

**STATE OF NEBRASKA
ATTESTATION REVIEW
OF THE
PUBLIC SERVICE COMMISSION
PUBLIC ADVOCATE EXPENSES
FISCAL YEARS ENDED JUNE 30, 2006
THROUGH JUNE 30, 2008**

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Issued on March 2, 2009

PUBLIC SERVICE COMMISSION – PUBLIC ADVOCATE EXPENSES

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Independent Accountant's Report

Citizens of the State of Nebraska:

We have reviewed the public advocate expenses of the Nebraska Public Service Commission for the fiscal years ended June 30, 2006, through June 30, 2008. The Nebraska Public Service Commission's management is responsible for the public advocate expenses. The management did not provide us a written assertion regarding such.

Our review was conducted in accordance with attestation standards established by the American Institute of Certified Public Accountants and the standards applicable to attestation engagements contained in *Government Auditing Standards* issued by the Comptroller General of the United States. A review is substantially less in scope than an examination, the objective of which is the expression of an opinion on the public advocate expenses. Accordingly, we do not express such an opinion.

Based on our review, nothing came to our attention that caused us to believe that the public advocate expenses are not presented, in all material respects, in conformity with the criteria set forth in the Criteria section.

In accordance with *Government Auditing Standards*, we are required to report findings of deficiencies in internal control, violations of provisions of contracts or grant agreements, and abuse that are material to the Nebraska Public Service Commission's public advocate expenses and any fraud and illegal acts that are more than inconsequential that come to our attention during our review. We are also required to obtain the views of management on those matters. We did not perform our review for the purpose of expressing an opinion on the internal control over the Nebraska Public Service Commission's public advocate expenses or on compliance and other matters; accordingly, we express no such opinions.

Our review disclosed certain findings that are required to be reported under *Government Auditing Standards* and certain other matters. Those findings, along with the views of management and the identification of significant deficiencies, are described below in the Summary of Results. A significant deficiency is a deficiency in internal control, or combination of deficiencies, that adversely affects the entity's ability to initiate, authorize, record, process, or report data reliably in accordance with the applicable criteria or framework such that there is more than a remote likelihood that a misstatement of the subject matter that is more than inconsequential will not be prevented or detected.

This report is intended solely for the information and use of management of the Nebraska Public Service Commission, the Citizens of the State of Nebraska, others within the Nebraska Public Service Commission, and the appropriate Federal and regulatory agencies; however, this report is a matter of public record, and its distribution is not limited.

Signed Original On File

Mike Foley
Auditor of Public Accounts

Cindy Janssen
Audit Manager

March 2, 2009

PUBLIC SERVICE COMMISSION – PUBLIC ADVOCATE EXPENSES
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Background

In 2003, the Nebraska Legislature passed LB 790, creating the State Natural Gas Regulation Act (Act), which is codified at Neb. Rev. Stat. §§ 66-1801 to 66-1864 (Reissue 2003, Cum. Supp. 2008). Through Neb. Rev. Stat. § 66-1804 (Cum. Supp. 2008), the Act grants the Nebraska Public Service Commission (Commission) the “full power, authority, and jurisdiction to regulate natural gas public utilities [.]” To assist in the performance of this duty, Neb. Rev. Stat. § 66-1830(1) (Reissue 2003) establishes the office of the public advocate as a “separate and independent division within the commission.” As provided by Neb. Rev. Stat. § 66-1830(2), the executive director of the Commission, in consultation with other Commission members, appoints the public advocate to a four-year term. Neb. Rev. Stat. § 66-1830(3) requires the public advocate to be an attorney and to “have experience in consumer-related utility issues or in the operation, management, or regulation of utilities.”

Under Neb. Rev. Stat. § 66-1831(1) (Reissue 2003), the public advocate has the power to:

1. Investigate the legality and reasonableness of rates, charges, and practices of jurisdictional utilities;
2. Petition for relief, request, initiate, and intervene in any proceeding before the Commission concerning such utilities;
3. Represent and appear for ratepayers and the public in proceedings before the Commission and in any negotiations or other measures to resolve disputes that give rise to such proceedings;
4. Represent and appear before ratepayers and the public in any negotiations or other measures to disputes that give rise to proceedings before the Commission and make and seek approval of agreements to settle such disputes; and
5. Make motions for rehearing or reconsideration, appeal, or seek judicial review of any order or decision of the Commission regarding jurisdictional utilities.

In addition, Neb. Rev. Stat. § 66-1832 (Reissue 2003) permits the public advocate to “hire or contract with attorneys, legal assistants, experts, consultants, secretaries, clerks, and such other staff necessary for the full and efficient discharge of the duties of the office as permitted by the budget of the public advocate, as approved by the Commission.”

Neb. Rev. Stat. § 66-1840(1) (Cum. Supp. 2006) provides that, whenever the Commission “deems it necessary to investigate any jurisdictional utility,” expenses exceeding the sum of \$100 shall be assessed and paid by such utility. Subsection (2) of that same statute requires that such payment shall be credited “to the Public Service Commission Regulation Fund for use of the Commission.” The total amount, in any one fiscal year, for which any utility shall be assessed, shall not exceed the following:

- Actual expenses, direct and indirect, incurred by the Commission, for a jurisdictional utility that has not filed an annual report with the Commission under the Act.

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- One percent of the utility’s gross operating jurisdictional revenue less gas cost derived from intrastate natural gas utility business as reflected in the last annual report filed with the Commission.

In November 2004, the Commission entered into a four-year agreement with the law firm Harding, Shultz & Downs to provide the public advocate services set out in the Act. For some time prior to this, the law firm was already assisting the Commission with similar services on a case-by-case basis. The agreement was modified in 2006 to allow for an increase of the hourly attorney fees billed to the Commission. In 2007, the agreement was amended again to reflect the law firm’s name change to Harding & Shultz, P.C., L.L.O. (Harding & Shultz). None of these amendments altered the original term length of the agreement, meaning that it remained in effect until November 14, 2008.

Prior to the 2004 agreement, Harding, Schultz, and Downs began exercising the public advocate’s authority under Neb. Rev. Stat. § 66-1832 to engage the services of needed staff or consultants. In August 2003, Dahlen, Berg & Co. (which later changed its name to Avant Energy Services), was hired to assist with “all consulting services necessary to protect and advance the interests of affected rate payers, the public, and Nebraska citizens” in a number of designated cases.¹ The resulting agreement capped the fee to be received by Dahlen, Berg & Co. for those services at \$65,000. Subsequent consulting service agreements with that same company contained no similar fee restrictions. Pursuant to all such agreements, Harding & Shultz submits invoices to the Commission for the work of the consultant, and the Commission remits payment to the law firm.

The following table illustrates expenses, as recorded in the Nebraska Information System (NIS), from the Commission to the public advocate (including consultant expenses) for the last three fiscal years.

Public Advocate Expenses		
FY 2008	\$	627,357
FY 2007	\$	388,806
FY 2006	\$	136,670
Total	\$	1,152,833

Note: A timing discrepancy exists between this table and the invoices submitted to the Commission, as shown below. These are actually payments made by the Commission per NIS, which do not include everything invoiced and unpaid as shown in the table below, due to timing.

The following table shows the fees remitted from the public advocate and its consultant for the fiscal years ended June 30, 2006, through June 30, 2008, including invoices for the public advocate through August 2008. See **Exhibit A** for a listing of the specific cases associated with these invoices:

¹ August 27, 2003, engagement letter, page 1.

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Fiscal Year	Public Advocate Invoices	Consultant Invoices	Total
2009	\$ 109,570.17	\$ -	\$ 109,570.17
2008	\$ 362,687.69	\$ 81,673.05	\$ 444,360.74
2007	\$ 333,078.49	\$ 339,085.75	\$ 672,164.24
2006	\$ 111,617.55	\$ 8,958.90	\$ 120,576.45
2005	\$ -	\$ 2,720.00	\$ 2,720.00
Grand Total	\$ 916,953.90	\$ 432,437.70	\$ 1,349,391.60

Note: FY 2005 represents invoices dated in fiscal year 2005, which were not submitted to the Commission until FY 2006. FY 2009 represents public advocate invoices dated through August 2008. The Commission provided these invoices for the public advocate, but had not yet received invoices for the consultant for this same time period.

The next table represents the percentage of charges for each hourly rate charged by the public advocate or the public advocate’s consultant:

Hourly Charges	% of hours	Hours	Charge
\$ 245.00	20.46%	1,322.60	\$ 324,037.00
\$ 230.00	25.34%	1,637.50	\$ 376,625.00
\$ 220.00	7.22%	466.80	\$ 102,696.00
\$ 200.00	31.48%	2,034.40	\$ 406,880.00
\$ 190.00	3.41%	220.70	\$ 41,933.00
\$ 135.00	0.08%	4.90	\$ 661.50
\$ 130.00	2.28%	147.40	\$ 19,162.00
\$ 125.00	2.44%	157.40	\$ 19,675.00
\$ 120.00	0.17%	10.90	\$ 1,308.00
\$ 110.00	0.07%	4.50	\$ 495.00
\$ 105.00	0.25%	16.10	\$ 1,690.50
\$ 95.00	0.69%	44.60	\$ 4,237.00
\$ 85.00	0.10%	6.50	\$ 552.50
\$ 83.00	0.24%	15.50	\$ 1,286.50
\$ 82.00	3.90%	252.30	\$ 20,688.60
\$ 80.00	0.11%	7.00	\$ 560.00
\$ 76.00	0.02%	1.40	\$ 106.40
\$ 70.00	0.12%	7.80	\$ 546.00
\$ 60.00	0.03%	1.70	\$ 102.00
\$ 55.00	0.09%	5.70	\$ 313.50
\$ 52.25	0.04%	2.50	\$ 130.63
\$ 50.00	0.04%	2.90	\$ 145.00
\$ 40.00	0.03%	2.00	\$ 80.00
See note below	1.39%	89.70	\$ -
Totals	100.00%	6,462.80	\$ 1,323,911.13
Expenses			\$ 25,480.47
Grand Total			\$ 1,349,391.60

Note: There were 89.7 hours on invoices that were not charged. These appear to be hours used to attend conferences in accordance with the agreement these hours are not to be charged.

See **Exhibit A** for a listing of the specific cases associated with these invoices.

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Criteria

The criteria used in this attestation review were those statutes within the State Natural Gas Regulation Act pertaining specifically to the office of the public advocate.

Summary of Procedures

In accordance with Neb. Rev. Stat. § 84-304 (Reissue 2008), the Auditor of Public Accounts (APA) conducted an attestation review of the public advocate expenses for the fiscal years ended June 30, 2006, through June 30, 2008, in accordance with standards applicable to attestation engagements contained in *Government Auditing Standards* issued by the Comptroller General of the United States. The APA attestation review consisted of the following procedures:

1. Obtained from NIS payment and expense information pertaining to the public advocate.
2. Obtained detailed supporting documentation from the Commission for all invoices submitted by the public advocate for payment.
3. Reviewed and summarized all supporting documentation provided by the Commission.

Summary of Results

The summary of our attestation review noted the following findings and recommendations:

1. Statutory Compliance

As previously noted, Neb. Rev. Stat. § 66-1830(2) requires the Executive Director of the Commission to appoint the public advocate to a four-year term. In addition, Neb. Rev. Stat. § 66-1830(3) requires the public advocate to be an attorney and to “have experience in consumer-related utility issues or in the operation, management, or regulation of utilities.” Neb. Rev. Stat. § 66-1832 (Reissue 2003) requires the office of the public advocate to “be located at the same location as the commission but . . . kept separate from the other offices as provided by rules and regulations adopted and promulgated by the commission.”

It does not appear the Commission is in compliance with the statutes noted above. One of Harding & Shultz’s senior attorneys, Roger P. Cox, routinely fills the role of public advocate. Nevertheless, the agreement between the Commission and Harding & Shultz appears to deviate somewhat from the original intent of statutory language found at Neb. Rev. Stat. § 66-1830 et seq.² Pursuant to those provisions of law, the Commissioner is directed to appoint a specific attorney to serve as public advocate and oversee an office that not only exists as a “separate and independent division within” but also is “located at the same location as” the Commission. However, under the current agreement, a corporate entity provides the public advocacy services in its capacity as an independent contractor. In doing so, it remains entirely set apart, both organizationally and spatially, from the Commission.

² The provisions of LB 790 (2003) pertaining to the office of public advocate became part of that legislation through AM2035, which was introduced during Select File debate. The legislative history of the bill contains no direct discussion of those provisions.

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Effective November 15, 2008, the Commission renewed its contract with Harding & Shultz for another 4-year term.

Questions regarding this contractual arrangement may arise since the Commission is not in compliance with statutes.

We recommend the Commission ensure compliance with the statutes regarding the contractual arrangement with Harding & Shultz for public advocate services.

Commission's Response: The Commission has maintained the Office of Public Advocate as a contracted position since the inception of the office in 2004. It has been and remains the opinion of the Commission that Neb. Rev. Stat. 66-1830 et seq. authorizes the actions undertaken by the Commission since 2004 relating to the operation of the Office of Public Advocate.

The Commission does appreciate the observations made in the review and the comments made by the Auditor's legal counsel in the course of the exit conference regarding the advisability of the Commission initiating a rule and regulation proceeding to add clarity to the Commission's construction of the provisions of law in question. It is the intent of the Commission to commence a rule and regulation proceeding on this subject as soon as practical.

APA Response: Any rules and regulations established by the Commission should comply with the provisions of statute, as noted above.

2. Public Advocate Expenses

Effective January 1, 2007, the agreement between the Commission and Harding & Shultz for base public advocate services was amended. In addition to establishing hourly rates for base public advocate services, the agreement provides for the payment of all out-of-pocket costs and reimbursable expenses incurred by Harding & Shultz in performance of those services. The agreement also requires Harding & Shultz to maintain and provide to the Commission, upon request, appropriate backup documentation for all reimbursable expenses; however, such documentation is not required to be provided automatically along with reimbursement requests.

Between approximately June 30, 2006, and June 30, 2008, Harding & Shultz submitted in excess of \$16,000 in expense reimbursement requests, while Dahlen, Berg & Co., the consultant hired to assist with certain public advocate cases, submitted almost \$14,000 in such requests. The Commission did not have a formal, written policy for the monitoring of expense reimbursements relating to public advocate services. According to the Executive Director of the Commission, Harding & Shultz had been submitting documentation of all expenses for approximately one year. Prior to that, Commission staff customarily requested supporting documentation for any expenses that seemed excessive or unusual. At that time, such documentation was obtained by the Commission for all expenses greater than \$350 and, in some cases, for expenses less than that amount.

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Without specific contractual language for the submission of expense documentation and a formal, written policy for the monitoring of such documentation, there is an increased risk of misuse of State funds through unsupported expense reimbursements.

We recommend the Commission include specific language in its agreement with Harding & Shultz, as well as with any other individuals or entities hired to provide future public advocate services, requiring the submission of supporting documentation for all requested expense reimbursements.

Commission's Response: Since late 2007 the Commission has required full documentation of requested expense reimbursements submitted by the Public Advocate. However the Commission does agree with the Auditor's recommendation and will work with the Public Advocate to place appropriate language to this effect in the agreement.

Overall Conclusion

The Commission is not in compliance with certain statutes related to the Office of the Public Advocate, which could raise questions regarding the contractual arrangement between the Commission and Harding & Shultz. We believe the information provided herein raises important questions regarding the cost-effectiveness of this contractual arrangement. These questions are outside of the scope of this engagement and have been referred by the APA to the Legislature's Performance Audit Committee. Furthermore, the Commission should ensure such contractual provisions pertaining to public advocate services contain specific language requiring the submission of supporting documentation for all requested expense reimbursements. The Commission should also review such documentation on a regular basis to ensure that ratepayer funds are protected from misuse.

The APA staff involved in this attestation review were:

Cindy Janssen, Audit Manager	Krista Davis, Audit Manager
Craig Kubicek, Auditor-In-Charge	Julie Smith, Auditor-In-Charge
Acacia Crist, Auditor II	Mary Avery, Special Audits and Finance Manager

If you have any questions regarding the above information, please contact our office.

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PUBLIC ADVOCATE AND CONSULTANT EXPENSES BY COMPANY AND CASE

Exhibit A

Company	Case	Hours	Amount Paid
Aquila	NG-0041	2,587.10	\$ 532,859.46
Aquila	NG-0004.1	81.50	\$ 17,550.37
Aquila	NG-0031	71.30	\$ 15,672.42
Aquila	NG-0034	25.00	\$ 5,689.58
Aquila	NG-0032	6.90	\$ 1,333.33
Aquila	Aquila	1.10	\$ 1,114.90
Aquila	NG-0007	0.90	\$ 180.00
Aquila/Black Hills	NG-0044	332.90	\$ 75,811.45
Aquila Total		3,106.70	\$ 650,211.51
Cornerstone Energy	Cornerstone Energy, LLC v. Aquila	5.20	\$ 1,146.08
Cornerstone Energy Total		5.20	\$ 1,146.08
Kinder Morgan	NG-0036	1,264.40	\$ 252,347.04
Kinder Morgan	adv. Kinder Morgan, Inc.	35.20	\$ 7,926.26
Kinder Morgan	NG-0023.1	17.70	\$ 3,540.00
Kinder Morgan	FC-1331	8.30	\$ 1,850.10
Kinder Morgan/Source Gas	FC-1327	323.60	\$ 78,394.82
Kinder Morgan/Source Gas	NG-0039	195.55	\$ 42,658.95
Kinder Morgan/Source Gas	NG-0040	77.65	\$ 17,374.35
Kinder Morgan/Source Gas	DR-0002/NG-0047	10.20	\$ 2,348.60
Kinder Morgan/Source Gas	NG-0046/PI-128	4.30	\$ 892.00
Kinder Morgan/Source Gas	DR-0002/FC-1327	2.80	\$ 560.00
Kinder Morgan/Source Gas	NG-0047/NG-0036	0.90	\$ 180.00
Kinder Morgan Total		1,940.60	\$ 408,072.12
Nebraska Resources Company	NG-0053	418.50	\$ 101,356.97
Nebraska Resources Company	NG-0051	32.00	\$ 7,670.03
Nebraska Resources Company	Nebraska Resources Company, LL	0.50	\$ 115.00
Nebraska Resources Company Total		451.00	\$ 109,142.00
Non-direct	Base Public Advocate Services	561.70	\$ 96,135.96
Non-direct	Rule & Regulation No. 157	76.90	\$ 14,850.41
Non-direct	Rule and Regulation #167	37.00	\$ 8,061.00
Non-direct	Legislative Matters	22.10	\$ 4,864.10
Non-direct	Rule & Reg. No. 161	23.50	\$ 4,469.10
Non-direct	Tariff No. 99	14.80	\$ 2,960.00
Non-direct	NG-0028/PI-97	13.30	\$ 2,530.40
Non-direct	General PA services	11.00	\$ 2,202.00
Non-direct	Rule and Regulation #157A	9.70	\$ 1,944.00
Non-direct	NG-0030/PI-98	8.90	\$ 1,691.00
Non-direct	Legislative matters	7.30	\$ 1,460.00
Non-direct	NG-0038	5.10	\$ 1,020.00
Non-direct	RM 167	1.80	\$ 360.00
Non-direct	General	1.20	\$ 228.00
Non-direct	NG-0035	0.80	\$ 160.00
Non-direct	NG-0045/PI-127	0.70	\$ 140.00
Non-direct Total		795.80	\$ 143,075.97
Northwestern Energy	NG-0048	47.20	\$ 11,161.74
Northwestern Energy	NG-0037	44.90	\$ 10,356.14
Northwestern Energy	adv. Northwestern Energy	23.50	\$ 5,215.15
Northwestern Energy Total		115.60	\$ 26,733.03
Public Alliance for Community Energy	NG-0012.1	38.20	\$ 8,796.58
Public Alliance for Community Energy Total		38.20	\$ 8,796.58
RnD Energy	NG-0033	9.70	\$ 2,214.31
RnD Energy Total		9.70	\$ 2,214.31
Grand Total		6,462.80	\$ 1,349,391.60