



# Public Service Commission

## State of North Dakota

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### COMMISSIONERS

Susan E. Wefald, President  
Kevin Cramer  
Tony Clark

Executive Director  
Illona A. Jeffcoat-Sacco

600 E. Boulevard Ave. Dept 408  
Bismarck, North Dakota 58505-0480  
web: [www.nd.gov/psc](http://www.nd.gov/psc)  
e-mail: [ndpsc@nd.gov](mailto:ndpsc@nd.gov)  
TTY 800-366-6888 or 711  
Fax 701-328-2410  
Phone 701-328-2400

June 20, 2008

Honorable Wayne K. Stenehjem  
Attorney General  
600 E. Boulevard Ave.  
Bismarck, ND 58505-0040

RE: Appointment of Special Assistant Attorneys General  
to Represent the Public Service Commission in the  
Appeal of the STB's decision in Ex Parte 646 (Sub-No. 1)  
*Simplified Standards for Rail Rate Cases*

Dear Mr. Stenehjem:

The Commission has entered into a contract for specialized legal counsel to represent the Commission in an appeal of the federal Surface Transportation Board's (STB) decision in Ex Parte 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases*.

The specialized legal counsel representing the Commission in these proceedings will be the firms of Thompson Hine LLP and McCarthy, Sweeney & Harkaway, P.C. These are the same firms that represented the Commission in previous matters before the STB. Three of the attorneys listed below, Andrew P. Goldstein, John M. Cutler, Jr., and Nicholas J. DiMichael, were involved in the 2003-2005 rail rate investigation and received appointments as Special Assistant Attorneys General. Those same attorneys as well as Jeffrey Moreno represented the Commission in pursuing a rail rate complaint case during 2005-2007. The previous appointments for these attorneys were terminated effective April 8, 2008. The attorneys that will be representing the Commission in the present proceeding are:

Andrew P. Goldstein  
McCarthy, Sweeney & Harkaway, P.C.  
2175 K St. N.W., Suite 600  
Washington, D.C. 20037  
Bar ID # 38372  
District of Columbia

Nicholas J. DiMichael  
Thompson Hine LLP  
1920 N St. N.W., Suite 800  
Washington, D.C. 20036  
Bar ID # 250407  
District of Columbia

130 RR-06-347 Filed: 6/20/2008 Pages: 9  
Letter to AG re Appointment of Special Assistant  
Attorneys General

Public Service Commission

Bill Binek

Honorable Wayne K. Stenehjem  
Attorney General  
Bismarck, ND 58505-0040  
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John M. Cutler, Jr.  
McCarthy, Sweeney & Harkaway, P.C.  
2175 K St. N.W., Suite 600  
Washington, D.C. 20037  
Bar ID #242065  
District of Columbia

Jeffrey O. Moreno  
Thompson Hine LLP  
1920 N St. N.W., Suite 800  
Washington, D.C. 20036  
Bar ID # 440070  
District of Columbia

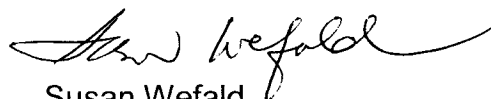
Appeals of STB decisions require legal counsel that has legal knowledge and expertise in federal rail rate and rulemaking proceedings. The firms selected have considerable experience in proceedings before the STB. The type of knowledge and experience required for this appeal is not available within the State of North Dakota.

Your office has copies of the biographies of each of the attorneys. The Commission will request that they provide you with certificates of good standing with the District of Columbia Bar, and provide a copy of insurance coverage required by the State of North Dakota. Enclosed is a copy of the Personal Service Contract between the Commission and the law firms.

The Commission requests that the attorneys identified above be appointed Special Assistant Attorneys General to represent the Commission as a party to this appeal.

Thank you.

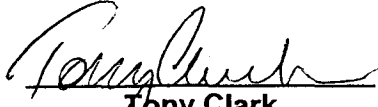
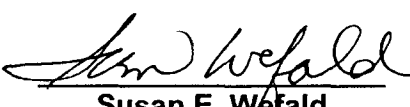
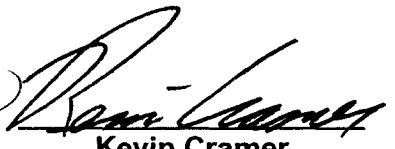
Sincerely,

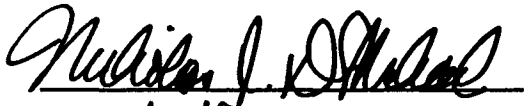
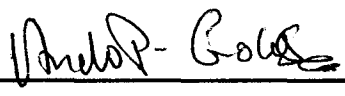


Susan Wefald  
Commission President

Enclosure

**PERSONAL SERVICE CONTRACT**

<b>Administrator:</b>	State of North Dakota Public Service Commission 600 E. Boulevard Avenue Bismarck, ND 58505-0480 (701) 328-2400	
<b>Date:</b>	June 4, 2008	
		
	Tony Clark Commissioner	Susan E. Wefald President
		
		Kevin Cramer Commissioner

<b>Contractor</b>	Thompson Hine LLP	McCarthy, Sweeney & Harkaway, P. C.
<b>Name</b>	Nicholas J. DiMichael	Andrew P. Goldstein
<b>Address</b>	1920 N St. NW – Suite 800	2175 K St. NW - Suite 600
<b>City/State/Zip</b>	Washington, DC 20036	Washington, DC 20037
<b>Telephone</b>	202-331-8800 Ext. 4103	202-775-5560 Ext. 4023
<b>Typed Name</b>	Nicholas J. DiMichael	Andrew P. Goldstein
<b>Title</b>	Counsel	Counsel
<b>Signature</b>		
<b>Date</b>	<u>6/13/08</u>	<u>6/13/08</u>

<b>Agreement Information</b>	
Contract No.:	<u>RR- 565-08</u>
Case No:	<u>RR-06-347</u>
Start Date:	<u>Upon Signing</u>
End Date:	<u>6-30-09</u>
Program Title:	<u>STB Simplified Standards Appeal, Ex Parte 646 (Sub-No.1).</u>
<b>Type of Contract:</b>	( ) Fixed Price ( ) Cost Reimb. ( ) Unit Price ( X ) Other
	Per hour basis contract with \$5,000.00 cap including expenses

<b>Budget Information</b>	
Cost Center:	<u>4100</u>
Services:	_____
Optional on-site review:	<u>0</u>
Expenses:	<u>0</u>
ID	_____
<b>Type of Contractor:</b>	( ) Individual ( X ) Corporation ( X ) Partnership (MS&H) (TH) ( ) Public Agency ( ) Nonprofit Organization  ( ) Other – Joint Venture

This contract is entered into between the State of North Dakota acting through the Public Service Commission (State) and Thompson Hine LLP & McCarthy, Sweeney & Harkaway, P.C. (Contractor). This contract consists of this sheet, general provisions and specific provisions.

## GENERAL PROVISIONS

### CONTRACTUAL FEATURES

#### LEGAL AUTHORITY

The Contractor assures that it possesses legal authority to participate in this contract.

#### ASSIGNMENT/SUBCONTRACTING

The Contractor may not assign this contract or any part thereof, or assign any of the monies to be paid hereunder, nor shall any part of the work done or material furnished under this contract be sublet without the State's express written consent.

The Contractor may not enter into subcontracts for any of the work contemplated under this contract unless included in the specific provisions of this contract. Any such subcontract must acknowledge the binding nature of the contract and must incorporate this contract, including any attachments. Contractor is solely responsible for the performance of any subcontractor. Contractor shall not have the authority to contract for or incur obligations on behalf of the State.

#### TERMINATION

The State, by written notice of default listing causes and reasons, may terminate this contract in whole or in part if (1) the Contractor fails to provide services required by this contract within the time specified or any extension agreed to by the State; or (2) the Contractor fails to perform any of the other conditions or provisions of this contract, or so fails to pursue the work so as to endanger performance of this contract in accordance with its terms. If this agreement is terminated prior to completion by the State for any reason other than the professional misconduct of Contractor, or by Contractor for good cause, Contractor shall be paid on the basis of (1) normal hourly billing rates of those participating on behalf of Contractor, and (2) reasonable expenses incurred by

Contractor in performing its obligations under this contract, up to the limit of the contract price.

Significant deviation from performance standards in this contract may result in reduced or terminated financial participation of the Contractor, subsequent to negotiations with the State.

This contract may be terminated in whole or in part without cause by mutual consent of the Contractor and the State. The parties shall agree upon the termination conditions including effective date and in the case of partial terminations, that portion to be terminated.

The State may terminate this contract effective upon delivery of written notice to the Contractor or on any later date stated in the notice in the event (1) funding from federal, state or other sources is not obtained and continued at levels sufficient to allow for purchases of the services or supplies in the indicated quantities or term; (2) federal or state laws or rules are modified or interpreted in a way that the services are no longer allowable or appropriate for purchase under this contract or are no longer eligible for the funding proposed for payments authorized by this contract; or (3) any license, permit or certificate required by law or rule, or by the terms of this contract, is for any reason denied, revoked, suspended or not renewed.

Any contract that extends beyond the current biennium may be terminated by the State if sufficient funds are unavailable, if the law regarding the contract is changed, or without cause at any time.

The rights and remedies of the State provided in the termination provisions related to defaults by the Contractor are not exclusive and are in addition to any other rights and remedies provided by law or under this contract.

**FORCE MAJEURE**

Contractor will not be held responsible for delay or default caused by fire, riot, acts of God or war if the event is beyond the Contractor's reasonable control and the Contractor gives notice to the State immediately upon occurrence of the event causing the delay or default or which is reasonably expected to cause a delay or default.

**DISPUTES**

The Contractor agrees to attempt to resolve disputes arising from this contract by informal administrative process and negotiations in lieu of litigation. Continued performance by the Contractor during disputes is assured.

The State does not agree to any form of binding arbitration, mediation, or other forms of mandatory alternative dispute resolutions. The parties have the right to enforce their rights and remedies in judicial proceedings. The State does not waive any right to a jury trial.

**MERGER AND MODIFICATION**

This contract constitutes the entire agreement between the parties. There are no understandings, agreements, or representations, oral or written, not specified within this contract. This contract may not be modified, supplemented or amended, in any manner, except by written agreement signed by both parties.

**SEVERABILITY**

If any term of this contract is declared by a court having jurisdiction to be illegal or unenforceable, the validity of the remaining terms shall not be affected, and if possible, the rights and obligations of the parties are to be construed and enforced as if the contract did not contain that term.

**NOTICE**

All notices or other communications required under this contract shall be given by registered or certified mail and are complete on the date mailed when addressed to the parties at the following addresses:

**State**

Ilona Jeffcoat-Sacco, Executive Secretary  
Public Service Commission  
State Capitol  
600 E. Boulevard Ave. Dept 408  
Bismarck, ND 58505-0480

**Contractor**

Andrew P. Goldstein  
Attorney at Law  
McCarthy, Sweeney & Harkaway, P.C.  
2175 K St. NW – Suite 600  
Washington, DC 20037

**APPLICABLE LAW AND VENUE**

This contract is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this contract must be brought in the District Court of Burleigh County, North Dakota.

**SPOILIATION – NOTICE OF POTENTIAL CLAIMS**

Contractor shall promptly notify State of all potential claims that arise or result from this contract. Contractor shall also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to the State the opportunity to review and inspect the evidence, including the scene of an accident.

**INDEMNITY**

Contractor and State each agrees to assume its own liability for any and all claims of any nature including all costs, expenses, and attorneys' fees which may in any manner result from or arise out of this agreement.

**CONFIDENTIALITY**

Contractor agrees not to use or disclose any information it receives from the State under this contract that the State has previously identified as confidential or

exempt from mandatory public disclosure except as necessary to carry out the purposes of this contract or as authorized in advance by the State. The State agrees not to disclose any information it receives from Contractor that the Contractor has previously identified as confidential and which the State determines in its sole discretion is protected from mandatory public disclosure under a specific exception to the North Dakota open records law, N.D.C.C. §44-04-18. The duty of the State and Contractor to maintain confidentiality of information under this section continues beyond the term of this contract, or any extensions or renewals of it.

State and Contractor acknowledge that the State has entered into a Joint Litigation and Information Sharing Agreement with various parties. State and Contractor understand that Contractor is an agent of the State for purposes of the Joint Litigation and Information Sharing Agreement and that certain information exchanged as a result of this agreement and the Joint Litigation and Information Sharing Agreement shall be protected from mandatory disclosure by the provisions of N.D.C.C. Chapter 44-04, including N.D.C.C. § 44-04-19.1. State and Contractor acknowledge that, as a general rule, litigation files of the State must be made available for public disclosure following completion of civil litigation or an administrative proceeding. Contractor agrees to contact the State immediately upon receiving a request for information under the open records law and to comply with the State's instructions on how to respond to the request.

## **INSURANCE**

**a. Required Coverages.** Contractor shall secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages covering the Contractor for any and all claims of any nature which may in any manner arise out of or result from this agreement:

- (1) Commercial general liability, with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- (2) Professional errors and omissions, including a three year "tail coverage endorsement," with minimum liability limits of \$1,000,000 per occurrence and in the aggregate.
- (3) Automobile liability, with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- (4) Workers compensation coverage meeting all statutory requirements.
- (5) Employer's liability or "stop gap" insurance of not less than \$1,000,000 as an endorsement on the workers compensation or commercial general liability insurance.

### **b. General Insurance Requirements.**

The insurance coverages listed above must meet the following additional requirements:

- (1) Any deductible or self-insured retention amount or similar obligation under the policies shall be the sole responsibility of the Contractor. The amount of any deductible or self-retention is subject to approval by the State.
- (2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A" rating must be approved by the State. The policies shall be in form and terms approved by the State.
- (3) The insurance required in this agreement, through a policy or endorsement, shall include a "Waiver of Subrogation" waiving any right to recovery the insurance company may have against the State.

- (4) The Contractor shall furnish a certificate of insurance and all endorsements to the undersigned State representative prior to commencement of this agreement.
- (5) The Contractor shall immediately notify the State of any cancellation or modification of any policy or endorsements.
- (6) Failure to provide insurance as required in this agreement is a material breach of contract entitling the State to terminate this agreement immediately.

#### **ATTORNEY FEES**

In the event a lawsuit is instituted by the State to obtain performance due of any kind under this contract, and the State is the prevailing party, Contractor shall, except when prohibited by N.D.C.C. § 28-26-04, pay the State's reasonable attorney fees and costs in connection with the lawsuit.

#### **INDEPENDENT ENTITY**

Contractor is an independent entity under this contract and is not a State employee for any purpose, including but not limited to the application of the Social Security Act, the Fair Labor Standards Act, the Federal Insurance Contribution Act, the North Dakota Unemployment Compensation Law and the North Dakota Workers' Compensation Act. The Contractor retains sole and absolute discretion in the manner and means of carrying out the Contractor's activities and responsibilities under this contract, except to the extent specified in the contract.

#### **FISCAL RESPONSIBILITIES**

#### **RECORDS**

All records, regardless of physical form, and the accounting practices and procedures of the Contractor relevant to this contract are subject to examination by the North Dakota State Auditor or the Auditor's designee. The Contractor shall maintain and retain all books, records, and other documents required by the State and to

produce program narrative and statistical data at times prescribed by the State relevant to this agreement for four years after final payment. Records shall be retained beyond four years if audit findings have not been resolved.

#### **NO CLAIM FOR ADDITIONAL WORK**

No claim for additional services not specifically herein provided, done, or furnished by the Contractor will be allowed, nor shall the Contractor do any work or furnish any material not covered by the contract, unless such work is ordered in writing by the State.

#### **TIME KEEPING PROCEDURES**

The Contractor shall require employees and subcontractors, if applicable, whose positions are funded under this contract or included as match, to maintain adequate documentation for services provided. For positions that are funded from more than one source, an analysis of duties performed by program shall also be prepared.

#### **MONITORING, EVALUATION AND AUDIT**

The Contractor agrees to cooperate with any monitoring, evaluating and/or audit conducted by the State, or its designee who shall have full access to and the right to examine all books, records and other relevant documents.

The Contractor agrees to take immediate corrective action on deficiencies disclosed through program monitoring of costs disallowed in the course of an audit, review, or monitoring.

#### **PREPAYMENT**

The State will not make any advance payments for work to be performed by the Contractor under this contract. At the end of any month after the Start Date of this contract, Contractor may submit a bill for work that has been completed in that month, or for work in any previous month for which a bill has not been submitted. Such bills shall be for legal fees and reasonable expenses incurred during Contractor's performance of its obligations under agreement, which shall in aggregate not

exceed \$5,000 over the term of this agreement. Hourly billing rates are as follows:

Nicholas DiMichael	\$460.00
Andrew P. Goldstein	\$360.00
John Cutler	\$300.00
Jeffrey Moreno	\$390.00

**TAXPAYER ID**

Contractor's North Dakota tax ID number is: \_\_\_\_\_  
Contractor's federal employer ID number is: \_\_\_\_\_

**PROGRAM REQUIREMENTS**

**COMPLIANCE WITH LAWS**

Contractor agrees to comply with all applicable laws, rules, regulations and policies, including but not limited to those relating to nondiscrimination, accessibility and civil rights. Contractor agrees to timely file all required reports, make required payroll deductions, and timely pay all taxes and premiums owed, including but not limited to sales and use taxes and unemployment compensation and workers' compensation premiums. Contractor shall have and keep current at all times during the term of this contract all licenses and permits required by law and shall be authorized to do business in the State of North Dakota. Attorneys representing the State under the terms of this contract must be appointed as Special Assistant Attorneys General by the North Dakota Attorney General.

**EQUAL OPPORTUNITY**

No individual shall be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with this contract because of race, color, religion, national origin, disability, age, sex, political affiliation or belief or citizenship.

The Contractor will take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, color, religion, national origin,

disability, age, sex, political affiliation or belief or citizenship.

**NONDISCRIMINATION**

This contract and any subcontract hereunder is subject to the Age Discrimination Act of 1975, Section 504 of the Rehabilitation Act, Title VI of the Civil Rights of 1964 and the Americans with Disabilities Act of 1990.

**WORK PRODUCT, EQUIPMENT AND MATERIALS**

All work product, equipment or materials created or purchased under this contract belong to the State and must be delivered to the State at the State's request upon termination of this contract. Contractor agrees that all materials prepared under this contract are "works for hire" within the meaning of copyright laws of the United States and assigns to State all rights and interests Contractor may have in the materials its prepares under this contract, including any right to derivative use of the material. Contractor shall execute all necessary documents to enable State to protect its rights under this section. Contractor shall include provisions appropriate to effectuate the purposes of this condition in all subcontracts entered into relating to this project.

**EFFECTIVENESS OF CONTRACT**

This contract is not effective until fully executed by both the Contractor and the State.

### **SPECIFIC PROVISIONS**

The Contractor will represent the State as a party in an appeal of the STB's decision in Ex Parte 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases*.

The Contractor will be compensated on an hourly basis, plus expenses, based on periodic itemized billing statements. Final payment will be made upon satisfactory completion of the described project work, as determined by the State.

In the event the case is settled or this agreement is otherwise terminated prior to completion of project work, compensation will be awarded for work satisfactorily completed.

Except as outlined above, no part of this contract may be assigned, sublet or subcontracted.