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Transcriber's Office

Executive Board Committee
February 17, 2011

[LB604 LR30 LR47]

The Executive Board of the Legislative Council met at noon on Thursday, February 17, 2011, in Room 2102 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB604, LR30, and LR47. Senators present: John Wightman, Chairperson; John Nelson, Vice Chairperson; Mark Christensen; Deb Fischer; Mike Flood; Russ Karpisek; Chris Langemeier; Steve Lathrop; and Lavon Heidemann. Senators absent: Rich Pahls. []

SENATOR WIGHTMAN: Welcome to the Executive Board Committee hearing. My name is John Wightman. I'm from Lexington, Nebraska, and serve in the 36th Legislative District. I serve as Chair of the committee. The committee will take up the bills and resolutions in the order posted. Our hearing today is your public part of the legislative process. This is your opportunity to express your position on the proposed legislation before us today. To better facilitate today's proceeding, I will ask that you abide by the following procedures. Please turn off your cell phones or silence them. The order of testimony as is usual will be the introducer first, the proponents, opponents, neutral, and closing. Testifiers should sign in. Hand in your sign-in sheets to the committee page when you come up to testify. Spell your name for the record before you testify. Be concise. Written materials may be distributed to committee members as exhibits only while testimony is being offered. Hand any written materials as exhibits to the page for distribution to the committee and staff. We will need 13 copies. If you have fewer than 13 copies or only have one, hold up your hand so that the page can make copies for you. If you do not wish to testify but would like your position to be a part of the record, you can sign the form found at the testifier's table by the testifier's sign-in sheet. I'll go ahead and introduce the members of the committee. To my far right is Senator Lavon Heidemann from District 1, Elk Creek. To his left is Senator Mark Christensen, District 44, of Imperial, Nebraska. Seated next to him is the Speaker of the Legislature, Mike Flood, District 19, of Norfolk, Nebraska. Seated to his left is Senator Russ Karpisek, District 32, of Wilber, Nebraska. Seated next to him is Senator John Nelson from Omaha, Nebraska. To my far left is Senator Steve Lathrop of District 12, from Omaha, Nebraska. To his right is Senator Deb Fischer, District 43, Valentine, Nebraska. Not present with us today is Senator Rich Pahls, District 31, of Millard, Nebraska. And seated to Senator Fischer's left is Senator Chris Langemeier, District 23, of Schuyler, Nebraska. Seated to my left is the committee clerk, Jessica Shelburn, and seated at my right is Janice Satra, committee counsel. With that we will take up, first, LB604, and then the two resolutions in the order that were posted. Thank you. []

SENATOR CONRAD: (Exhibits 1, 2, 3) Thank you. Good afternoon, Senator Wightman, members of the committee. My name is Danielle Conrad, D-a-n-i-e-l-l-e, Conrad, C-o-n-r-a-d. I represent the "Fightin' 46th" Legislative District, right here in our Nebraska Unicameral Legislature. I am here today to introduce LB604. LB604 adopts the Private Attorney Retention Sunshine Act. This is based upon an ALEC model bill to ensure

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accountability and openness in the state's hiring of outside counsel. Contracts for outside counsel are paid for with taxpayer dollars. As in other instances when taxpayer dollars are being outsourced to private contractors, we require competitive bidding, oversight, and transparency. The same should hold true for legal service contracts. This legislation sets a threshold to trigger these protections on contracts that exceed \$50,000. That is the same threshold that we utilize for contracting in the Legislative Council. Under this legislation, the Attorney General is not prohibited from entering into contracts for legal services that exceed \$50,000, but rather, he must first engage, he or she must first engage in an open and competitive bidding process. LB604 also requires that at the conclusion of a legal services contract the private attorney or law firm shall provide the Attorney General with a statement of the hours worked, expenses incurred, aggregate fee amount, and the breakdown of the hourly rate. This information would then be available to ensure legislative oversight and public review. LB604 also prohibits legal fees in excess of \$1,000 per hour and it includes a severability clause. I passed around three handouts that help explain this legislation. The first is a handout from the American Legislative Exchange Council, commonly known as ALEC, which shows a map of the states that have passed a version of this bill--eight states thus far. Also eight states, including Nebraska, of course, have an introduced version of this legislation this year. The second is an article from The Wall Street Journal, detailing the ethical, legal, and political problems surrounding these contracts. As you will see, this has been a significant problem in other states, and legislation like this has been an effective solution to remedy these problems. The third handout is an August 6, 2009, article from LegalNewsline.com, which quotes Nebraska Attorney General Jon Bruning agreeing with these principles. According to Attorney General Bruning, "the key to using outside counsel is transparency." He further goes on to note that when his office utilizes outside counsel, they do so "with safeguards, including billing guidelines and a competitive selection process." Thus, this legislation would be quite simple to implement considering the Attorney General has already committed to these parameters. Thank you for your time and your careful consideration. [LB604]

SENATOR WIGHTMAN: Thank you, Senator Conrad. Just turning to Section 5, it says "The Attorney General shall not enter into a contract for legal services exceeding fifty thousand..." If it's under \$50,000, then the bill would not apply at all? Is that correct? [LB604]

SENATOR CONRAD: That's right, Senator Wightman. Just as we have for contracts in the Legislative Council and in other areas of government, it recognizes that some smaller contracts for efficiency purposes need not trigger the additional requirements for oversight and accountability. [LB604]

SENATOR WIGHTMAN: Thank you. [LB604]

SENATOR CONRAD: So those contracts would be unaffected. [LB604]

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SENATOR WIGHTMAN: Thank you, Senator Conrad. Senator Christensen. [LB604]

SENATOR CHRISTENSEN: Thank you, Chairman. Thank you, Senator. I'm referring to, in Section 4, the "competitive bidding process has been undertaken." But if this is a very specific case--I'll pick on water, using water--so you definitely want to get water lawyers bidding on this. If some of the outside bids are cheaper, are we requiring them to take the cheapest, or do they have any flexibility to make sure they are experts in the field that we need? [LB604]

SENATOR CONRAD: As in our other public contracting rules, regulations, and statutory frameworks, we usually recognize the lowest responsible bidder as the one who should be awarded a contract. And so that kind of definition would take into account experience and expertise because we indeed do have a great interest in ensuring that the best and the brightest are representing the citizens of Nebraska on important litigation. But, Senator Christensen, I'm so glad you mentioned that example because as you well know, and many members of this committee and the public know, we've got a proposal before the Appropriations Committee this year for an increase in the Attorney General's budget for millions of dollars in water litigation. And it's unclear at this moment in time how much of that will be handled in-house, how much will be handled by outside counsel and who that outside counsel is, and I think that all of those with an interest in water litigation have a right to know that it goes to the, indeed, most qualified folks who can handle those issues. [LB604]

SENATOR CHRISTENSEN: Thank you. [LB604]

SENATOR WIGHTMAN: Thank you, Senator Christensen. Senator Lathrop. [LB604]

SENATOR LATHROP: I do have a question, Senator Conrad, and that relates to the idea that we set a threshold of \$50,000. And I'm wondering if, and I've never worked--I won't say I've never worked on an hourly rate, but I know lawyers, plenty of lawyers that do. And I'm wondering if it's, as a practical matter, a problem because...or if we need to be clearer about it. Let's say that there's a police chase case; the State Patrol is involved in a police chase case. There's going to be a suit filed by the injured person, and I've done one of these before, even before I got here, where they hired outside counsel. And I'm not sure why they hired outside counsel, but somebody from a private law firm, and the guy was the same guy that did them time and time again. When they come in, I don't know if they know that it's going to exceed \$50,000. And so I can see the Attorney General saying, well, this could be done in two months and the fee could be no more than \$5,000, or it might take me...it might be three years of litigation. So what's the criteria or how do we determine if someone is going to do work on a...and bill on a monthly basis? How do we know it's going to exceed and what is the standard going to be? [LB604]

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SENATOR CONRAD: I think those are great questions and I think as in other aspects of law, whether it be contracting or otherwise, there's always a reasonableness standard that is inherent therein. And in terms of some of the specific parameters and definitions included in this legislation, I'm wide open to working with the committee or the Attorney General's process to ensure that we can have a very clear set of public policies surrounding these issues. But at this point in time, I definitely think that the concept about public transparency on outsourced legal contracts is what I'm really try to focus the conversation on. [LB604]

SENATOR LATHROP: Okay. And maybe in a follow-up to that, if the Attorney General's Office is going to hire somebody to defend police chase cases, as an example, and you could...it could be water law, it could be whatever. To some extent, the state is going to get an advantage by having the same lawyer handle or specialize in those kind of cases. And I'm wondering if they're going to choose somebody to be...and I used police chase because that's the only thing I can think of in civil litigation where they have historically had outside counsel. But maybe it needs to be if you're going to hire somebody to do this, the police chase cases, this is going to be the contract so that they don't have to do it each time one of those cases come along, and then they're going through this process each time and bouncing around where the second guy has to reinvent the wheel or relearn an entire area of law. [LB604]

SENATOR CONRAD: Um-hum. I think that that's again something that I'm open to working with the committee on if...as this legislation moves forward. And the other point, Senator Lathrop, I think that's included in that line of questioning, at least that provoked some thoughts on my part as you were asking the question, is if indeed we have some of these instances in law where we see frequent litigation, why isn't that being handled in-house? Why is that being outsourced? I think those are questions that are inherent in the ideas in this bill and that we need to have very careful attention paid to. [LB604]

SENATOR WIGHTMAN: Thank you, Senator Lathrop. Any other questions? Thank you for your time. [LB604]

SENATOR CONRAD: Oh, Senator... [LB604]

SENATOR NELSON: I'm sorry. [LB604]

SENATOR WIGHTMAN: Wait. Senator Nelson. [LB604]

SENATOR NELSON: Thank you, Senator Wightman and Senator Conrad. I'm just looking at page 3 here, trying to track what happens here again. Section 4, it says "an open and competitive bidding process has been undertaken." Well, has that been done then, and a contract, a proposed contract arrived at after this bidding process? And is

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that what the Exec Board reviews? Is that...? [LB604]

SENATOR CONRAD: Right. Yes. [LB604]

SENATOR NELSON: Okay. [LB604]

SENATOR WIGHTMAN: Thank you, Senator Nelson. Any other questions? Senator Karpisek. [LB604]

SENATOR KARPISEK: Thank you, Senator Wightman. Senator Conrad, would they be able to spec what they wanted in an attorney? Kind of like, you know, you talked about any other, we're going to spec this kind of car. Could they spec we want an attorney who specializes in water law? Is...I don't know if you could say from Nebraska? I don't know what... [LB604]

SENATOR CONRAD: Yes. Absolutely, Senator Karpisek. All of those parameters, specifications would be fully allowed under this legislation and should be finely detailed so that we can ensure the best and the brightest and the most qualified are indeed pursuing these contracts, winning these contracts, and litigating on the state's behalf, rather than the current process where we have absolutely no way to ensure that. [LB604]

SENATOR KARPISEK: I guess my question then is, could you spec it so narrow that you pick out the one person, as I know sometimes happens? We want this fire truck so we spec this fire truck. [LB604]

SENATOR CONRAD: Um-hum. I suppose that may be a possibility. And, of course, we can't legislate against a party's bad faith if they're trying to work around state law. But I would have full confidence in the Attorney General's Office to operate in good faith with this legislation as it moves forward. And in some instances, very specific qualifications will be required that not every lawyer with a law license is going to be able to fulfill, but rather a very, very small class of those. [LB604]

SENATOR KARPISEK: Very good. Thank you, Senator Conrad. Thank you, Senator Wightman. [LB604]

SENATOR WIGHTMAN: Thank you, Senator Karpisek. Any other questions? Thank you for your testimony. [LB604]

SENATOR CONRAD: Thank you. [LB604]

SENATOR WIGHTMAN: Are there other persons wanting to testify as proponents of the bill, of LB604? Seeing none, are there persons desiring to testify in opposition to

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LB604? [LB604]

DAVID COOKSON: Mr. Chairman, members of the committee, I'm David Cookson.
[LB604]

SENATOR WIGHTMAN: Welcome. [LB604]

DAVID COOKSON: D-a-v-i-d C-o-o-k-s-o-n. Chief Deputy Attorney General. I'm here in opposition today, along with Dale Comer, chief of my legal services bureau. He will speak to constitutional issues. I want to talk about the practical impact of this bill and some misconceptions about existing law in Nebraska. First and foremost, the ALEC bill PARSA, and its brother bill TPAC, which has been passed in a few of the eight states that were mentioned, are actually designed to address the issue of contingent fee contracts, particularly in the areas of securities litigation and litigation against drug manufacturers for Medicaid fraud and consumer protection cases. And from a transparency perspective, Nebraska already has that in statute: 73-201, 202, 203 requires that the public be provided 30 days' notice of any contingent fee contract entered into either by the Governor on behalf of an agency or by the Attorney General's Office. We have chosen, because we have never seen a case that justifies the use of contingent fee contracts, to enter into a contingent fee contract, although we've been approached literally dozens of times. As you might imagine, there are a number of firms who do this for a living. We have never actually found a case that merits hiring contingent fee counsel. And I philosophically doubt that we, at least in this administration, ever will. Where Senator Conrad's bill then differs from the ALEC and PARSA bill and the TPAC bill is requiring this to be applied to for-fee hour cases. And in Nebraska we have limited our use of outside counsel to the interstate water cases--the Republican River, the Missouri River cases; the OPS litigation; and one specialized gambling litigation in which we needed the services of a litigator, but it wouldn't have been covered here because we contracted for \$50,000 or less, and they came in under budget on that particular litigation. As Senator Conrad correctly noted, we do, at least in this administration, do a competitive process. I know there were concerns with previous administrations both the AG and the Governor hiring law firms without that process. However, when you use the phrase "open and competitive" and put it in the state's procurement process, what you do is invite additional litigation, because once you start injecting the word "reasonable" into a calculation, you find that lawyers, who may not be qualified in our eyes, would be considered reasonable in their eyes, and they challenge the open and competitive bidding process regardless of the constitutional issues regarding separation of powers that Mr. Comer will address. The only...those are the only instances in which our office contracts with outside counsel. With the OPS litigation, we involved the Governor, the Chairman of the Education Committee in our search process. The water litigation, we've had the same lawyer that we've had since the beginning of the Kansas litigation. They also represent the state of Arizona, the state of Florida, the state of Wyoming. They've also represented the state of Tennessee

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in an interstate water fight between Mississippi and Tennessee in which they successfully convinced the court not to take the case. They've consulted with the state of North Carolina in its water fights with South Carolina. And we've managed to win each of the water cases that they've been involved in. They are highly specialized. They also charge us significantly less than most of the other firms that do this kind of work, in some instances about half of the billable hour cost. There is transparency. All contracts we enter into are posted with the DAS. We do redact privileged information. This bill would not permit that. We also are required to go to the Appropriations Committee, which we do. We've provided a number of briefings regarding status of the litigation over the years. We, this session, have already briefed the Natural Resources Committee about the status of it. And upon requests, in a confidential setting, we have provided a breakdown of how we expend our money. But to give a comparison: when Governor Nelson hired outside counsel in the Low Level, they spent \$25 million, instead of running it through the AG's Office, because that AG chose to recuse himself. They ran it through DEQ. This bill would not apply to that. The previous Attorney General ran the initial funding of the Kansas litigation through DNR, not through his budget. Again this bill, on its face, would not apply to that. When Attorney General Bruning came in, believing in the transparency, as evidenced in his quote, we moved all of the litigation budgets for outside counsel into our budget, notwithstanding the fact that that inflates our budget significantly. For instance, when I was lead counsel in the Kansas case, our budget was twice the size of the office's budget in one fiscal year, given the nature of that case. We have asked for a budget appropriation this year because we are now before the Supreme Court again in the Kansas case, and that requires that we incur additional expert and lawyer costs. And when we talk to the committee we will break down how that money is spent. The primary...the bulk of the work, though, is done in-house. And again, we only hire outside counsel for very specialized purposes. We're hearing rumblings that OPS is gearing up for another lawsuit. Hopefully not. But there seems to be some action being taken that indicates that might be the case, and as such, we'll go through the same process we went through before, bringing in the Legislature and the Governor's Office should we choose to go in a different direction than the law firm we used in the last litigation. [LB604]

SENATOR WIGHTMAN: Thank you, Mr. Cookson, for being here and testifying today. Do we have any questions? Senator Lathrop. [LB604]

SENATOR LATHROP: I appreciate your testimony, Dave. The first question I have for you is, do you think LB604 is unworkable for some reason, or can you...? If we pass this, are you going to be able to comply with it? [LB604]

DAVID COOKSON: Well, I think...and Mr. Comer will get to the constitutional issues. Nebraska is unique in that we have a very strict separation of powers, much more so than the federal government and other states, as has been recognized by our Supreme Court. And frankly, it at its core, it's unconstitutional in requiring us to get approval from

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the Legislature to do any part of our activity. Again this goes back to the Board of Regents v. Exon case. [LB604]

SENATOR LATHROP: Okay. And if there is a constitutional problem because you are getting permission from the Legislature, is that your argument? [LB604]

DAVID COOKSON: Right. [LB604]

SENATOR LATHROP: Okay. [LB604]

DAVID COOKSON: But as to the parts about competitive bidding and all, the transparency parts, those already exist in the law. It's sort of the classic solution in search of a problem, because we're required to post our contracts. We're required to go to the Legislature to get appropriations, because, frankly, our budget isn't big enough to contemplate outside counsel... [LB604]

SENATOR LATHROP: Okay. [LB604]

DAVID COOKSON: ...without getting a specific appropriation, which is what we've always done. [LB604]

SENATOR LATHROP: All right. And then let me ask you this, because this may be part and parcel of the...and I don't know, because I've not discussed it with Senator Conrad what her motivation for this was. But I'm wondering if, is there any place where you've disclosed...the Attorney General's Office is required to disclose whether the law firm that is hiring, that's being hired, has made a contribution to the Attorney General? [LB604]

DAVID COOKSON: Any contributions would be reported under NADC, and the identity of the contracted parties would be reported to DAS, so that's all in the public domain. [LB604]

SENATOR LATHROP: If you go and do the...look at the letterhead of the law firm and try to find out who the lawyers are, and then go and look and see if they've contributed to the Attorney General or the... [LB604]

DAVID COOKSON: Right. [LB604]

SENATOR LATHROP: ...particular party. [LB604]

DAVID COOKSON: Right. And again, in our instance, the two firms that we had...the water firm was actually selected by General Stenberg, and the OPS firm was selected by a unanimous decision of the Governor's Office, the Chairman of the Education Committee, and our office. [LB604]

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SENATOR LATHROP: Okay. [LB604]

DAVID COOKSON: I did want to respond to the car chase if you would indulge me. [LB604]

SENATOR LATHROP: And believe me, I just used that as an example, not as a...I'm not picking on him because I... [LB604]

DAVID COOKSON: While we select that person and we have supervisory authority, we do not contract with that person. Because that person is paid for through the Risk Manager and our excess carrier, and is required by the terms, as I understand, of our excess insurance carrier to be paid for through that process--through DAS, not through us. We have a self-insured retention which I believe is \$300,000. We require...we approve all settlement decisions and major litigation decisions, but we don't contract directly with that law firm. So again, this bill would not cover that. [LB604]

SENATOR LATHROP: Is that unique to police chase cases or does that happen with a lot of the litigation? [LB604]

DAVID COOKSON: No, it's only with regards to litigation that's covered by that portion of Risk Management. And it's almost all auto, car chase, roads--no, actually roads is done in-house by us. [LB604]

SENATOR LATHROP: Okay. [LB604]

SENATOR WIGHTMAN: Thank you, Senator Lathrop. Senator Fischer. Oh, I thought you had your hand up. Anyone else have any questions? If not, thank you, Mr. Cookson. [LB604]

DAVID COOKSON: Thank you. [LB604]

DALE COMER: Mr. Chairman, members of the committee, my name is Dale Comer. The last name is spelled C-o-m-e-r, and I'm an Assistant Attorney General and I'm chief of the legal services bureau for the Attorney General's Office. As Mr. Cookson has indicated, we believe that there are significant constitutional issues with three aspects of this particular bill, growing out of the separation of powers provision in the Nebraska Constitution, which is Article II, Section 1, and also Article IV, Section 1 of the Nebraska Constitution which deals with the duties of executive officers. There are a number of AG's Opinions from our office which indicate that constitutional officers, such as the Attorney General or the State Treasurer or the Secretary of State, have inherent constitutional, core constitutional authority which cannot be diminished or abrogated by legislative enactment. Some examples of those opinions would be 92106, 93012, and

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02012. Under those opinions and others from our office, what we've indicated in the past is that the Attorney General's core responsibilities under the Nebraska Constitution is to conduct the legal business of the state of Nebraska and to manage litigation on behalf of the state of Nebraska. Sections 4 and 5 of LB604 would require the Attorney General to undertake a competitive bidding process, as we've heard today, for legal services contracts exceeding \$50,000. Now presumably, as Senator Conrad indicated, that would require the Attorney General, because of the bidding process, to hire the lowest responsible bidder. And we believe that restricts the Attorney General's ability to hire the person that he believes best suited to handle the case, and that, in turn, impacts and diminishes his ability to manage litigation on behalf of the state of Nebraska. Section 6 of the bill would require the Appropriations Committee or this particular body to hold hearings on legal services contracts and to make recommendations for the content and the execution of those various contracts, and we believe that that involves the Legislature directly in the exercise of executive functions which deals with the process of contracting on behalf of the state of Nebraska. And finally, Section 8 of the bill would create a, or place a \$1,000-per-hour cap on expenditures for legal services obtained on a contingency fee basis. And again we believe that that restricts the Attorney General's ability to hire who might be best suited to handle a particular case and, in that sense, diminishes the ability of the Attorney General to manage litigation on behalf of the state. So for those various constitutional reasons, we believe that there are significant issues with this particular legislation and we would oppose the bill on that behalf...or for those reasons. Thank you. [LB604]

SENATOR WIGHTMAN: Thank you, Mr. Comer. Any questions? Thank you for your testimony. Do we have any other persons wanting to testify as a proponent of LB604...or proponent? Do we have anybody in opposition? I see none on proponents. Are there any...anybody wanting to testify in opposition? I guess we're on...okay, anybody in a neutral capacity? Seeing none, Senator Conrad, you're recognized to close. [LB604]

SENATOR CONRAD: Thank you. Thank you, Chair. Thank you, members, for your kind attention. I think it's very sad to see the Attorney General's Office really switch their position in terms of having an adherence to transparency when it comes to the use of taxpayer dollars from general public statements, to now, when proposed for actual application. And in regards to some of the constitutional questions that Mr. Comer mentioned, you know, from an Appropriations perspective, we already have legislative oversight on these agencies and their budgets and provide very specific direction. There is no problem there, but rather that's inherent in our work as the Legislature, and part of the checks and balances that we do have is that is the power of the purse. Finally, the example that Mr. Cookson gave vitiates those constitutional arguments where he noted very clearly that school counsel was chosen by the Governor, the Legislature, and the Attorney General's Office. So if there are, indeed, separation of powers issues with this legislation, then there are serious separation of powers issues with the selection of that

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litigation team as well. Finally, I think it's entirely unreasonable that state taxpayers would be funding lawyers at a rate of over \$1,000 an hour. That's what we make in a month for our service in the Legislature. And to think...to hear that the Attorney General's Office thinks that that prohibition is unreasonable, is really quite telling, I think. Finally, I think it was helpful for the committee to hear that Nebraska already has a public policy in statute that puts these kinds of limitations and parameters on contingency fee contracts for legal services, and because of those same recognized public policy considerations, this should be extended to other contracts for legal services. So rather than really being a new idea, it's an extension of existing policy. Again, the bottom line is taxpayer dollars are at issue here and we should ensure the utmost transparency and accountability with the use of those dollars. Thank you. [LB604]

SENATOR WIGHTMAN: Thank you, Senator Conrad. Senator Speaker Flood. [LB604]

SENATOR FLOOD: Senator Conrad, you mentioned that in your service in the Appropriations Committee you give clear direction to state agencies receiving state money, and I agree. But I think there's a difference here that needs to be distinguished. You authorized funding for programs but you don't ever participate in the selection of a vendor. Is that accurate? [LB604]

SENATOR CONRAD: That's right. But we do have a variety of other parameters in place to ensure transparency for public contracts with DAS or procurement or otherwise. [LB604]

SENATOR FLOOD: And it sounds like they're following those, but I guess I just want to make sure that the record reflects that, you know, the Appropriations Committee is in a much different role than what you want to put them in with this, or the Exec Board because you're actually talking about the selection of a vendor. And I don't know that the Legislature, and it may be prohibited under our legislative powers in Article III as it relates to specific prohibitions on the Legislature choosing, just like we can't...I can't say we're going to build this highway with this bill. I think Article III does limit our authority as a branch of government to take those very specific actions. And I don't have a copy of the constitution but I know right where that's at in there, so. [LB604]

SENATOR CONRAD: Well, and Senator Flood, I think that if we can agree that this is a worthy concept, we can work on the application and implementation to ensure uniformity with the other areas of our public policy that puts similar parameters on contingency fee cases. And if that means moving some of the process pieces in a different direction from the legislation as proposed, that's fine, and that's typical when we introduce model bills that may need specific state level tweaks. [LB604]

SENATOR FLOOD: Well, it's the decision regarding a specific vendor that I think is

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problematic. The other thing that was mentioned and you brought it up in your closing, I hadn't thought about it, was the selection of counsel during the OPS lawsuit. My recollection of that, although I was on the periphery, is that Senator Raikes--the Chair of the Education Committee, the Governor, and to a limited extent, myself, were asked whether we had any preference as to who handled the litigation. I did not get specifically asked that question. But I don't recall that anybody said: if you veto this, we won't do it. I think it was more of a consultation that the Attorney General's Office wanted to make sure that Senator Raikes was comfortable and that the Governor was comfortable. But I don't remember that being: if you're not comfortable with this, we're not going to do it. It was more of a "what do you think about this" exercise. [LB604]

SENATOR CONRAD: And sadly, Senator Flood, the public has no record of those conversations either. [LB604]

SENATOR FLOOD: Well, ironically, I wasn't present for them but I know Senator Raikes talked to me about that, so. It was very...you know, the other part of this is that when you're discussing the appropriate vendor or attorney to represent the state, you have to disclose certain privileged elements of the case to better understand whether or not this attorney is able to...I mean, you don't go to an attorney and say, you know, I'm here on my drunk drive charge; and, you know, the client doesn't say, how do you do on drunk driving? Usually the client says, well, I had a few drinks, I got stopped--you know, you've got to give some facts of the case for the lawyer to give you some feedback and to understand whether that's a good thing. And I guess I don't know if you would be trying the case in the courtroom...or in the hearing room in the Legislature before you get to court. That's my concern. [LB604]

SENATOR CONRAD: No, I understand that. And, of course, we would work with the committee to ensure that we offer the utmost protections to privileged information as afforded in other aspects of law to protect the integrity of the attorney/client privilege and relationship. [LB604]

SENATOR WIGHTMAN: Thank you, Senator Flood. Anyone else have any questions? Senator Heidemann. [LB604]

SENATOR HEIDEMANN: How did you come up with the \$1,000 figure? [LB604]

SENATOR CONRAD: That was part of the suggestion from the model bill that has been utilized in other states. It's just to set some sort of ceiling on the amount of taxpayer dollars that are paid out to ensure a reasonableness factor. [LB604]

SENATOR HEIDEMANN: You talked about being able to get the brightest and the best. If the brightest and the best costs \$1,100 an hour and if there's litigation that could cost the state tens, if not hundreds of millions of dollars, would you want to still impede?

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[LB604]

SENATOR CONRAD: Well, I think a couple things, Senator Heidemann. There are provisions within the legislation as proposed that would allow some of these triggered provisions to not apply if good cause is shown and so that we would have the opportunity to look at that on a case-by-case basis. But again, I think you would be hard-pressed to find among Nebraska's best and brightest lawyers those making \$1,000 an hour or more. So I think if we are indeed employing law firms and lawyers that make...that are charging the state taxpayer more than that currently, that is indeed a problem. [LB604]

SENATOR HEIDEMANN: I don't disagree with that because I think you know my views on how much lawyers make. [LB604]

SENATOR CONRAD: Not including this one (laughter). [LB604]

SENATOR HEIDEMANN: I hate to be part of something that would hurt a process, you know, as far as getting the best, when so much money would be involved. [LB604]

SENATOR CONRAD: Sure. [LB604]

SENATOR HEIDEMANN: Thank you. [LB604]

SENATOR WIGHTMAN: Thank you, Senator Heidemann. Senator Flood. [LB604]

SENATOR FLOOD: Does it offend you if a lawyer working on contingency, you know, scores a \$100,000 verdict of which they're paid \$33,000... [LB604]

SENATOR CONRAD: No. [LB604]

SENATOR FLOOD: ...and they don't put in a...I mean if you calculated it out, it would be more than \$1,000? [LB604]

SENATOR CONRAD: No. Particularly in the private sector. When taxpayer dollars are involved, different parameters come into play. [LB604]

SENATOR FLOOD: All right. Thank you. [LB604]

SENATOR WIGHTMAN: Thank you, Senator Flood. Senator Langemeier. [LB604]

SENATOR LANGEMEIER: Thank you. Senator Conrad, should we take this to other elected officials--NRDs, for example, that are hiring probably lawyers costing more than \$1,000 now to sue us? [LB604]

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SENATOR CONRAD: You know, Senator Langemeier, that is something I considered in drafting the legislation and had thought about an application for all state agencies. And as you heard from the testimony provided by the Attorney General's Office today, that's probably not necessary because they have consolidated all of that litigation under the auspices of their office. [LB604]

SENATOR LANGEMEIER: But I mean to the next level--to NRDs, to schools, school districts? OPS is using tax dollars to sue us. We have NRDs potentially using tax dollars for litigation. I mean, where does...where could this start and stop? [LB604]

SENATOR CONRAD: I think those are great questions. And again, if we can find some common ground on the principles contained therein, you know, I'm open to thinking about application to other areas. But from a state appropriations perspective, I'm most concerned about the state budget and state contracts. And I'm not exactly sure what abilities we would have to impose these sort of restrictions on other entities of government, because, of course, of their sovereign nature. But we could sure look into it. [LB604]

SENATOR LANGEMEIER: Okay. Thank you. [LB604]

SENATOR CONRAD: Yep. [LB604]

SENATOR WIGHTMAN: Thank you, Senator Langemeier. I guess I would have one other question. [LB604]

SENATOR CONRAD: Sure. Yes. [LB604]

SENATOR WIGHTMAN: When we set the limit at \$1,000, are we inviting people to maybe bid their services higher than they might normally bid them because here's this \$1,000 ceiling? [LB604]

SENATOR CONRAD: Yes, I can appreciate that, Senator Wightman. But I can tell you that the attorneys that I've had the pleasure to know in the Nebraska Bar Association, I think would operate in a manner that includes good faith and would hopefully ensure that they were not running up the bill on the taxpayers' dime. [LB604]

SENATOR WIGHTMAN: Thank you. Any other questions? If not, thank you for your closing. [LB604]

SENATOR CONRAD: Great. Thank you. [LB604]

SENATOR WIGHTMAN: With that, we will go ahead and close the hearing on LB604

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and take up LR30, Senator Campbell. [LB604]

SENATOR CAMPBELL: (Exhibits 4 and 5) I have some information. Senator Wightman and members of the Executive Committee, I am Kathy Campbell and I serve the 25th Legislative District, and it's C-a-m-p-b-e-l-l. I am here to introduce LR30. LR30 is a continuation of the work completed under LR467. And today also with me is Senator Nordquist. Senator Nordquist and I worked extensively with Senator Gay when we had the first LR467, which was an interim study that initiated an examination of healthcare financing and delivery under the federal healthcare reform act. The select committee of LR467 conducted several public hearings to facilitate wide collaboration, gather guidance and information from a variety of sources, and began to develop recommendations to present to the Legislature regarding healthcare reform. You have been given the executive summary of the work. If you would like any of the documentation, we would be more than happy to supply them from the office of the Health and Human Services Committee. Also in your report is a checklist in the back that would give us some guidance as to what state legislatures need to do to be ready or prepared. Now whether you think that federal healthcare should continue or not, or what will happen in Congress or not, the position that was taken by the committee that came together under the first LR467 was that we need to be prepared no matter what. And I have to say I also feel that that has been the Governor's position in the sense that he certainly has not supported it, but on the other hand, he has taken action to ensure that if indeed it continues to be the law of the land, that we are prepared. So what we are coming back to you to say is that we would like to continue as a committee to work. We met this summer to get a lot of background information and a lot of education, and it was particularly helpful to have the cross nature between the Health and Human Services Committee, Banking and Insurance, and Appropriations. One change that may be from your packet to what is LR30 is that, originally, the Chairman of the Health and Human Services Committee also chaired the legislative resolution. We changed that to say that one of the members from the Health and Human Services Committee that serves on the resolution would serve as the Chair. And I have to say from all intents and purposes, from the committee's standpoint, we anticipate that, should we proceed with LR30, that would be Senator Gloor. I do want to emphasize the importance of the cross nature of this, and Senator Heidemann also served on the committee this summer, and he and I were talking on the floor. One of the things that I'm concerned about is that should we proceed with this and proceed to health exchanges, in that health exchange a person can step forward and it will be a one-stop shop in terms of being eligible for Medicaid as well as the other avenues that are there. We need to ensure that we have good collaboration and coordination between the committees, and that really is the purpose. Senator Nordquist has another piece of material that he'll provide after I finish any questions that you might have. [LR30]

SENATOR WIGHTMAN: Senator Flood. [LR30]

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SENATOR FLOOD: Thank you, Senator Campbell, for bringing this. I am concerned that the Legislature is not conducting the discussion of healthcare exchanges. I feel like there's a lot that we could be doing in the world of healthcare exchange. Would this special committee continuation be able...? I see you've got...you would have the Banking Committee Chair, yourself, and many others. Could we amend this resolution to specifically state very clearly that we want this committee to set up a framework, a legislative framework for healthcare exchanges and a healthcare exchange in Nebraska? Because as I understand it, we are running out of time as it relates to getting this all done. And next session is going to be critical. And so I guess my interest would be, if we're going to do this, I'd like to work with Janice Satra; you know, your committee counsel; the Banking Committee counsel. I'd like to mandate if we're going to continue this, that this group of people assemble the right folks and construct the exchange from a legislative perspective, so that we are in control of this as it has been our responsibility to draft the policy. Is that where you want to go with this? [LR30]

SENATOR CAMPBELL: Senator Flood, absolutely we could add on to it. I do want you to ask the same question of Senator Nordquist because we have talked about this, but we would take on any assignment, and I think that's a good suggestion. But Senator Nordquist also has a bill or resolution that also deals with exchanges, and I'd prefer that he give you the detail to those. So how we mesh those, we would be willing to work out. [LR30]

SENATOR FLOOD: Well, I like the makeup of this because it's all legislative, and ultimately we are going to decide what the policy is. [LR30]

SENATOR CAMPBELL: Absolutely. [LR30]

SENATOR FLOOD: And you might need some funding for something like this. I know the Health Committee has that \$100,000 that may, some of it may be used here for child welfare, but. I just want to talk about it, so. [LR30]

SENATOR CAMPBELL: Absolutely. And I couldn't agree with you more. One of the things that we learned this summer was how critical it is going to be to watch the demonstration projects that may come down and how they would affect, and particularly to seek primary healthcare positions and how we would aid and work toward healthcare in the rural parts of Nebraska. We already have a great number of problems there, but we want to make sure that we're setting up a system that works for all of our citizens, not just those who live on the eastern side of the state. [LR30]

SENATOR WIGHTMAN: Thank you, Senator Flood, Senator Campbell. Anyone else have any questions? Thank you. [LR30]

SENATOR CAMPBELL: Thank you, Senator. I'm going to have Senator Nordquist

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follow me. [LR30]

SENATOR WIGHTMAN: Okay. [LR30]

SENATOR NORDQUIST: (Exhibit 6) Thank you, Mr. Chairman. My name is Jeremy Nordquist, N-o-r-d-q-u-i-s-t, and I represent District 7 in downtown and south Omaha. I want to thank Senator Campbell for bringing forward this resolution. I think the progress we made over the summer was a good start identifying the key issues that are coming forward with healthcare reform. And they are broad and they cross the jurisdictions of all the committees that are on, that are represented on the task force. What I'm handing out is a...my staff went through some reports of other states, some NCSL reports. Just kind of listed a lot of the key items, and then we identified potentially what subjects or what committee they would fall under, depending on the subject. And as you can see, there's a number of them that cross over, certainly issues of healthcare work force cross between Appropriations and Health and Human Services. When we start talking about setting up a health insurance exchange, that certainly crosses over between Insurance. It's got to be a portal that...Medicaid, so that crosses to HHS. And there's got to be a funding stream somewhere, so certainly that's Appropriations and maybe even Revenue. Through NCSL, one of the issues we're looking at, that at the coming spring forum, is going to be on access to broadband and how that works with health IT, so maybe there's certainly issues of telecommunications as well. The point of this resolution is to kind of break down those barriers between committees and try to collaborate. I do have a bill on the exchange issue before Banking and Insurance, and that, as we set it up, Speaker Flood sent a letter about the constitutional issues of it, and I probably agree with him after talking to him about it. The way we set that up was a nine-member committee: three legislators; the three key agency heads from HHS, Department of Insurance, and Chief Information Officer of the state; and then three public members by the Governor. That probably crosses the line of too much blending of executive branch and legislative branch. I certainly would be very much open to the idea of focusing and having a key focus of this group on the exchange with maybe with the potential that could be written in. I think there needs to be some expertise at the table as we have those discussions. I don't know if we can do some sort of informal or formal advisory committee of key, whether it's administrators or people in the private sector who have great knowledge of the insurance sector, and consumer advocates as well, but. I'd be happy to take any questions. [LR30]

SENATOR WIGHTMAN: Thank you, Senator Nordquist. Senator Flood. [LR30]

SENATOR FLOOD: You know, I appreciate your willingness to take what you want to do and put it in here. I looked at Senator Langemeier's model on wind energy. You know, that was all senators that ultimately ran that committee. But the Chair of the special committee, Senator Langemeier, brought them in and had them around the table. And everything I get is that people want to be around a table. So I think I'm willing

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to really work for an amendment that writes that in there and makes it very definite, and that, you know, people's attendance may have to be compelled if you need to do it. But we should be in charge of this exchange business as the Legislature. And this is the right vehicle. I think if you're comfortable with it and Senator Campbell is, I don't think it's just "one" of the things they do--I think it is "the" thing this group does. On or before January 1, 2012, there should be a statutory framework ready to go in for discussion. [LR30]

SENATOR NORDQUIST: I think that's a great idea and I'd also put in a nod, as Senator Campbell said, for Senator Gloor to be a leader of this. I think he would be a perfect person. [LR30]

SENATOR WIGHTMAN: Thank you, Senator Flood. Senator Langemeier. [LR30]

SENATOR LANGEMEIER: Thank you, Chairman Wightman. And I maybe should have asked this of Senator Campbell, but I think you're qualified to answer it. And it talks about the membership here and you talk about two from Appropriations, just two from Banking, but Healthcare, it says it has to be the Chairman and one other person. What's the significance of making the Chairman of one committee versus...because most likely this is going to go to Banking as a bill anyway... [LR30]

SENATOR NORDQUIST: Yeah. I can't remember...yeah... [LR30]

SENATOR LANGEMEIER: ...because the Department of Insurance is the one going to have to deal with the exchange... [LR30]

SENATOR NORDQUIST: Yeah, exactly. [LR30]

SENATOR LANGEMEIER: ...yet we put a Chair of one...and I'm not making it (inaudible). I just think it's interesting. [LR30]

SENATOR NORDQUIST: No, no. Sure. I don't know. Was the original one...? I can't remember. [LR30]

SENATOR CAMPBELL: The only... [LR30]

SENATOR NORDQUIST: Sorry. Maybe...can she come up? [LR30]

SENATOR CAMPBELL: We'll switch here. The only thing I can remember, Senator, is that we've thought a lot of the bills not only might come out of Banking, but there's going to be a lot of work that needs to come out of bills out of HHS--however the committee might want to designate is fine with us. We would just like to utilize the people who had already gotten all of the training. So however it's worded, we're fine with. We're more

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concerned about getting down to work. [LR30]

SENATOR WIGHTMAN: Both of them could be designated by the Chair. [LR30]

SENATOR NORDQUIST: Sure. [LR30]

SENATOR CAMPBELL: Absolutely. [LR30]

SENATOR NORDQUIST: And Appropriations too. [LR30]

SENATOR FLOOD: What is your bill number, real quick? [LR30]

SENATOR NORDQUIST: I wish I could remember. (Laugh) [LR30]

SENATOR FLOOD: Could you get a copy of that to Janice Satra? [LR30]

SENATOR NORDQUIST: Yeah. LB240, I think. LB240. But I'll work on it. Yep. [LR30]

SENATOR WIGHTMAN: Thank you, Senator Nordquist. [LR30]

SENATOR NORDQUIST: Thanks. Any other questions? [LR30]

SENATOR WIGHTMAN: Any other proponents? We... [LR30]

JENNIFER CARTER: (Exhibit 7) Good afternoon, Chairman Wightman, members of the committee. My name is Jennifer Carter, J-e-n-n-i-f-e-r C-a-r-t-e-r. I'm the director of public policy and healthcare access at Nebraska Appleseed, and we've been working on the Affordable Care Act for over two years. And now we're extremely involved and interested in the implementation, and we're very grateful to Senator Campbell and Senator Nordquist for bringing this. We found the LR467 committee's work during the interim to be extremely helpful and that this kind of legislative oversight is needed, even more, as Senator Flood described, as we come down to the time line where important decisions need to be made. And I think part of what is important is that there are many decisions, big and small, that need to be made, and while...and that we need to have everyone who might be involved at the table, including consumers. And from our perspective, that's important, not just for us, but because we actually think consumers could be extremely helpful in figuring out what would work best across our rural and urban areas and for consumers that may have different barriers or challenges as we set up an exchange. And we've been really grateful to be able to meet with the Department of Insurance and that they've been open to speaking with us, and actually, we even had an opportunity to meet with the Governor and talk about some of our concerns. But there has been a lack of any kind of formal public structure to the implementation process. And, in fact, even without consumer input, there's just not a public process

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where the public understands what agencies are working together, if they're working together, how they are, what decisions are being made, when they need to be made, and what questions they're grappling with so that we might better be able to be helpful in a timely way. So for that reason, we think if we continue not to have an interagency council or a governing board looking over this process or things that other states have done, it would be extremely helpful to have this process. And I actually think what...the discussion that was just had about focusing on the exchange and bringing expertise in would be a great idea, because I do think that is extremely important, and the Legislature is ultimately going to be the one who has to pass this. So we would love, obviously, if that happens, to be...have consumers at the table. And we have groups that we've worked with for years and a larger stakeholder group that we would be more than happy to be helpful in any way we can in getting those groups together, if that's helpful. But we think this is very, very important in order to set up the best exchange that's going to work for the most Nebraskans and across all of our different challenges and areas. So we're very much in support of it. [LR30]

SENATOR WIGHTMAN: Thank you. [LR30]

JENNIFER CARTER: Happy to take any questions. [LR30]

SENATOR WIGHTMAN: Any questions? Thank you for your testimony. [LR30]

JENNIFER CARTER: Okay. Thanks. [LR30]

SENATOR WIGHTMAN: (Exhibits 8, 9, 10) Do we have anyone else as a proponent of LR30? If not, we do have three letters of support of LR30: one from the Center for Rural Affairs--they are all in the back of your section LR30; one from Friends of Public Health in Nebraska; and another from Public Health Association of Nebraska, and they will be made part of the record. Do we have anyone in opposition to LR30? Anybody who wants to testify in a neutral capacity? If not, we will close the public hearing on LR30 and take up LR47. Senator Lathrop. [LR30]

SENATOR LATHROP: Good afternoon, Mr. Chairman and members of the Executive Board. My name is Steve Lathrop, L-a-t-h-r-o-p. I'm the state senator from District 12, here today to introduce LR47. And very simply, LR47 is a resolution to continue what has generally been referred to as the BSDC Committee. In 2008, the Legislature adopted LR283, which really I think was the suggestion of the Speaker when it became clear that we were having significant problems at the Beatrice State Developmental Center. That resolution put together a committee and you're all familiar with it. The committee put out a report which I think was instrumental in moving the state forward on not only BSDC but issues relating to the waiting list and related matters concerning the developmentally disabled. Last year, we extended the committee again with LR11--or that might have been two years ago, continued it for two more years. That committee,

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the LR11 committee, met a few occasions to monitor the progress made by the Division of Developmental Disabilities. And I'm pleased to say, frankly, that I think that the committee has been instrumental in the changes that have taken place, and that where we are going with developmental disabilities in that division of HHS is very, very positive. We've seen new management put into place. A new director, Jodi Fenner, I think is doing a good job and is responsible for much of the success that we've experienced both at BSDC and in other aspects of delivering services to the developmentally disabled and working on the waiting list. But it was this committee that included people from different committees: John Harms from Appropriations, for example, that I think made this particularly effective. I'd like to continue it, and let me tell you where I think we're at in the process and why I'm asking to extend it for one year. We are now to the place where we are beginning the surveys. They've decided to try to recertify BSDC by turning it into five separate ICF/MRs, and we've had the initial survey done of the first ICF/MR at BSDC. We have another resurvey or another inspection by CMS coming up shortly. And we're hopeful that we'll see the first ICF/MR at BSDC recertified in the next month or so. That's a big step, because the funding is all, of course, contingent upon recertification. I do not need to have this, the putting the committee together again and reconstituting the committee for another year isn't because I have something specific that I want to go look into that I think is a bad problem. I think it's just useful to have the committee in place as we see BSDC cross the finish line, and certainly we're hopeful that happens in the next six months. [LR47]

SENATOR WIGHTMAN: Thank you, Senator Lathrop. Is there an urgency, do you think, to having a committee...or to moving forward with LR47? [LR47]

SENATOR LATHROP: Well, I think it's important that we do it, partly because of the people who have spent so much of their time over the interim and so much time on the subject matter. It also, I think, helps to have this committee in place to field questions from people that have concerns as we go through the process, because we still field those concerns, the members of the committee do. Do I think it's important? Yes, I do. Do I think you need to do it this afternoon after we get done with this? No, but I certainly want to see it. And I'm also going to make this pitch, and that is we did all that without spending any money. We used legal counsel from the Speaker's office. I used my own staff, and essentially did all the work that the LR283 committee did. Didn't cost the Legislature anything, and I think it is a model for how to bring people from different specialities or different committees together to provide important and effective oversight. [LR47]

SENATOR WIGHTMAN: Thank you. Senator Heidemann. [LR47]

SENATOR HEIDEMANN: Do you think we'd be totally recertified by the first of July? And if we are, do you see...do you think you'll see a need that, after another year, to continue on, or do you think it would end at that time? [LR47]

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SENATOR LATHROP: I would say that I would not expect to ask to have this committee reconstituted unless something really drastic happened. But if we're recertified, I won't be back to ask you to do it again. This is really to make sure that we get all five of the ICF/MRs at BSDC across the finish line. [LR47]

SENATOR HEIDEMANN: Do you anticipate that by the first of July? [LR47]

SENATOR LATHROP: I don't think we're going to have them, all five, done by the first of July, honestly. That's what I'm told. Here's kind of what I think will happen, is that you'll see, because of the funding issue, and I'm sure that's your concern and understandably so, because of the funding issue we have essentially budgeted as though none of them will be recertified until...at the end of the fiscal year, and then all of them will be right at the end of the fiscal year. And in reality what is going to happen is you'll see one recertified maybe in a month if everything goes the way it should, and we'll start to see part of the funding come back--and that's money you weren't counting on. And then we'll see the second one recertified and that will be money coming in before the end of this fiscal year. And so my best estimate is we won't have them all five recertified that quickly. [LR47]

SENATOR HEIDEMANN: But it will even out. [LR47]

SENATOR LATHROP: But it should even out. That's the expectation. [LR47]

SENATOR HEIDEMANN: Okay. [LR47]

SENATOR WIGHTMAN: Thank you, Senator Heidemann. And thank you for all of the service you've given the citizens of Nebraska over the past four years and the members of your committee. Anyone else have any questions? Thank you, Senator Lathrop. [LR47]

SENATOR LATHROP: Sure. [LR47]

SENATOR WIGHTMAN: (Exhibit 11) Do we have anyone else who wants to testify as a proponent of LR47? We do have one letter that we just received, so it's not part of your packet yet, a letter in support of LR47 from Brad Meurrens. And so we will make that a part of the record. Anyone that wants to testify in opposition to LR47? Anyone in a neutral capacity? If not, we will close the public hearing on LR47. [LR47]