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The Honorable Senator Peter Courtney, Co-Chair
The Honorable Representative Nancy Nathanson, Co-Chair
Interim Joint Committee on Ways and Means
900 Court St. NE
H-178 State Capitol
Salem, OR 97301-4048

Re: DOJ Legal Services Billing Model Report

Dear Co-Chairpersons:

Executive Summary

This report responds to a budget note requesting the Oregon Department of Justice (DOJ) to report to the Legislature on the agency's billing model and potential alternative funding models for legal and other services. It describes the agency's current blended billing model used by its legal divisions – predominantly hourly billing with a small pilot using a flat-charge or assessment model – and nine alternatives. The main alternatives include hourly billing only, assessment only, General Fund appropriation only, and some combination of these three forms of funding.

The primary weaknesses of DOJ's current blended billing model are: (1) its tendency to inhibit client agencies from seeking timely legal advice and thereby avoiding costly legal problems; (2) its potential to cause large unplanned changes in client agencies' budgets; and (3) its tendency to encourage the flat-charge clients to use more legal services than they pay for, thereby shortchanging legal time for hourly billed clients. A more effective legal services funding model would alleviate these weaknesses.

Of the alternatives examined, the flat-charge or assessment model of funding appears to have the most promise to address these weaknesses. The transition to this model would take some effort. Replacing the hourly billing model with the assessment model for all client agencies would involve some additional coordination with those client agencies to ensure the change does not negatively impact them and, if possible, reduces their legal costs and the legal costs for state government as a whole.

DOJ has begun the process of meeting with agencies not currently using the flat-charge model to obtain their input on this potential transition. Meanwhile, DOJ is planning to develop assessment projections for all agencies for use in developing their Agency Request Budgets for the 2019-21 biennium. It will also develop its own Agency Request Budget to accommodate the transition to the flat-charge model.

Purpose of this Report

This report responds to a budget note in House Bill 5015 (2017) that reads:

> **Budget Note**
> *DOJ is to submit a report to the Legislature during the 2018 Session on how the agency bills for legal and other services, and provide a feasibility study related to alternative billings models.*

Scope of this Report

This report focuses on the Oregon Department of Justice (DOJ) billing model by the department's legal divisions, which include the entirety of the Appellate, Trial, and General Counsel Divisions and the legal services portions of the Civil Enforcement and Criminal Justice Divisions. The legal divisions also nominally include the Administration Division, which provides administrative services to all of the department's divisions.

The study examines options for providing more effective and cost-efficient legal and other services to DOJ's customers. These options include the agency's current billing model and alternative billing models. The study addresses the question, "How should Oregon fund DOJ's legal services within DOJ and to state agencies, boards, commissions, and District Attorney offices to optimize the tradeoffs between the total cost of legal services, the equitable distribution of those costs, the just and timely application of those legal services, and the cost of public safety agency expenditures and of securing judgments and settlements?"

Current model, problem description / business opportunity, past studies, national practices

Current Model

Currently, DOJ provides legal services within its own programs and to state agencies, boards, commissions, and District Attorney offices when those offices request legal assistance from DOJ. Some of those requests arise from state policy, such as the requirement that contracts be reviewed by DOJ. DOJ currently has a mixed or hybrid model of billing. Most recipients of DOJ legal services pay DOJ directly for the legal services they use on a per-hour basis using DOJ's published legal billing rate. About 16 of DOJ's clients participate in a "flat-charge" pilot program. One client is on a retainer basis.

Oregon Revised Statute 180.160 provides the authority for the Department of Justice to charge other public bodies for the cost of rendering legal assistance to them. ORS 180.170 provides authority for the Department of Justice to estimate these costs in advance and to invoice those public bodies for their share of the Department's legal expenses. These two statutes are reproduced in Appendix A of this report.

Hourly Billing

The Department of Justice bills most of its clients, including internal customers and funds, by keeping track of the time spent by "billers" on work done for the client and then sending the client an invoice for the cost of that time, plus any ancillary expenses incurred by DOJ on behalf of the client, at the standard hourly billing rate published by the Department of Administrative Services in the DAS Price List. "Billers" include attorneys, paralegals, investigators, law clerks, legal secretaries, and the Alternative Dispute Resolution (ADR) coordinator. Billers track their time in a timekeeping system called Carpe Diem. The DOJ Financial Services Section sends invoices for billed hours and expenses to clients, who then typically spend time examining the invoices, occasionally challenging some portion of the invoices, and eventually agreeing to pay either the original invoice or a modification of the original invoice.

Flat-Charge / Assessment

Currently, as an alternative to the hourly billing model, about 16 clients opt-in to a pilot project using a "flat-charge" model in which the client's biennial cost of standard legal services is established by contract at the beginning of the biennium and is invoiced to the client on a quarterly basis. The flat charge is adjusted each biennium to reflect historical changes in usage levels by the clients so that, by design, each agency's biennial flat charge will fully cover its use of DOJ legal staff time, including overhead, during the biennium.

The flat-rate agreements cover all legal services provided by DOJ to participating clients by DOJ staff. Agreements cover the entire biennium. Clients generally make payments quarterly (every three months) in advance. The agreements do not cover recoverable expenses (witness fees, travel costs, expert witness fees and similar expenses) or legal services not directly provided by DOJ (conflict counsel or special assistant attorneys general). DOJ bills these additional expenses to the client separately and in addition to the flat rate payment.

DOJ tracks legal services provided under the agreement in the same way that it tracks legal work provided to other agencies. DOJ sends the client a monthly report showing legal services provided and the time devoted to providing those services. This is an informational report; it does not affect the client's current-biennium flat charge. The retainer agreement provides that DOJ and client management may prioritize work and that DOJ may limit work, if necessary, to stay within the retainer amount. As a practical matter, legal work has rarely been prioritized or limited for that purpose.

The biennial flat charge is calculated using a rolling six year look-back at the client's share of total hours of legal services provided by DOJ's legal billers. DOJ multiplies the client's share of total legal hours provided during the most recent six-year period by DOJ's projected cost of legal services, including overhead, for the upcoming biennium. The result is the client's flat charge for the upcoming biennium. DOJ calculates its projected cost of legal services by projecting the total expenditures of its legal divisions, including the legal divisions' share of administrative overhead within the Administration Division. The projections are consistent with the official budget documents, with adjustments to separate legal divisions from non-legal divisions.

The flat-rate calculation has the effect of smoothing increases or decreases in an agency's cost of legal services from one biennium to the next. The flat rate is a fixed charge for the biennium and does not change even if the agency's use of legal services varies substantially from the amount anticipated under the agreement.

See Appendix D of this report for a copy of the flat-charge agreement template.

Retainer

The Public Utility Commission (PUC) is the only agency currently using the retainer program. Under the retainer agreement, DOJ and the PUC estimate the amount of legal fees that the PUC would be charged for all legal services provided by DOJ to the PUC Utility Program for the six month period covered by the retainer agreement. PUC pays that amount to DOJ in advance. As with the flat-charge agreement, the retainer agreement does not cover legal services not directly provided by DOJ (conflict counsel or special assistant attorneys general) and does not cover recoverable expenses.

DOJ tracks legal services provided under the agreement in the same way that it tracks legal work provided to other agencies. PUC receives a monthly report showing legal services provided and the time devoted to providing those services. This is an informational report; it does not affect PUC's current-biennium retainer amount. The retainer agreement provides that DOJ and PUC management may prioritize work and that DOJ may limit work, if necessary, to stay within the retainer amount. As a practical matter, legal work has rarely been prioritized or limited for that purpose. If work performed under the retainer either exceeds or falls below the amount contemplated by the agreement by more than 5%, then the agreement provides that a credit will be given or an additional payment will be required.

See Appendix E of this report for a copy of a recent retainer agreement.

Problem Description / Business Opportunity

Under ORS 180.160 and 180.170, funding for most Department of Justice (DOJ) legal operations comes from direct billing to agency clients for services rendered. These billings have traditionally – and continue to be predominately – based on a billed-hour model. DOJ's experience has shown that this mechanism is fairly effective in aligning the sources of funding for legal services with the users of those services; however, because the clients are operating on a pay-as-you-go basis, the billed-hour model can discourage agencies from timely seeking needed services in situations where early intervention might reduce or even prevent a later-developing and typically more costly problem. While DOJ billing rates are set at a level calculated only to enable DOJ to recover its operating costs, they are substantial enough to adversely affect client agencies' willingness to engage legal services, particularly in times of budget stress or when the need for legal services was not anticipated. The billed-hour method also makes it difficult for agency clients to accurately anticipate and effectively budget for the legal services they will require in any given biennium.

DOJ is testing an alternative – the flat-charge agreement – which alleviates these problems. However, providing agencies with the option of a flat charge based on historical usage of legal services allows agencies to opt in when it appears to benefit their budget at the expense of DOJ's budget and to opt out when they expect to pay less under the hourly billing model. Continuing to provide this flat-charge model leaves DOJ's budget vulnerable to requests for legal work in excess of funding for that legal work. For example, in the 2013-15 biennium, flat-charge agencies used about $565,000 more of billers' time at the standard hourly billing rate than they paid for in their flat-charge assessments. In the 2015-17 biennium, flat-charge agencies used about $1.25 million more of billers' time at the standard hourly billing rate than they paid for in their flat-charge assessments. See Appendix B of this report for graphs of the monthly actual use of legal services by flat-charge clients as compared to their funding through the flat-charge agreement for the 2013-15 biennium and the 2015-17 biennium. Although DOJ could decide to limit the legal work provided to the flat-charge clients to prevent this from happening, implementing such a decision would require additional accounting and management processes and, due to the potential for greater variability of legal work needed in a small pool of flat-charge clients, could result in some important legal work not being done. DOJ believes the flat-charge model would work much better if all agencies were included and could not opt in and opt out because this would create a much broader pool of clients with less overall variability in legal work needed. Allowing clients to opt in or out puts DOJ's legal services to other clients at risk.

Past Studies

DOJ has examined its billing model for about two decades and has proposed a comprehensive flat-charge model during most of that time. Although the proposal has not yet been implemented in a comprehensive way, it led to the pilot project begun in the 2009-11 biennium that has included a dozen or more client agencies in recent biennia. Here is a list of the flat-charge client agencies in the past two biennia and the current biennium:

2013-15

- Board of Licensed Counselors and Therapists
- Psychologist Examiners Board
- Board of Licensed Social Workers
- Secretary of State – Audits Division
- Oregon Government Ethics Commission
- Oregon Youth Authority
- Board of Chiropractic Examiners
- Oregon Health Licensing Agency
- Board of Naturopathic Medicine
- Board of Medical Imaging
- Board of Speech Pathology and Audiology
- Veterinary Medical Examining Board
- Board of Nursing
- Board of Pharmacy
- Physical Therapist Licensing Board
- DHS/OHA Shared Services

2015-17

- Board of Licensed Counselors and Therapists
- Psychologist Examiners Board
- Board of Licensed Social Workers
- Secretary of State – Audits Division
- Oregon Government Ethics Commission
- Oregon Youth Authority
- Board of Chiropractic Examiners
- Oregon Health Licensing Office
- Board of Naturopathic Medicine
- Board of Medical Imaging
- Board of Speech Pathology and Audiology
- Veterinary Medical Examining Board
- Board of Pharmacy
- Physical Therapist Licensing Board
- DHS/OHA Shared Services

- Appraiser Certification & Licensure Board
- Occupational Therapy Licensing Board
- Board of Tax Practitioners
- Board of Accountancy

2017-19

- Bureau of Labor and Industries
- Board of Licensed Counselors and Therapists
- Psychologist Examiners Board
- Board of Licensed Social Workers
- Oregon Government Ethics Commission
- Oregon Youth Authority
- Oregon Health Licensing Office
- Board of Medical Imaging
- Board of Speech Pathology and Audiology
- Veterinary Medical Examining Board
- Board of Pharmacy
- Physical Therapist Licensing Board
- DHS/OHA Shared Services
- Occupational Therapy Licensing Board
- Board of Accountancy
- Board of Maritime Pilots

In addition to DOJ's experience with an alternative billing model, a recent trend in the provision of private-sector legal services is the trend toward clients insisting on budgets (with caps) for legal services. The Center for the Study of the Legal Profession at the Georgetown University Law Center and Thomson Reuters Legal Executive Institute published 2017 Report on the State of the Legal Market. The report identifies recent changes in the legal market and the key issues likely to influence the legal market in the future. It asserts that the legal market has changed fundamentally in the past decade, including the "Death of Traditional Billable Hour Pricing" (page 9). The report says alternative fee arrangements, such as fixed-price or cost-plus models that make no reference to billable hours in the calculation of fees, account for probably 15 to 20 percent of all law firm revenues. In addition, it says budget-based pricing is much more prevalent, comprising another 65 or 70 percent of all law firm revenues. Together, these non-traditional methods account for 80 or 90 percent of all revenues (page 10). A copy of the report is accessible online at https://www.thomsonreuters.com/en/press-releases/2017/january/2017-report-on-the-state-of-the-legal-market.html .

National Practices

In 2009, DOJ asked the National Association of Attorneys General (NAAG) to survey all member Attorneys General to obtain information on their sources of funding of Attorney General

Office functions. Thirty states responded to the survey. In 2017, DOJ again asked NAAG to survey its members using the same question. Eleven states and the District of Columbia responded to this 2017 survey. Combining the information from the two surveys, DOJ has obtained information from 2009 or 2017 – or both – on the sources of funding of Attorney General Office functions for 35 states and the District of Columbia. Although some responses are very general and many use different terms for what appear to be similar funding mechanisms, in aggregate they provide a broad view of the wide variety of funding used by Attorney General offices.

Seven states appear to use a single funding mechanism such as direct appropriation (Arkansas and Mississippi), hourly billing (Kentucky and North Carolina), some form of agency contract (Iowa and Washington), or staff employed by the client agencies (Illinois). All the other states and the District of Columbia appear to have more than one funding mechanism. The most common element of these hybrid mechanisms is direct appropriation, used by 25 states and the District of Columbia. Hourly billing is used by the Attorney General offices in 18 states, in addition to the two states that rely on it as their sole source of funding. The remaining methods of funding the offices are much less common.

In addition to the seven states with a single funding mechanism, 10 states and the District of Columbia have two, 13 states have three, four states have four, and one state has five separate sources of funding. As noted above, some of the responses were very general and many used terms that could be interpreted in multiple ways, so the actual number of funding mechanisms used by states for their Attorney General offices may differ somewhat from this summary. Also, this summary lacks information on 15 states that did not respond to the survey in either 2009 or 2017, or both.

See the 2009 and 2017 survey responses of state Attorney General Offices in Appendix C of this report.

Solution requirements

During the past two decades of considering alternatives to its hourly billing model, DOJ has examined criteria for a successful model. To be viable, a legal services billing model must:

1. Be cost-effective by minimizing attorney, administrative services, and client agency time associated with billing

2. Provide predictable, affordable, and preferably stable legal costs for clients and for DOJ; reduce or eliminate the possibility that one or two legal issues will consume the entire biennial legal budget of a small agency; accommodate an agency's unanticipated legal needs without increasing the agency's biennial legal charges

3. Reduce the cost disincentive or increase the incentives for client agencies to obtain preventive legal advice

4. Provide sufficient detail of the time and cost of all legal work to satisfy the needs of the client agencies and to ensure accountability within DOJ and among attorneys for the services provided

5. Ensure alignment between agencies' and fund types' contributions to DOJ operational expenses and their use of services

6. Allow efficient budgeting of legal services benefiting multiple agencies and state government generally

In enumerating these solution requirements, we assume that legal services for the State of Oregon will continue to be provided by DOJ and that the funding for those legal services continues to be funneled through the client agencies to ensure equity of funding by fund type (i.e., General Fund, Lottery Fund, Other Funds, and Federal Funds) and by agency as well as transparency of state government expenditures (i.e., reporting expenditures on DOJ legal services within the budget of the agency for which the work was done, as well as within DOJ's budget). We also assume that a change in the billing model must be implemented within the constraints of the state's budget and especially that it will not add to the state's General Fund budget.

Solution selection methodology and criteria

DOJ has identified the major benefits and risks of the various potential funding models. These are presented in the following section. An assessment of the benefits and risks of each model, as well as a general assessment of the administrative overhead costs and potential legal risks and costs associated with each model, provide a basis for selecting the model that is most likely to meet our solution requirements. The ideal model will meet all of the solution requirements.

Analysis of alternatives

Over the past two decades, DOJ has developed the following list of potential alternative billing models. Many of them fare poorly when compared to our solution requirements.

Alternative #1 – Do Nothing (Status Quo)

Description

In this alternative, DOJ continues its current practice of calculating an hourly billing rate for each of its biller categories (attorneys, paralegals, etc.) and providing a flat-charge option in lieu of hourly billing. Agencies' budgets continue to include an Attorney General account that is inflated each biennium based on the percentage change in the hourly billing rate for attorneys.

Benefits

DOJ's experience has shown that the hourly billing model is fairly effective in aligning DOJ's funding with the clients' use of services. But while DOJ billing rates are set at a level calculated only to enable DOJ to recover its operating costs, they are substantial enough to adversely affect client agencies' willingness to engage legal services, particularly in times of budget stress or when the need for legal services was not anticipated. The billed-hour method also makes it difficult for agency clients to accurately anticipate and effectively budget for the legal services they will require in any given biennium. The option of a flat-charge billing arrangement allows a desirable alternative for agencies who feel this would suit them better.

Risks

Because DOJ's clients are paying for legal services on a pay-as-you-go basis, the billed-hour mechanism can discourage agencies from timely seeking needed services in situations where early intervention might ameliorate or even prevent a later-developing and typically more costly problem.

Also, providing agencies with the option of a flat charge based on historical usage of legal services allows agencies to opt in when it appears to be to their budget's advantage at the expense of DOJ's budget and to opt out when they expect to pay less under the hourly billing model. Continuing to provide this flat-charge model leaves DOJ's budget vulnerable to requests for legal work in excess of funding for that legal work. For example, in the 2015-17 biennium, flat-charge agencies used about $1.25 million more of billers' time at the standard hourly billing rate than they paid for in their flat-charge assessments. Although DOJ could decide to limit the legal work provided to the flat-charge clients to prevent this from happening, implementing such a decision would require additional accounting and management processes and, due to the potential for greater variability in a small pool of flat-charge clients, could result in some important legal work not being done.

Costs

The status-quo option involves the ongoing administrative cost of operating two billing systems, one of which tends to overuse the resources for which it pays. Also, the status quo involves the potential cost of legal representation and judgments and settlements due to foregone legal advice as agencies avoid receiving and paying for preventing legal advice under the hourly billing model.

Alternative #2 – 100% Hourly Billing

Description

In this alternative, DOJ ends the pilot flat-charge option and the retainer option used by PUC, thereby reverting all flat-charge and retainer clients to the hourly billing model. Agencies' budgets continue to include an Attorney General account that is inflated each biennium based on the percentage change in the hourly billing rate for attorneys.

Benefits

1. Requires no changes to current billing system.
2. Allocates DOJ costs based on client agency use of legal services.
3. Assigns large percentage of DOJ costs to non-GF agencies (lightens burden on GF).
4. Helps insulate DOJ from impact of GF budget shortfalls.
5. Funded with a mixture of funds (GF, FF, LF, OF)
6. If additional billing staff are added to meet client needs, they will generate additional revenue to cover their costs.

Risks

1. Agency legal costs fluctuate from biennium to biennium. This can cause significant problems for small agencies.
2. Hourly billing rates continue to climb. They now are at a point where they discourage some agencies from seeking preventative legal advice.
3. DOJ and agencies spend large amounts of time generating and reviewing DOJ's hourly billings.
4. Legislative resistance to rate increases.

Costs

The administrative cost of implementing the hourly billing model for all agencies is almost zero because this is the model DOJ already uses for the vast majority of its client agencies. The ongoing administrative costs associated with the hourly billing model include attorney time spent tracking their billed-hour time and client agency time spent perusing their detailed DOJ invoices. As with the status quo, this alternative involves the potential cost of legal representation and judgments and settlements due to foregone legal advice as agencies avoid receiving and paying for preventing legal advice under the hourly billing model.

Alternative #3 – 100% Flat Charge / Assessment

Description

In this alternative, all DOJ costs related to providing legal services to state government would be passed on to agencies through a biennial assessment. Each agency's assessment would be based on that agency's average biennial use of DOJ legal services over the previous 2, 4, or 6 years. DOJ would bill the assessment to the client agency over the course of the biennium at regular intervals, most likely quarterly, in fixed amounts. Agencies' budgets would include an Attorney General account that is equal to the assessment amount, similar to the provision of a State Government Service Charge account.

Benefits

The assessment model preserves many of the positive aspects of the billed-hour model, while eliminating or minimizing the major negative attributes of the current system. The positive elements of the current system that would be preserved include:

- Retaining DOJ and individual Assistant Attorneys General accountability for services provided through informational statements provided to client agencies
- Retaining alignment of agencies' contribution to DOJ operational expenses with their use of services, over a span of several biennia

Adoption of an assessment-based funding system would result in the following additional benefits to DOJ and its clients:

- Greatly diminish the real and perceived financial disincentives for agencies to seek legal advice at an early stage, when legal services can often be provided most cost-effectively and offer the greatest benefit
- Greater predictability of legal costs for agencies, as assessments for legal costs would be included in agencies' biennial budgets, like other assessments
- By encouraging earlier use of legal services, reduction in the amount of litigation and enhance likelihood of success when litigation does occur
- Reduce DOJ and client agency time spent reviewing and processing invoices, thus reducing costs (although DOJ will continue to provide agencies with reports containing the same information they currently receive in billing reports)
- Allow DOJ to more efficiently budget for programs benefiting multiple agencies and state government generally, such as the AG manuals on public records and meetings, administrative law, and public contracting, trainings for agencies on significant public law topics, and other means of proactively providing information to state agencies

Risks

Replacing the current long-standing hourly billing method with an assessment method will present a number of challenges which would have to be addressed by DOJ and the client agencies:

- Eliminating hourly billings might result in some agencies substantially increasing requests for legal advice, which DOJ would have to manage with the agencies by prioritizing requests for services (though a significant increase in an agency's demand for legal services would be reflected in future assessments)
- With regard to agencies that pay for legal services from dedicated sources, such as federal grants, permit fees, etc., DOJ would need to reconcile the assessment system with their accounting obligations, probably in a manner similar to that used by other assessment-funded agencies
- A mechanism would have to be developed to address spikes in demand for legal services arising from unanticipated major new agency projects, programs, or problems arising during a biennium, and that were not anticipated in the assessment for that biennium (for example, the system might be designed to require Emergency Board funding for such major new projects or programs)
- Limits agencies' ability to reduce legal costs in the midst of a biennium to address budgetary stresses

DOJ has tested the pilot program only with agencies which are directly billed for their own legal services. In other words, it has not been used for costs billed to funds or agencies, such as DAS

Risk, other than the client. If the flat-rate billing system is adopted in those areas, DOJ may wish to take time to assess how, if at all, the flat-rate billing system changes the relationship with the fund or agency paying DOJ's costs, as well as with the client.

Costs

The administrative cost of implementing the flat-charge model includes the time spent developing systems to overcome the challenges identified in the Risks associated with this alternative. The ongoing administrative costs of the flat-charge model should include reduced attorney and client agency time spent in timekeeping and invoice review and may include additional time spent in meetings with a "Customer Utility Board" to ensure client agencies understand and support DOJ efforts to prioritize its legal services on matters of the greatest value to the state. This alternative is expected to include a reduction in the potential cost of legal representation and judgments and settlements as client agencies seek legal advice early in the course of a potential legal problem.

Alternative #4 – Combination Assessment (tied to DOJ fixed costs and overhead) and Hourly Billing

Description

In this alternative, client agencies would be assessed an amount sufficient, in aggregate, to pay DOJ's fixed costs (everything except salary and OPE for attorneys and support staff providing legal services to agencies). DOJ would base each agency's assessment on the agency's historical use of DOJ legal services. DOJ would charge agencies an hourly billing rate for actual time spent on their legal work. DOJ would base the hourly rate only on the salary and OPE for attorneys and support staff performing this work.

Benefits

1. Places most DOJ overhead costs in a "base budget" funded by assessments, allowing significant reduction in hourly billing rates.
2. Reduced billing rate should make agencies more likely to seek legal advice.
3. Combination of assessments and lower billing rate should reduce volatility of agency legal costs and of DOJ revenue.
4. Retention of hourly billing reduces likelihood agencies may seek unneeded legal advice.
5. Funding mix (GF, OF, FF, LF) should remain the same.

Risks

1. More complex to administer than some other options.
2. Shares the risks of the 100% assessment and 100% hourly billing models.

Costs

This model is expected to be administratively costly due to maintaining multiple funding mechanisms. Also, in sharing the hourly billing model risks, it is expected to include some potential cost of legal representation and judgments and settlements as client agencies try to save money by postponing legal advice early in the course of a potential legal problem.

Alternative #5 – Contract or Assessment for General Counsel Services; Hourly Billing for Trial and Appellate Services

Description

In this alternative, agencies pay DOJ a biennial assessment or enter into a biennial retainer agreement to cover General Counsel services. In addition, DOJ bills client agencies on an hourly basis for trial and appellate court work

Benefits

Provides certainty for General Counsel charges while allowing costs for trial and appellate work to fluctuate based on usage. Theoretically, this should provide an incentive to use General Counsel and a disincentive to engage in activities likely to lead to litigation.

Risks

In reality, much of trial and appellate work for agencies is billed to Risk Management, which effectively means this work is already covered by agency assessments. Therefore, this model is unlikely to provide a disincentive to engage in activities likely to lead to litigation.

Costs

This model is expected to be administratively costly due to maintaining multiple funding mechanisms.

Alternative #6 – Combination General Fund (tied to DOJ fixed costs and overhead) and Hourly Billing or Assessment

Description

In this alternative, General Fund appropriation pays DOJ fixed costs and other overhead. In addition, DOJ pays its remaining costs through one of two methods: (1) it bills each agency on an hourly basis for the agency's actual use of legal services; or (2) it assesses each agency on a biennial basis to pay the actual costs of attorneys and other billing staff who do work for the client agency.

Benefits

1. Significantly reduces hourly billing rate and client agency legal costs, while retaining hourly billing to cover legal division marginal costs.
2. Should increase agency willingness to seek legal advice.

Risks

1. Likely legislative opposition to use of GF.

2. Transfers responsibility for significant portion of DOJ costs from other/federal funds to GF.
3. Shares the risks of the 100% hourly billing model or the 100% assessment model.

Costs

This model is expected to be administratively costly due to maintaining multiple funding mechanisms.

Alternative #7 – Combination General Fund (tied to GF in client agencies) and Hourly Billing or Assessment

Description

In this alternative, all DOJ costs related to providing legal services to General Funded agencies would be funded through a General Fund appropriation to DOJ. DOJ's funding level for these costs would be based on historical use of DOJ legal services by these agencies, as in alternative #4 above. DOJ costs related to agencies receiving no General Funds would be based on either hourly billings or assessments to those agencies. DOJ costs related to agencies with mixed funding sources (some General Fund and some federal or other funds) would be a combination of General Fund appropriations to DOJ and hourly billings or assessments to the agencies, based on their ratios of General Fund to federal and other funds.

Benefits

1. Funding mix (GF, FF, OF, LF) unchanged.
2. For GF agencies:
   (a) Decrease agency concern about impact of legal costs on their budgets.
   (b) Likely make GF agencies more willing to seek legal advice.
   (c) Likely to reduce agency complaints regarding legal bills.
3. For non-GF agencies if hourly billing used:
   (a) Allocates DOJ costs based on agency use of service.
   (b) Helps insulate DOJ from GF shortfalls.
   (c) Funded with a mixture of funds (OF, FF, LF).
   (d) If additional billing staff are needed to meet client needs, they will generate additional revenue to cover their costs.
4. For non-GF agencies if assessments used:
   (a) Provides agencies certainty regarding their biennial costs for legal services.
   (b) Could make agencies more likely to seek legal advice.
   (c) "Smooths" agency legal service costs from biennium to biennium.
   (d) Recovery of initial budgeted cost regardless of quantity of work performed.
   (e) Could reduce agency complaints regarding legal bills.

Risks

1. For GF agencies:
   (a) No direct correlation between cost of legal service and use of legal service.
   (b) Leaves DOJ more vulnerable to GF cuts than most other funding models.

   (c) Changes in DOJ staffing levels for staff serving GF agencies would require legislation change in GF appropriation.
2. For non-GF agencies if hourly billing used:
   (a) Agency legal charges would fluctuate. This could cause significant problems for small agencies.
   (b) Hourly billing rates continue to climb.
      i. This will discourage some agencies from seeking preventative legal advice.
      ii. Agencies have increasing incentive to employ in-house attorneys.
   (c) Legislative resistance to rate increases.
   (d) DOJ and agencies devote significant time to generating and reviewing legal bills.
3. For non-GF agencies if assessments used:
   (a) Limited ability for agencies to reduce DOJ costs in current biennium.
   (b) Legislative resistance to increases in assessment charges.
4. For both GF and assessment:
   Could leave DOJ short of funds or require rationing/prioritization of legal services if demand for legal services exceeds funded legal resources. This issue could be addressed either by providing that agencies could purchase additional legal services if their need for service substantially exceeded budgeted service, or by funding a substantial DOJ operating reserve.

Costs

This model is expected to be administratively costly due to maintaining multiple funding mechanisms.

Alternative #8 – 100% General Fund

Description

In this alternative, all DOJ costs related to providing legal services to state government would be funded through a General Fund appropriation to DOJ. DOJ would not bill client agencies for legal services. DOJ would manage its legal services workload to remain within its General Fund appropriation.

Benefits

1. Alleviate, or at least decrease, client agency concerns about impact of legal costs on their budgets.
2. Likely make agencies less hesitant to seek legal advice.
3. Possible reduction in Administrative Services billing staff.
4. Likely to reduce agency complaints regarding legal bills.

Risks

1. Transfers burden for much of the state’s costs for legal service from other/federal/Lottery fund sources to the GF.
2. Likely to meet substantial resistance in legislature because of no. 1.

3. Could leave DOJ short of funds or require rationing/prioritization of legal service if demand for services exceeded funded legal resources. This issue could be addressed either by providing that agencies could agree to purchase additional legal services if their need for service substantially exceeded budgeted services, or by funding a substantial DOJ operating reserve.
4. Significantly increases impact on DOJ from GF revenue shortfalls.
5. Eliminates direct alignment between agencies' demands for legal services and the costs assigned to those agencies.

Costs

This model shifts the cost of legal services onto General Fund and away from Federal Funds and Other Funds.

Alternative #9 – Small Agency "Insurance" Assessment

Description

In this alternative, DOJ would assess small agencies a small "premium" (a small percentage of their projected biennial legal costs). The proceeds of this assessment would go into a small agency legal services fund. DOJ would use the fund to pay any extraordinary legal costs incurred by the small agencies paying the premium.

Benefits

Addresses problem of one major case or legal issue using most or all of a small agency's legal budget.

Risks

Many small fee-supported boards and commissions have opposed similar concepts in the past, asserting that their licensee's fees should not be used to benefit any other agency. Also, it retains the risks of the 100% hourly billing model for all other agencies.

Costs

This model is a potential solution for only a small portion of state government legal services. It therefore requires a solution for the remainder of state government. This model is expected to be administratively costly due to maintaining multiple funding mechanisms.

Alternative #10 – Retainer

Description

The Public Utility Commission (PUC) is the only agency currently using the retainer program. Under the retainer agreement, DOJ and the PUC estimate the amount of legal fees that the PUC would be charged for all legal services provided by DOJ to the PUC Utility Program for the six month period covered by the retainer agreement. PUC pays that amount to DOJ in advance. The agreement does not cover legal services not directly provided by DOJ (conflict counsel or special assistant attorneys general) and does not cover recoverable expenses.

DOJ tracks legal services provided under the agreement in the same way that it tracks legal work provided to other agencies. PUC receives a monthly report showing legal services provided and the time devoted to providing those services. This is an informational report. The retainer agreement provides that DOJ and PUC management may prioritize work and that DOJ may limit work, if necessary, to stay within the retainer amount. As a practical matter, legal work has rarely been prioritized or limited for that purpose. If work performed under the retainer either exceeds or falls below the amount contemplated by the agreement by more than 5%, then the agreement provides that a credit will be given or an additional payment will be required.

Benefits

This option satisfies one state agency. Like the hourly billing model, it matches agency use of legal services with the source of funding for those services, except for the 5% buffer in the end-of-period true-up.

Risks

This model involves considerable administrative overhead on a per-agency basis to calculate the end-of-period true-up, without providing material advantages over the conventional billed hour model. It retains most of the risks of the 100% hourly billing model.

Costs

This model is administratively costly due to the end-of-period true-up.

Recommendation

DOJ serves a wide variety of state agencies, boards, and commissions, each with a unique set of needs. To ensure we meet those needs in the most effective way for these clients as a group, we must obtain our clients' input on any change in billing model. To obtain this input, we have scheduled meetings with a committee of agency heads formed by the DAS Executive Leadership Team. In those meetings, we will focus on two billing models: the billed-hour model and the flat-charge model. DOJ believes these two models best meet the solution requirements without adding administrative complexity and cost.

DOJ recommends the continuation of the process of meeting with client agencies and the Enterprise Leadership Team committee to examine the feasibility and desirability of implementing a comprehensive flat-charge assessment model to pay for DOJ's legal services with the goal of starting this model in the 2019-21 biennium.

Consequences of a failure to act

DOJ considers the "do nothing" or "status quo" option to be undesirable due to the continuation of the current problems identified earlier, including both the disincentive to use preventive legal services and the tendency for flat-charge pilot agencies' legal services, in aggregate, to exceed their assessments. Instead, the consequence of a failure to proceed with an alternative billing model is likely to be the cessation of the flat-charge pilot in the 2019-21 biennium. This consequence would address one current problem but would not address all of the desired solution requirements identified earlier.

Next Steps

DOJ has scheduled meetings with a committee of state agency directors formed by the DAS Executive Leadership Team. The committee will assist DOJ's in reviewing and developing the proposal to change DOJ's billing model from hourly billing to flat charge. It will also help DOJ understand how its service delivery model would work under the flat-charge billing model.

In concert with DOJ's work with the ELT committee, DOJ will work on developing its 2019-21 Agency Request Budget under the flat-charge concept, and it will prepare materials for other agencies to use the flat-charge assessment figures in their Agency Request Budgets.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

8712204

Appendices

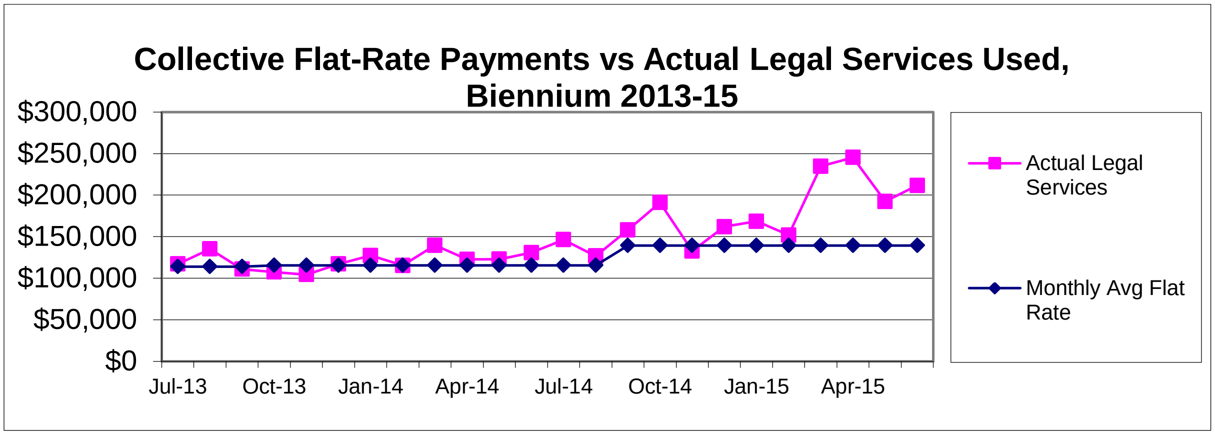
Appendix A

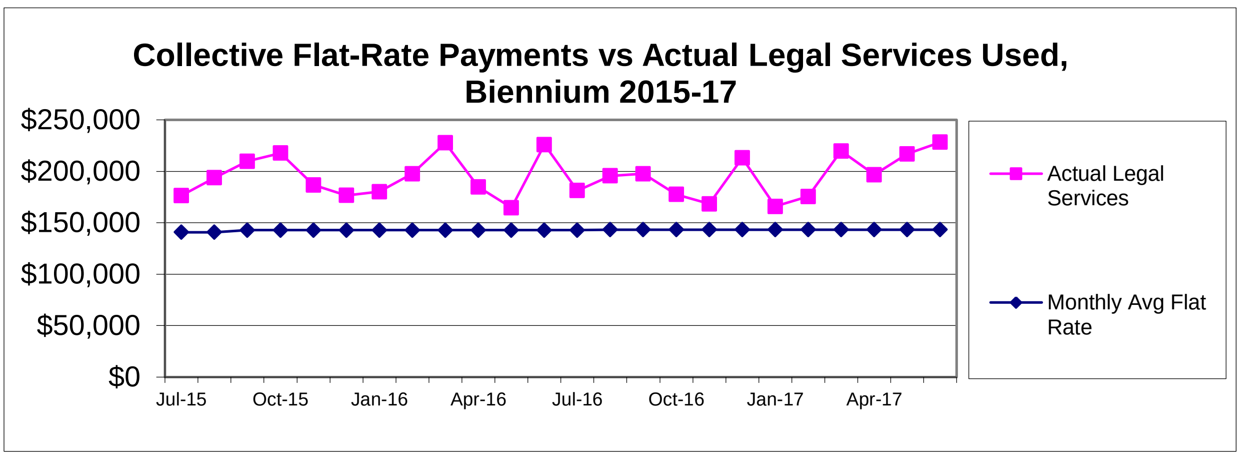
180.160 Charges for services to public agencies; rules. Subject to rules prescribed by the Attorney General, in rendering assistance to the respective officers, departments, boards and commissions of state government, and other public bodies, the Department of Justice may charge such officers, agencies and public bodies (including, when appropriate, the Department of Justice itself) separately for the cost of such assistance, said cost including, but not limited to salaries of assistants and administrative and clerical salaries, investigative services, and capital outlay; and shall also charge such officers, departments, boards, commissions or public bodies for other costs incurred and disbursements made pursuant to request or authorization in connection with such assistance, and not paid directly out of moneys appropriated or otherwise available for expenditure by such officers, agencies or public bodies.

180.170 Billing for services to public agencies. The Department of Justice shall estimate in advance the expenses that it will incur during the biennium under ORS 180.160 and 180.340, and shall render to officers, departments, boards and commissions of state government and other public bodies an invoice for their share of such expenses for periods within the biennium and in sufficient amounts to provide reasonable cash operating requirements for the Legal Division of the Department of Justice within the biennial period. Each officer, department, board or commission or other public body shall pay to the credit of the Department of Justice Operating Account such invoice as an administrative expense from funds or appropriations available to it in the same manner as other claims against the state or public body are paid. If the estimated expenses for any officer, department, board, commission or public body are more or less than actual expenses for the period covered by the invoice, the difference shall be reflected in the next following estimate of expenses.

Appendix B

The following graphs show the monthly average cost of actual legal services used by flat-charge agencies and the average monthly value of the flat-charge payments by those agencies.





Appendix C

States' Responses to 2009 and 2017 NAAG Surveys regarding Funding

Question:
How is your AGO funded?

Is it by appropriation(s) of the state legislature, federal and/or state grants(s), billable attorney hours billed to state agencies, other method, or a combination thereof?

Are any state or other funds entrusted to your office's management (such as tort claim fund, consumer protection fund, etc.)?

What are the strengths and weaknesses of your model?

	2009 Response	2017 Response
Alabama:	No billing information.	Funded by direct appropriation, litigation recoveries and hourly billings. AGO also receives funds from litigation recoveries and federal Medicaid Fraud funding.
Alaska:	Direct appropriations 59%; hourly billings to agencies 40%.	
Arizona:	No billing information.	Information provided for only the State Government Division of the AGO (Agency Counsel/Education & Health/Tax/Natural Resources/Transportation/Licensing & Enforcement/Employment/ Public Law/Liability Management) – funded by: a. Direct appropriation, b. Interagency services agreement – Some state agencies agree to pay for full or partial additional AAGs & staff in 2 ways: hourly fee, or lump-sum covering salaries & other costs. These agencies' legal work is given priority over non-participating agencies. c. Collection Enforcement Revolving Fund – funds positions that provide services related to contract and collection efforts. Pros: Flexibility in funding methods, the ISAs reduce the burden on the general fund. ISA agencies have a dedicated point of contact and can expect to have their legal needs prioritized. ISA attorneys develop specialized knowledge of their client's business needs and interact with agency leadership more

		consistently. Cons: Risk that an ISA agency will not renew ISA, leaving positions vulnerable; need to re-negotiate ISA every year; AGO required to provide legal services to non-ISA agencies – some are large and produce a demanding workload.
Arkansas:	Direct appropriation.	
California:	Direct appropriation 66%; hourly billing 34%	Funded by direct appropriation, hourly billings, settlement funds and proposition funding. They manage 32 other legal and law enforcement funds.
Colorado:	No billing information.	
Connecticut:	No billing information.	Funded by direct appropriation – personal services (90% of funds) and other expenses. AGO does not track or bill attorney time. They do charge 20 of their staff salaries to an agency – those staff are devoted almost exclusively to the funding agencies. The AGO manages the Consumer Protection Fund. Pros: more simple and predictable. Cons: requires sustained communication and relationship building by AG with Governor and legislature; requires sharing of data re recoveries and risk management savings.
District of Columbia:		Primarily funded by direct appropriation. Some general counsel AAGs funded via MOU based on salary + benefits, with individual agencies who pay with federal or other grant funds. Additional attorneys needed for special projects are funded in the same way. AGO also receives federal child support funds, and manages Litigation Support Fund and Restitution Fund. Direct appropriation pros: AGO makes case for resources to the legislature, rather than a client agency. Cons: Time and energy required by budget process.
Delaware:	No billing information.	
Florida:	Direct appropriation 5%; hourly billings 37%; contracts with agencies covering cost of AAGs/staff working with the agency 58%.	Divisions funded differently: Direct appropriations from General Fund and Legal Affairs Revolving Trust Fund, and Motor Vehicle Warranty Trust Fund; federal grants; and agency billable hour contracts (with smaller agencies) and funded position contracts

		(with larger agencies). State Risk Management Trust Fund managed by Risk Management Division. Trust Fund cons: decisions of where recoveries will go – to consumers or trust fund. Trust Fund pros: Allows a stable funding source. Billable hour cons: Workload can decrease, causing funding concerns; Billable hour pros: encourages AAGs to work and meet billable hour expectation and to be efficient.
Georgia:	Direct appropriation, except for defense of tort and civil rights cases, which are billed to a Risk Management agency (19%); some assessment of agencies.	
Hawaii:	50% direct appropriation; 35% funded by client agency (agency pays cost of assigned AAGs and overhead); DHS billed at hourly rate.	
Idaho:	Direct appropriation, but attorneys track time for work for agencies and agencies are charged with fees used to reimburse general fund appropriation. A few agencies are direct billed by AAG on hourly basis.	
Illinois:	General counsel attorneys are all agency employees and are not AAGs.	
Indiana:	No billing information.	Mainly funded by direct appropriation, plus federal Medicaid Fraud funding, and billable hours. AGI also manages the state's Tort Claim Fund and Unclaimed Property Fund. Pros: Since funding is mostly not based on billable hours, their budget is more reliable. Cons: They are under-funded, and are tied to budget year cycles.
Iowa:	Agencies pay all payroll costs associated with the AAGs who advise the agency, except for some small agencies that pay under "flat-fee" contracts. No	

	information on how DOJ overhead is covered.	
Kansas:	Large agencies have in-house attorneys. AG advises smaller agencies and fee supported boards. Portion of fees for fee funded agencies goes to GF to offset AG costs. AG funded with direct appropriation. A few AAGs are assigned to agencies that pay the full cost for those attorneys.	
Kentucky:	Hourly billings 4%.	
Louisiana:	No billing information.	
Maine:	Approximately one third of AAGs are supported through direct appropriations. The remaining AAGs are funded through charges to state agencies or charges to federal funds where the attorney works with an agency receiving federal matching funds.	
Maryland:	Most AAGs housed in client agencies and their expenses paid by the agency. Some AAGs are located in AG office and their costs paid by the agencies with which they work. A few AAGs are located in AG office and are part of the central AG budget	
Massachusetts:	Most agencies have their own attorneys. A few agencies don't have in-house attorneys and rely on AG. Entire AG budget is direct appropriation.	
Michigan:	54% of AG budget comes from client billings and federal funds and 46% is direct appropriation. No indication of funding.	
Minnesota:	No billing information.	
Mississippi:	Direct appropriation 38%; hourly billings 32%; plus federal funds, penalty recoveries.	Beginning 2 years ago, AGO is funded by direct appropriation only. No additional funds. Pros: Agencies no longer have financial

		control over AAGs. Cons: Inability to hire additional AAGs, due to lack of funding, and no disincentive for agencies to demand services from a limited pool of employees.
Montana:	Most agencies have in-house counsel. AG advises smaller agencies, with funding through hourly billing rate under interagency agreements.	
Nebraska:	Direct appropriation 87%; assessments to agencies 13%; hourly billings 1%.	
Nevada:	No billing information.	
New Hampshire:	51% of AG budget is (GF) direct appropriation and 49% of the budget is directly paid by client agencies. In general, work for GF agencies is supported by direct appropriation and work for fee supported (or federally funded?) agencies is paid for by those agencies. In many cases, these agencies have the attorneys on their payrolls but they are assigned to DOJ by interagency agreement.	
New Jersey:	Direct appropriation 20%; hourly billing 80%.	
New Mexico:	No billing information.	
New York:	No billing information.	
North Carolina:	Entirely funded through client billings.	
North Dakota:	Hourly billing to other fund/federal fund agencies; direct appropriation to AG for costs of advising/representing GF agencies.	
Ohio:	No billing information.	
Oklahoma:	Some agencies have in-house attorneys, some have outside counsel and some advised by AG. AG attorneys are funded through contracts with agencies. The contracts are similar to retainers,	

	covering all or a portion of an attorneys costs, plus overhead.	
Pennsylvania:	Governor's office, not AG, provides legal advice to agencies.	Funded primarily through state appropriations, plus restricted revenue accounts, dedicated fees and federal funding. The AGO does not bill state agencies for its attorney services. The AGO manages a public protection enforcement account, civil asset forfeiture account and forfeiture accounts for property seized in cooperation with federal agencies. Pros: flexibility within state funding lines. Cons: significant reliance on the legislature and governor to provide adequate funding; restricted accounts become targets and lawmakers are less willing to provide additional funding because of the balances that have accumulated; heavy reliance on restricted revenues results in budgetary instability, when AGO is pressured to spend down those balances.
Rhode Island:	No billing information.	
South Carolina:	Agencies use in-house or outside counsel approved by AG. Agencies pay all associated costs.	Funded by direct appropriation, annual provisos (allows them to keep some security fees and fines) and consumer protection recoveries. Slowly moving back to direct appropriation. (State also has an insurance reserve fund, but unclear if AGO manages it.) Cons: Consumer protection recoveries vary widely, annual provisos can disappear at the will of the legislature, general fund appropriations can be reduced during fiscal crisis.
South Dakota:	Funded by direct appropriation.	Funded by direct appropriation, (includes federal funds and other funds [consumer protection monies, background check fees, law enforcement training fund portion of court costs assessed on tickets and cases], and billable-hour contracts with 4 state agencies that receive federal reimbursement). AGO also manages consumer protection fund, antitrust enforcement fund, drug enforcement fund, law enforcement training fund.
Tennessee:	Agencies are billed for all costs and overhead associated with	

	about one fourth of the AAGs. About 7% of AAGs are funded through recoveries (consumer, antitrust, attorney fees). About 65% of AAGs are funded through direct appropriation.	
Texas:	Hourly billing.	Funded by direct appropriation, state and federal grants, collection of statutory fees, and attorney billable hours. The AGO administers funds for: compensation of crime victims, prevention of internet crimes against children, child support enforcement, and funding grant programs for sexual assault and human trafficking victims. Pros: By receiving funds from a combination of sources, the AGO is able to deploy its assets in the most efficient and effective manner. Cons: Compounding funding sources tends to compound funding restrictions.
Utah:	Other fund and federal funded agencies are billed for attorney time (39%); advice to GF agencies is covered by direct appropriation to AG (57%).	
Vermont:	Agencies assessed a portion of cost for AAGs (20%). Direct appropriation (43%); fees, penalties (8%).	
Virginia:	No billing information.	
Washington:	Client agencies estimate lawyer months (FTE) of attorney service they will need and pay into legal service revolving fund to cover the cost at beginning of biennium. AAGs bill against that fund. Agency account in revolving fund reconciled based on use at end of biennium.	
West Virginia:	No billing information.	
Wyoming:	No billing information.	

Appendix D

Flat Charge Agreement Between [Client Agency] and the Department of Justice (DOJ)

1. This Agreement is for legal services provided by DOJ to [Client Agency] (the Agency) for the period July 1, 2017 through June 30, 2019. The Agency will pay DOJ $______________ for legal services covered by this Agreement during that period. Payments will be made as follows: Quarterly, in advance ($xx,xxx.xx August 14, 2017; October 1, 2017; January 1, 2018; April 1, 2018; July 1, 2018; October 1, 2018; January 1, 2019; and April 1, 2019).

2. The fee set forth in Paragraph 1 is for all legal services provided by DOJ to the Agency, and includes charges for attorney, paralegal, investigator, law clerk and clerical time. Recoverable expenses (costs associated with the legal services provided, such as travel expense, court costs and expert witness fees) are not included in the fee in Paragraph 1. Such expenses will be forwarded to the Agency for payment when possible or billed monthly as incurred. This Agreement does not cover legal services provided to the Agency by special assistant attorneys general or conflict counsel appointed or authorized by the Attorney General. Charges for such services will continue to be billed to the Agency monthly on a fee-for-services basis.

3. DOJ will continue to provide the Agency a monthly report showing legal work performed under this Agreement and the time required for such work. This report is for informational purposes only. The report will indicate the amount that would have been charged to the Agency for legal services if this Agreement was not in place.

4. This Agreement is intended to provide sufficient legal services to cover the Agency's reasonably anticipated legal work requirements from DOJ. DOJ will adjust to the extent possible its work on Agency matters as required to stay within the flat charge amount in Paragraph 1. The Agency will prioritize work required of DOJ attorneys to assist DOJ in remaining within the flat charge amount. The Attorney General reserves the right, in consultation with the Agency, to modify work priorities should the Attorney General determine that such modification is in the legal interests of the state.

5. At the close of the 2017-2019 biennium DOJ will calculate the Agency's flat charge for the next biennium based on the average of the volume of legal services the Agency used during the 2017-2019 biennium and during the two preceding biennia.

____ ____________________

[Client Agency] Date

____

Title

______________________________________ ________________

Oregon Department of Justice Date

____

Title

Appendix E

Interagency Retainer Agreement Between the Public Utility Commission and the Department of Justice

1. This Agreement is for legal services provided by the Department of Justice (DOJ) to the Utility Program of the Public Utility Commission (PUC). Although we anticipate the retainer arrangement may continue indefinitely, this Agreement is effective July 1, 2017, and terminates December 31, 2017, unless extended. The PUC will pay DOJ the sum of $800,000 for legal services covered by this Agreement during that period. In addition, based on application of the formula set out in Paragraph 6 of the January-June 2017 Agreement to PUC's use of legal services for the period from January 1, 2017 to June 30, 2017, there is payment due from PUC in the amount of $298,265.73. Therefore, the total payment due from PUC is $1,098,265.73. Payment will be made in advance.

2. The fee set forth in Paragraph 1 is for legal services provided by DOJ to the Utility Program of the PUC, and includes all charges for DOJ attorney, paralegal, investigator, law clerk and clerical time by all divisions of DOJ that would normally be billed to Account No. 8601xx, and office services and supplies associated with those charges. This Agreement does not cover recoverable expenses (costs associated with the legal services provided, such as travel expense, court costs and expert witness fees) or legal services provided to the PUC outside of the Utility Program that would not normally be billed to Account No. 8601xx, including but not limited to billings to the Risk Management Tort Claims Fund. Charges for these services will continue to be billed to PUC or to other appropriate client agencies on a fee-for-services basis.

3. DOJ will continue to provide PUC a monthly report showing legal work performed under this Agreement and the time required for such work to the following program areas: (1) Electric, (2) Natural Gas, (3) Telecommunications, (4) Water, (5) Appellate, and (6) Other. This report is for informational purposes only.

4. This Agreement is intended to provide sufficient legal services to cover the Utility Program's reasonably anticipated legal work requirements from DOJ. DOJ will limit its work on Utility Program matters to the greatest extent reasonably possible as necessary to stay within the retainer amount. The Utility Program's management team will prioritize work required of the PUC Section attorneys to assist with DOJ in remaining within the retainer amount. The Attorney General reserves the right, in consultation with the PUC, to modify work priorities should the AG determine that such modification is in the legal interests of the state.

5. This Agreement is not intended to cover extraordinary legal assistance that may be required by the Utility Program. If it appears that the DOJ's cost of providing legal services to the Utility Program will exceed or fall below the fee in Paragraph 1 by more than five percent (5%), DOJ and the Utility Program management will jointly prioritize

workload and modify any succeeding Agreement to reflect changes in workload. DOJ and PUC may agree that fees and expenses for a particular matter will be paid outside this Agreement or may adjust this Agreement at any time to provide for extraordinary legal fees or expenses.

6. If at the end of the retainer period DOJ's costs of providing legal services as shown on the monthly informational billing reports exceeds or falls below the fee in Paragraph 1, then DOJ and PUC will adjust their accounts as follows: If DOJ's costs exceed the fee in Paragraph 1, then PUC will pay to DOJ the amount by which actual costs exceed the Paragraph 1 amount. If DOJ's costs are less than the fee in Paragraph 1, then DOJ will pay to or credit PUC the amount by which actual costs were less than the Paragraph 1 amount.

7. This Agreement will be reviewed by DOJ and PUC two (2) months before its expiration to determine if the Agreement should be continued, or if the fee or terms should be revised.

8. The Retainer Agreement may be terminated upon 30 days notice by either DOJ or PUC, and will terminate on December 31, 2017, unless extended by written Agreement of the parties.

_______________________________________ __________________
Public Utility Commission Approval Date

____
Title

_______________________________________ __________________
Department of Justice Approval Date

____
Title