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2007 HOUSE NATURAL RESOURCES

HB 1456

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1456

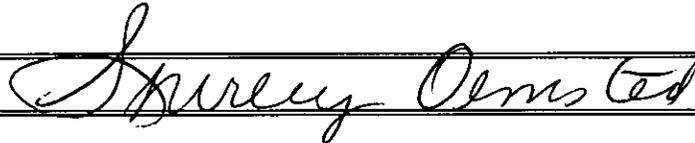
House Natural Resources Committee

Check here for Conference Committee

Hearing Date: February 2, 2007

Recorder Job Number: 2726

Committee Clerk Signature



Minutes:

**Chairman Porter** opened the hearing on HB 1456 and asked the clerk to read the title.

**Representative Jon Nelson** came forward to introduce HB 1456. See written testimony marked as Item #1. There is a situation that did occur in Dickey County and I would like to introduce some of the members of that township that have some sophistication in the area of wind development and this is the only area that I am aware of that has zoning regulations in place. It is very unlikely that most local townships would have the ability to enact that and I think that is the responsibility of the state. With us today is Mr. Brad Crabtree whom all of you know and Mr. Mark Flaten who is also a township official and they will talk about their experience in the Spring Valley Township and I am sure that many others will follow with testimony as well. He would urge a do pass and would stand for questions.

**Representative Keiser** asked if the PSC would be doing the study and reporting to the Legislative Council. Why hasn't the PSC done this study already? What are we paying them for?

**Representative Nelson** said he couldn't answer that. I think it is a very good question. This is certainly a small step to make from standpoint. I would like to think that we as a Legislative body would be ready to take this issue and move with it, but you know numbers as well as I do

and we have to start somewhere. I certainly would support a more aggressive approach and looking forward rather than back, I cannot answer that question why the PSC hasn't responded in a more timely fashion. We are here today and we can start here.

**Chairman Porter** said that one or two sessions ago we removed the siting requirements completely and took them off the books. The PSC has no authority on wind projects below 100 MW. What would happen if we would just put that authority back in the game and have the PSC doing the siting projects just like other industries moving into the area?

**Representative Nelson** said it was last session. He said he voted in favor of that bill as did many of us. Quite honestly as I look back today, I think that was a mistake. I think the PSC should have oversight on commercial development. How you define that, I am not sure. I

think it needs to be tightened up on those under 100 MW. Maybe there should be some less restrictive approaches. I think we went too far in that legislation and I think that would be a good first step to get the PSC back into commercial application oversighting and I think that is good for the long term industry. Landowners and the state of North Dakota need the help and the guidance from the state as they need in so many other areas not only in energy development but in feed lot applications and other areas where the State Health Department has a template to draw from. I am a township official and it is difficult for me to fathom dealing with some of these issues. We deal with loads of gravel and putting in roads and that is about the extent of our sophistication in these local governments. To have to develop zoning regulations for commercial wind energy applications it is past the level of sophistication that we can deal with.

**Chairman Porter** asked if he would have any information or input on the number that we would bring back to the PSC in the siting process. Not only would it address the concerns that you bring forward today but it would also address those issues on decommissioning as it would

bring them back in under their regulation. If we started out at a 25 MW energy project, or is there a number out there that you have been in discussions with that would work?

**Representative Nelson** said that his suggestion would be that this is a negotiated number that people in the industry such as commercial applicators and private applicators would have better idea on. It would be a number that could be reasonably decided upon. I don't know what it is and I wouldn't make a determination on it. In my district we do have wind farms that are under that 100 MW threshold and there is one proposed over that threshold. There is potential for smaller applications as well. I think the industries and the utilities, the stakeholders, need to be brought together to do that. This is one thing that the study can take care of. Do we need two years to get there? I don't think so. I think they can be brought together and I would think that most of those people are in the room today. An attempt could be made to bring them together sooner than that.

**Chairman Porter** asked if he would be opposed to use this bill as a vehicle to do that.

**Representative Nelson** said as usual he is open to almost everything.

**Chairman Porter** said he should know the deadline they are up against with the appropriation. A choice has to be made if we are going to use this bill as the vehicle to do that and we all have to be in agreement to strip the appropriation off and keep it here for another week and make it into that vehicle or we are going to have to make a determination to vote it up or down and rerefer it to appropriations. I am interested in your input as to what you would like to do.

**Representative Nelson** said he was very open to making this study a bill that digs deeper and I would work very closely with this Committee if that is what you feel has some value. This could be a vehicle in my opinion.

**Commissioner Roger Johnson** of the State Agriculture Commissioner came forwarding support of HB 1456. See written testimony attached marked as Item #2. He thinks that this is

a very sensible approach and following up on your question Mr. Chairman, if you want to dig deeper, I think that may be a sensible approach as well. There are a lot of moving parts to this and there are a lot of people who have very strong views and the industry is certainly among them. It is important that we get this right. North Dakota is number one in the nation in terms of wind energy potential. There are lots of issues in terms of trying to develop that potential but certainly we should do what we can to solve the local issues in a fashion that is beneficial to both the industry and the local land owner. I think that is really at the heart of this particular bill. The issue that arose in Dickey County underscored in my mind a couple of issues; one of which is where should the number be. Should it be 100 or should it be another number as you have been talking about. Another very simple and important issue in my mind is what about the private property rights of folks who might be adjacent to a sight where a wind tower happens to be. If you want to put it on or very near a section line and if the wind resources are being drawn from property across that section line, it seems that we need to have a mechanism for compensating people that are both using the land and are contributing the resources. It was my understanding that this bill was going to be a vehicle to discuss some of those issues as well. My mind tells me that this should not be that complicated. We do this with oil production down below the ground in places we cannot even see visually. We figure out how to attribute the value of that oil to adjacent resource owners and this certainly should not be that difficult to do it on top of the ground as well. I suspect that while this arose in Dickey County, this is an issue that has statewide appeal and I think this bill was introduced in a fashion to try to bring some very thoughtful considerate discussion and deliberation as to how we can deal with some of these issues.

**Chairman Porter** asked for further testimony in favor of HB 1456.

**Mr. Mark Flaten**, Chairman of the Spring Valley Township from Dickey County came forward in support of HB 1456. See written testimony marked as Item #3. He wanted to address the issue that Representative Nelson said he thought that they were the only township that has used its wind ordinance that was developed and since we did that other townships in Dickey County have adopted that policy so we are not the only ones with that anymore. He urged a do pass to do this study.

**Chairman Porter** asked what is the population of your township.

**Mr. Flaten** said 32 people. He said there are 7 kids and the rest are husbands and wives.

**Chairman Porter** asked him to explain briefly what your ordinance does or is currently doing.

**Mr. Flaten** said it does a lot of things. It sets up a guideline for how far a turbine can be from a property line depending on the size of the turbine and there are lots of different sizes of course. The distance that we have set up is variable according to the turbine size. One provision that we feel is very important that was voted down I guess, is there is a provision that the contractor has to have a bond in case the project fails the things that are left there after 25 years there is some money there to restore the land and that was our biggest concern. The biggest issue is siting turbines close to a property line where adjacent people have a different developer that has paid them for wind rights and the chance of diminishing their land getting developed is the biggest problem. We are not against siting turbines on property lines because where we live the property lines are not always in the best spot. They go over hills and down valleys and the hills where you need the turbines which are the windiest spots. We just believe that there needs to be something in place because just because you are on the wrong side of the line you still get a share of the money that the turbine produces. We feel that is only fair.

**Representative Hofstad** asked if as this process goes forward and the state develops some regulations and zoning laws, how would the township weigh in on that process as the state versus township. Can you weigh in on that issue for me?

**Mr. Flaten** said when we started this and went to our commissioners, they didn't want to do anything about it. I think they were in the same boat that we were. They didn't know where to start so we were left with the situation. The way it was explained in some of my first telephone calls to Bismarck, the township had the first authority and if they don't have anything in place, it goes to the County. If the County doesn't have anything in place, it goes to the State. We talked about the fact that if the state develops something that we feel is suitable then our zoning commission will more than likely adopt the same policy as the state does if we feel it is right and fair to everyone. You can take everyone in the wind project and ask them if it is a good deal and they are all going to say yes. During this study, they need to talk to the people that neighbor the project, those that are not included but still deal with what is going on in their area.

**Representative Solberg** said so the major complaint the landowners had when they came to you was the sharing the wind resources. Am I correct?

**Mr. Flaten** said the compensation for the wind resource. That was the complaint. If the turbines are sited close, it cast a shadow down further and it diminishes their chance to get a turbine on their land. There aren't many people in their township and he was one of the 6 people that were affected by that. That is no secret and I am not trying to hide it but there aren't that many people in the township to do the job and I happened to be one of the people that was affected by both ends of the stick.

**Representative Solberg** said as a side note and a statement, his township has 12 people in it.

**Representative Keiser** said a few years ago we passed legislation that said below 100 MW that it was a wind farm and we were going to create opportunities for everyone out there. Wasn't it the people from your area that wanted this to be changed?

**Mr. Flaten** said to be honest with you he doesn't know who wanted the change. Brad Crabtree is my neighbor and you guys probably talk to him more than I do. You know how it is with your neighbors. I didn't know anything about wind farms or wind turbines until February of 2005 that I started getting my education.

**Mr. Brad Crabtree** came forward in support of HB 1456. See written testimony marked as Item #4. He said he was not here today as the organization that he works for. He said he checked their ordinance and they don't require a bond actually. I do not believe that we can require a bond. Our language merely obligates a developer to restore the property at the end of the wind farms life. The description as to what condition the land was in was in the decommissioning bill. The only other clarification he wanted to make, and Mark didn't say this but he just wants the Committee to understand that they do not regulate compensation. You cannot legally regulate compensation through zoning. We privately, in our discussions, and publicly suggested formulas that we think might work but our zoning only defines the setbacks and the parameters of the wind farms. It doesn't affect the turbines within the wind farm. He didn't want that to be misunderstood. You have heard about our zoning ordinance. There are many reasons why you might zone for wind farms. Our principle reason was the issue of private property rights that Commissioner Johnson and Representative Nelson as well as Mark Flaten have talked about. The only thing I want to emphasize is that this is not just an issue of individual wind rights. As I mentioned last week, we were the first place in the state that had two wind farms directly adjoining each other. South of my ranch they actually come to a common boundary. We also had the issue of competing commercial wind rights because we

had a developer that held the rights to develop it with one set of landowners and another developer that held a similar set of rights through leases to wind resources on adjacent land. So why was this an issue? The answer is fairly simple. As Roger Johnson talked about, turbines create wind wakes. They create wind wakes within the project but developers as a matter of course do all kinds of modeling and engineering to determine how best to position turbines within a wind farm so they aren't cheating their own turbines out of wind so they space them appropriately. The idea is not that they totally eliminate wind wakes because that would take too much distance. What they do is optimize the distance between turbines so that they get the most output possible while not making their infrastructure costs too great. The more the turbines are spread out, the greater your infrastructure costs are so they use engineering and modeling types of things to figure out that formula. The bottom line is in the wind farms it became the issue in our township that the developer was proposing to leave over 2000 feet between their own turbines between upwind to downwind along the prevailing wind. As Mark Flaten has mentioned they were proposing to site turbines within 150 to 300 feet of the neighbors who were not participating in the project. That is the fundamental problem for which there was no regulation and we had to deal it. I won't get into details as it has already been mentioned. This is not unique to wind development and I am beginning to think it is probably unique to any resource that is shared in any way once that resource begins to get developed. Oil and gas is the common example. That is regulated with the establishment of space units for oil and gas. It is a very good regulation and it allows for resource to be developed by individual owners and other adjacent owners cannot stand in the way, but in state regulations, the nonparticipating owners in that oil and gas development, the mineral resource owners, must be compensated on a royalty formula basis through royalties. It is a good compromise. You don't tie up development but you make sure that everyone is treated well. This is not

widely known and I don't think it was intentional at least in the broader concepts that we are talking about, but in last session you actually recognized wind rights in the formal way in Senate Bill 2239 and you can see in my testimony that there are other relevant portions but I quote "a wind easement means a right.... Executed by or on behalf of an owner of land or airspace" so it explicitly states an owner in the bill. Then it goes on to say what a property owner may do with that ownership right. That is very unambiguous language that the state of North Dakota recognizes wind rights. This is broader than wind rights and broader than the decommissioning issues that we talked about last week. I want to emphasize that Mark and I are sometimes misinterpreted while we believe large scale wind farms are beneficial. I devote a lot of my professional life to promoting renewable energy. You can still want to see an industry grow and see that there is a need for some sensible regulation and that is where we come down on this. We believe that one or two wind farms people will get excited about it and nobody notices it. Three or four people start to pay more attention and as they grow issues will crop up and we need to make sure some of these things will be accepted and we can anticipate what a lot of these impacts will be. As in every other thing in our lives, there will always be things that we don't expect and so I think in that sense some level of public oversight falls in the realm of common sense. As Representative Nelson said this is common sense that is good for the industry because avoiding mistakes will maintain what is our great comparative advantage. It is very hard to site a wind farm in Wisconsin and it is almost impossible to site a wind farm off Cape Cod. It is very easy to site a wind farm in North Dakota. That is going to attract the industry to places like North Dakota assuming we do things right and keep landowners supportive. Again, there has been ample discussion of HB 1283 last session where they moved the threshold up to 100 MW on the PSC oversight authority. I won't get into that except to point out what the Chairman and I talked about briefly

after the hearing last week is that at some level you set that number and it drives development at a lower number. Our township for the first time used our zoning and we permitted a feeder line and a substation for what will be a very large wind project, the largest in the northern plains except for Iowa. It straddles the North Dakota/South Dakota border. It is 180 MW. Does that sound right? It is by far the largest project in North Dakota. Only 99 MW of that wind farm is going to be in North Dakota. There is no magic in that. They very clearly chose 99 MW so as not to be at 100. Mr. Chairman you raised the question earlier and I would have answered the same as Representative Nelson. I don't know what the precise number is but I do know that if it is not quite low, substantially lower than the 50 MW used to be, we will just see a profusion of wind farms just under that and that is why we talked about some way of thinking about a tiered structure of oversight so that the level of megawatts doesn't drive the size of the wind farm but real issues like transmission capacity, market for the power and those kinds of issues determine the size of wind farms. He did strongly favor the decommissioning bill and he thought a lot of good work went into it. If there is a way to bring that back, he would certainly be in favor of that. I also clearly recognize as stressed last week by Chairman Porter and other members of this committee that this situation does need a comprehensive and thoughtful policy. I was relieved that the committee thought that way. I think that is also why the ND renewable energy partnership and the public private and nonprofit members throughout ND endorse this bill. It is not because they favor any particular policy but they think that this issue needs to be resolved. That means the study is a good step. It allows the PSC to frame issues comprehensively rather than piece meal and it brings everyone to the table. The other thing that is important that we haven't talked much about is that this is not new ground. I realize that regulation in Minnesota is not necessarily a popular topic in the North Dakota legislature, and I would not even propose that we adopt everything that Minnesota has

done relative to wind farm siting. I think they do things that frankly are unnecessary in North Dakota. In terms of some of the things like decommissioning, basic property rights issues and those kinds of things, they have a very clear planning guidelines that offer protection to affected parties but also offer flexibility so that they don't stop wind farms. Of that bulk of regulation in Minnesota, there are pieces of that regulation that could be studied and possibly used in North Dakota. I want to make it perfectly clear that I am not advocating that it be brought to ND as a whole document. It has been very divisive and very painful for some people and some people are not talking to each other in church. They are not shaking hands in church and that kind of thing. There is no reason for that. With that, I will request a do pass and would be happy to answer questions.

**Representative Solberg** asked as question regarding air space. Has your group studied or do you have any suggestion as to the size or boundaries if there is a wind farm located in the NE quarter of section 2? Have you studied what those boundaries should be as far as air space is concerned?

**Mr. Crabtree** said yes. They have studied them in a non-engineering capacity or as a lay person. My understanding from a number of engineering professionals in the field that he talked to and worked with is that the economically significant wind wake, again you have to distinguish between what they call the access of prevailing winds which in the northern plains is most of the year northwest southeast, and then all other wind directions. The wind wake on an average basis in terms of its affect on power generation differs depending on prevailing winds to other winds. In our region it is commonly talked about 8 to 10 rotor diameters of the turbine. So if you think blade tip to blade tip. That is a rotor diameter. You take a GE 1.5 MW turbine which is the size of the turbine in the Kulm wind farm north of our ranches those are GE 1.5 turbines, right? The rotor diameter of those turbines is approximately 250 feet, it is

250 something so you multiply that and it gives you the sense of the distances you are talking about. In our zoning, we are only talking about the boundary of the wind farm and if our zoning asks the developer setback from the property line, then the other owner if they have development on their land you can setback a comparable amount. Our zoning says 5 rotor diameters. We don't discriminate between prevailing winds and nonprevailing winds because as Mark talked about we have 32 people. We can't make it very complicated. I think if the state were to do this they need to very clearly distinguish between prevailing and nonprevailing winds because it has economic significance. Minnesota has 5 rotor diameters for prevailing winds and 2.5 for nonprevailing winds with flexibility. If a turbine is on the edge of a federally protected wetland you don't necessarily need to require that kind of a rotor diameter setback. I do not have the engineering background to go any farther on this question.

**Mr. William Binek**, council for the PSC, offered written testimony on behalf of Commissioner Susan Wefald who could not be here today. See attached testimony marked as Item #5.

**Representative Keiser** asked if one commission hold the portfolio on wind.

**Mr. Binek** said the commission portfolios are split up and since wind comes under the electricity portfolio Commissioner Wefald holds that portfolio.

**Representative Keiser** said in the job description of the PSC, why wouldn't this be a part of your normal function.

**Mr. Binek** said as far as conducting the study, this a new project that is going to take considerable time and expertise. As Commissioner Wefald pointed out, the commission had a very small staff in a new area like this. This would regularly contain a consultant for a specific job. It is not unusual for the legislature to appropriate funds for the hiring of consultants. This would be a special type project and it is outside of what would be considered a normal project for the PSC. The appropriation would cover the cost of that consultant.

**Representative Keiser** said he understands that but he still has a problem with it simply because the PSC certainly could have put funding for this in their budget. The second point is that we heard testimony today that many states, including Minnesota, have done this and we could look at that. There are people in this room that could sit down and recommend a suggested policy and bring that to the legislature reasonably easy. Again, why aren't we doing it and why isn't it in your budget?

**Mr. Binek** said this was not an item that to his knowledge that this legislation was being contemplated. He said he could only speak for himself on this. I don't know if any of the commissioners were aware of this at the time they were proposing their budgets.

**Representative Keiser** said but they were aware that there was a problem in certain areas of the area that have wind farms.

**Mr. Binek** said the commission was aware of that as it has already been pointed out but the legislature made it very clear to the commission that their siting authority is to be very limited. The Commission has sited one wind farm above 100 MW and this was some time ago. We did provide for some setbacks and we did make some requirements regarding the reclamation of the land but that is the only instance where we have had the authority to do that.

**Mr. Harlan Fuglesten** with the ND Association of Rural Electric Cooperative and they support this bill. They think it is a reasonable step that should be taken. There are issues that need to be resolved and not everyone is in agreement and there are different sides to it. We need to be sure that we have the proper regulations going forward.

**Representative Keiser** asked instead of doing this under the PSC, why not just do legislative council study and pick it up during the interim. We have two options. We can change the legislation now or we are going to study it. Why do we want it in the PSC versus the Legislative Council?

**Mr. Fuglesten** said that is an option that could be considered but he was not involved in formulating the bill. I think it is not inappropriate to have the PSC handling this because they will be the agency siting this. They are going to make a report to the Legislative Council and I think it probably does a considerable amount of study and legwork looking at what other states do as an example and so I think in the time allowed it might provide for a little more focus but I certainly respect the rights of the Legislature to study the issues and come up with a recommendation as well.

**Representative Keiser** said one of the problems that we have is the fiscal note on it. If we have an interim committee that is dedicated to studying energy related issues and they are the policy makers, why wouldn't we want it there.

**Mr. Fuglesten** said he respects the fact that he is concerned about the fiscal note. He doesn't know what it should cost or will cost to do the study, but he said he does know that if they provide the forum for parties to get together, they will do a lot of work themselves and come up with some of the research. Again, it isn't my choice and I support the bill as written but there certainly are other options that you can consider.

**Mr. Richard Schlosser** came forward in support of this bill. He is here on behalf of the members of the ND Farmers Union. He is a landowner and is representing land owners and we can look back about 8 or 10 years ago and Representative Kelsh serving in another capacity made a visit to our community in Edgely, ND, and talked about the wind energy development in their area. They were anticipating 30 or 40 people at that meet and there were over 200. Obviously the enthusiasm and the support for this type of development transpired into what happened here a few sessions ago. We were in a large hearing room to hear three tax bills and everyone was in support of that. Now in subsequent sessions we have seen a number of issues arise from that, whether it be siting or severability or whether it be

reclamation or the decommissioning. When we looked at this bill, we thought whether this study would be with the PSC, there was a need for this and obviously there is more than one wind farm out there developing and how these issues are arising as a result of this. We are support of this bill.

**Ms. Mary Mitchell** of the Dakota Resource Council and they support this study. This has been an interesting topic for their members. They thought it was interesting that they brought up the fact they had moved the siting requirements to 100 MW. They have talked about this quite a bit and the number that keeps coming up in casual conversation is 20. She does not know where that comes from but that is the number that keeps coming up.

**Mr. Curtis Jabs** from Basin Electric came forward in support. He said they do own a small wind farm near Minot and have also been involved in the Edgeley Kulm area. They think having standard rules for everyone is siting wind farms is a good idea. They think a study is appropriate. Whether it is done by the PSC or by an interim committee, he said they were open to either one of them but they think a study is in order.

**Chairman Porter** asked for further support of this bill. Hearing none, he asked for opposition to the bill.

**Representative Keiser** asked if they had talked to Representative Nelson, the sponsor of this bill, whether it would be appropriate for the PSC or the interim committee to study this issue.

**Representative Nelson** said initially his thought process would be this. If the interim study were picked, it would be a shell and it would meet that criteria that we do study it. I do think the resources the PSC has to go into a more detailed study would weigh heavily on their side as they have the expertise and the experience to draw from in other industries that they have some oversight on. Obviously they would be a main part of the legislative study. I guess from my standpoint if it was shell language in there I don't have an ax to grind with that.

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1456

House Natural Resources Committee

Check here for Conference Committee

Hearing Date: February 2, 2007

Recorder Job Number: 2728

Committee Clerk Signature

*Shirley Bennett*

Minutes:

**Chairman Porter** asked the committee to consider HB 1456.

**Representative Keiser** said he thought the intern had an amendment prepared for HB 1456.

He said he would move the amendment because it simply takes this study out of the Public Service Commission which I think hasn't done their job apparently and says the Legislative Council "shall" study in the next interim and that would take out the appropriation. It drives me crazy that they say they have the expertise and knowledge and that they had all these issues before them and they are going to need \$75,000 to study this. I think it is a policy question at this point whether to put back in the 100 MW or whatever but we should have some discussions.

**Representative Drovdal** said he would second this so they could go into discussion on it.

**Representative Damschen** second the motion.

**Representative Meyer** asked Representative Keiser if there is a difference in the results when they come out. A lot of us have served on the interim and when it gets done but by having the PSC study it, does it give it more impact?

**Representative Keiser** said he thinks she has served on the wrong interim committees.

There are a lot of interim committees.

**Chairman Porter** said he passed the bill that they dealt with last session and the PSC actually came in and opposed on changing the siting requirements for the generation of electricity from 50 MW to 100 MW. I guess the question he has for the committee, is waiting 2 years the good thing to do or do we also want to look at moving that back to what it was and putting an expiration date on it so that there siting comes in. Part of that has to do with the fact that the decommissioning is also part of every siting. It is addressed there from the PSC standpoint.

**Representative Kelsh** said as he recalled, Commissioners Clark and Kramer were in support of the bill and Commissioner Wefald was in opposition to the bill two years ago, just for clarification.

**Representative Keiser** said the dilemma is we don't know if it should be 50 or 20 or 25.

Again, you can move it back to 50 and everyone will go to 49.

**Chairman Porter** said that is true. I guess my thought is to move it back to 50 and have the study and then find out where it should be and put an expiration date on the moving it back to 50 so that it makes the study a meaningful study.

**Representative Drovdal** said he was in agreement to moving in back to 50, but when we moved it to 100 we had a complete hearing and everyone decided that. I am a bit nervous about that giving them another chance to speak on it.

**Chairman Porter** said the bill would be guaranteed a public hearing.

**Representative Keiser** said he strongly supports moving it back to 50 as well. I would incorporate that into this amendment as well.

**Representative DeKrey** moved to further amend Representative Keiser's amendment by moving it back to 50.

**Chairman Porter** asked if he wanted an expiration date on the move.

**Representative DeKrey** said yes.

