valorem property tax as provided in this section to each taxing jurisdiction within which the project or any part of it is located.

(b) For purposes of this section, "annual fee" means the annual fee described in Subsection (1)(a) that is in lieu of ad valorem property tax.

(c) The requirement to pay [~~these fees~~] an annual fee shall commence:

[~~(a)~~] (i) with respect to each taxing jurisdiction that is a candidate receiving the benefit of

impact alleviation payments under contracts or determination orders provided for in Sections 11-13-305 and 11-13-306, with the fiscal year of the candidate following the fiscal year of the candidate in which the date of commercial operation of the last generating unit, other than any generating unit providing additional project capacity, of the project occurs, or, in the case of any facilities providing additional project capacity, with the fiscal year of the candidate following the fiscal year of the candidate in which the date of commercial operation of the generating unit providing the additional project capacity occurs; and

[~~(b)~~] (ii) with respect to any [~~other~~] taxing [~~jurisdictions~~] jurisdiction other than a taxing jurisdiction described in Subsection (1)(c)(i), with the fiscal year of the taxing jurisdiction in which construction of the project commences, or, in the case of facilities providing additional project capacity, with the fiscal year of the taxing jurisdiction in which construction of those facilities commences.

(d) The [~~requirements~~] requirement to pay [~~these fees~~] an annual fee shall continue for the period of the useful life of the project or facilities.

(2) (a) [~~Because~~] The annual fees due a school district shall be as provided in Subsection (2)(b) because the ad valorem property tax imposed by a school district and authorized by the Legislature under Section 53A-17a-135 represents both:

[~~(a)~~] (i) a levy mandated by the state for the state minimum school program under Section 53A-17a-135; and

[~~(b)~~] (ii) local levies for capital outlay, maintenance, transportation, and other purposes under Sections 11-2-7, 53A-16-107, 53A-16-110, 53A-17a-126, 53A-17a-127, 53A-17a-133, 53A-17a-134, 53A-17a-143, 53A-17a-145, and 53A-21-103[~~, the~~].

(b) The annual [~~fee in lieu of ad valorem property tax~~] fees due a school district shall be as follows:

(i) the project entity shall pay to the school district [~~a~~] an annual fee [~~in lieu of ad valorem property tax~~] for the state minimum school program at the rate imposed by the school district and authorized by the Legislature under Subsection 53A-17a-135(1); and

(ii) for all other local property tax levies authorized to be imposed by a school district,

the project entity shall pay to the school district either [~~a~~]:

(A) an annual fee [~~in lieu of ad valorem property tax~~]; or

(B) impact alleviation payments under contracts or determination orders provided for in Sections 11-13-305 and 11-13-306[~~, for all other local property tax levies authorized~~].

(3) (a) [~~The~~] An annual fee due a taxing jurisdiction for a particular year shall be calculated by multiplying the tax rate or rates of the jurisdiction for that year by the product obtained by multiplying the [~~taxable~~] fee base or value determined in accordance with Subsection (4) for that year of the portion of the project located within the jurisdiction by the percentage of the project which is used to produce the capacity, service, or other benefit sold to the energy supplier or suppliers.

(b) As used in this section, "tax rate," when applied in respect to a school district, includes any assessment to be made by the school district under Subsection (2) or Section 63-51-6.

(c) There is to be credited against the annual fee due a taxing jurisdiction for each year, an amount equal to the debt service, if any, payable in that year by the project entity on bonds, the proceeds of which were used to provide public facilities and services for impact alleviation in the taxing jurisdiction in accordance with Sections 11-13-305 and 11-13-306.

(d) The tax rate for the taxing jurisdiction for that year shall be computed so as to:

[~~(a)~~] (i) take into account the [~~taxable~~] fee base or value of the percentage of the project located within the taxing jurisdiction determined in accordance with Subsection (4) used to produce the capacity, service, or other benefit sold to the supplier or suppliers; and

[~~(b)~~] (ii) reflect any credit to be given in that year.

(4) (a) Except as otherwise provided in this section, the annual fees required by this section shall be paid, collected, and distributed to the taxing jurisdiction as if:

(i) the annual fees were ad valorem property taxes; and

(ii) the project were assessed at the same rate and upon the same measure of value as taxable property in the state.

(b) (i) Notwithstanding Subsection (4)(a), for purposes of an annual fee required by this

section, the fee base of a project may be determined in accordance with an agreement among:

(A) the project entity; and

(B) any county that:

(I) is due an annual fee from the project entity; and

(II) agrees to have the fee base of the project determined in accordance with the agreement described in this Subsection (4).

(ii) The agreement described in Subsection (4)(b)(i):

(A) shall specify each year for which the fee base determined by the agreement shall be used for purposes of an annual fee; and

(B) may not modify any provision of this chapter except the method by which the fee base of a project is determined for purposes of an annual fee.

(iii) For purposes of an annual fee imposed by a taxing jurisdiction within a county described in Subsection (4)(b)(i)(B), the fee base determined by the agreement described in Subsection (4)(b)(i) shall be used for purposes of an annual fee imposed by that taxing jurisdiction.

(iv) (A) If there is not agreement as to the fee base of a portion of a project for any year, for purposes of an annual fee, the State Tax Commission shall determine the value of that portion of the project for which there is not an agreement:

(I) for that year; and

(II) using the same measure of value as is used for taxable property in the state.

(B) The [~~assessment~~] valuation required by Subsection (4)(b)(iv)(A) shall be made by the State Tax Commission in accordance with rules [~~promulgated~~] made by [~~it~~] the State Tax Commission.

(c) Payments of the annual fees shall be made from:

(i) the proceeds of bonds issued for the project; and [~~from~~]

(ii) revenues derived by the project entity from the project[~~; and the~~].

(d) (i) The contracts of the project entity with the purchasers of the capacity, service, or other benefits of the project whose tangible property is not exempted by Utah Constitution

Article XIII, Section 2, from the payment of ad valorem property tax shall require each purchaser, whether or not located in the state, to pay, to the extent not otherwise provided for, its share, determined in accordance with the terms of the contract, of these fees.

(ii) It is the responsibility of the project entity to enforce the obligations of the purchasers.

(5) (a) The responsibility of the project entity to make payment of the annual fees is limited to the extent that there is legally available to the project entity, from bond proceeds or revenues, monies to make these payments, and the obligation to make payments of the annual fees is not otherwise a general obligation or liability of the project entity.

(b) No tax lien may attach upon any property or money of the project entity by virtue of any failure to pay all or any part of [~~the~~] an annual fee.

(c) The project entity or any purchaser may contest the validity of [~~the~~] an annual fee to the same extent as if the payment was a payment of the ad valorem property tax itself.

(d) The payments of [~~the~~] an annual fee shall be reduced to the extent that any contest is successful.

(6) (a) Any public agency that is not a project entity and that owns an interest in facilities providing additional project capacity which, if its tangible property is not exempted by Utah Constitution, Article XIII, Section 2, from the payment of ad valorem property tax, uses any capacity, service, or other benefit from it or which sells any capacity, service, or other benefit from it to an energy supplier or suppliers whose tangible property is not exempted by Utah Constitution, Article XIII, Section 2, from the payment of ad valorem property tax, shall pay an annual fee [~~in lieu of ad valorem property tax~~] with respect to its ownership interest, and shall have the obligations, credits, rights, and protections set forth in Subsections (1) [~~through~~], (2), (3), (4)(a), (4)(c), (4)(d), and (5) with respect to its ownership interest as though it were a project entity.

(b) The ownership interest of a public agency upon which [~~a fee in lieu of ad valorem property tax~~] an annual fee is payable is not subject to:

(i) ad valorem property taxes under Title 59, Chapter 2, Property Tax Act; or

(ii) privilege taxes under Title 59, Chapter 4, Privilege Tax.

(c) Each public agency and project entity that owns an interest in facilities providing additional project capacity:

(i) is subject to [~~a fee in lieu of ad valorem property tax~~] an annual fee only with respect to that ownership interest; and

(ii) is not subject to [~~a fee in lieu of ad valorem property tax~~] an annual fee with respect to any portion of the facilities providing additional project capacity that it does not own.

Section 5. Section **11-13-310** is amended to read:

11-13-310. Termination of impact alleviation contract.

If the project or any part of it or the facilities providing additional project capacity or any part of them, or the output from the project or facilities providing additional project capacity become subject, in addition to the requirements of Section 11-13-302, to ad valorem property taxation or other payments in lieu of ad valorem property taxation, or other form of tax equivalent payments to any candidate which is a party to an impact alleviation contract with respect to the project or facilities providing additional project capacity or is receiving impact alleviation payments or means with respect to the project or facilities providing additional project capacity pursuant to a determination by the board, then the impact alleviation contract or the requirement to make impact alleviation payments or provide means therefor pursuant to the determination, as the case may be, shall, at the election of the candidate, terminate. In any event, each impact alleviation contract or determination order shall terminate upon the project, or, in the case of facilities providing additional project capacity, those facilities becoming subject to the provisions of Section 11-13-302, except that no impact alleviation contract or agreement entered by a school district shall terminate because of in lieu ad valorem property tax fees levied under Subsection 11-13-302(2)[~~(a)~~] (b)(i) or because of ad valorem property taxes levied under Section 53A-17a-135 for the state minimum school program. In addition, if the construction of the project, or, in the case of facilities providing additional project capacity, of those facilities, is permanently terminated for any reason, each impact alleviation contract and determination order, and the payments and means required thereunder, shall terminate. No termination of an impact

alleviation contract or determination order may terminate or reduce any liability previously incurred pursuant to the contract or determination order by the candidate beneficiary under it. If the provisions of Section 11-13-302, or its successor, are held invalid by a court of competent jurisdiction, and no ad valorem taxes or other form of tax equivalent payments are payable, the remaining provisions of this chapter shall continue in operation without regard to the commencement of commercial operation of the last generating unit of that project or of facilities providing additional project capacity.

Section 6. Section **11-13-311** is amended to read:

11-13-311. Credit for impact alleviation payments against in lieu of ad valorem property taxes -- Federal or state assistance.

(1) In consideration of the impact alleviation payments and means provided by the project entity or other public agency pursuant to the contracts and determination orders, the project entity or other public agency, as the case may be, shall be entitled to a credit against the fees paid in lieu of ad valorem property taxes as provided by Section 11-13-302, ad valorem property or other taxation by, or other payments in lieu of ad valorem property taxation or other form of tax equivalent payments required by any candidate which is a party to an impact alleviation contract or board order.

(2) Each candidate may make application to any federal or state governmental authority for any assistance that may be available from that authority to alleviate the impacts to the candidate. To the extent that the impact was attributable to the project or to the facilities providing additional project capacity, any assistance received from that authority shall be credited to the alleviation obligation with respect to the project or the facilities providing additional project capacity, as the case may be, in proportion to the percentage of impact attributable to the project or facilities providing additional project capacity, but in no event shall the candidate realize less revenues than would have been realized without receipt of any assistance.

(3) With respect to school districts the fee in lieu of ad valorem property tax for the state minimum school program required to be paid by the project entity or other public agency under

Subsection 11-13-302(2)[(a)] (b)(i) shall be treated as a separate fee and shall not affect any credits for alleviation payments received by the school districts under Subsection 11-13-302(2)[(a)] (b)(i), or Sections 11-13-305 and 11-13-306.

Section 7. **Retrospective operation.**

The amendments in this act to Sections 11-13-302, 11-13-310, and 11-13-311 have retrospective operation to January 1, 2003.