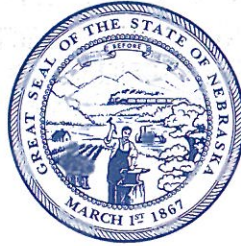


# State of Nebraska Accountability and Disclosure Commission

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LANCASTER COUNTY  
BOARD

March 31, 2017

Kerry P. Eagan  
Lancaster County Chief Administrative Officer  
555 South 10<sup>th</sup> Street, Suite 110  
Lincoln, NE 68508

Dear Mr. Eagan:

Reference is made to your letter of March 15, 2017 on behalf of Lancaster County Commissioners Deb Schorr and Bill Avery. Commissioners Schorr and Avery are also members of the Board of Directors of the District Energy Corporation (DEC). They hold their positions as directors on the DEC Board as the designated representatives of the Lancaster County Board. The county board is expecting to consider three matters related to DEC. Commissioners Schorr and Avery wish to know if their positions on the Board of Directors of DEC would result in a conflict of interest as to the DEC matters coming before the Lancaster County Board.

**Background:** In your letter you state that DEC was formed as a non-profit corporation in 1989 pursuant to an Interlocal Agreement between Lancaster County and the City of Lincoln for the purpose of financing, furnishing and operating energy facilities and related services for governmental entities. In accordance with the agreement, DEC has been providing thermal energy for heating and cooling to city and county buildings. The 1992 amended Articles of Incorporation of DEC provide that the corporation may "furnish heating and cooling and other energy requirements and related services to federal, state and local governmental entities, agencies and subdivisions and to the general public". The proposed amendment to the energy service agreement recites that that DEC is "desirous of selling unutilized capacity ... to other potential public and private customers within the vicinity ..." DEC is contemplating expanding its customer base.

**Matters at Issue:** The first issue is a request by DEC to amend the site lease agreement between DEC and the County. By this agreement Lancaster County leases property to DEC for the purpose of operating a facility which provides heating and cooling to the Adult Detention Facility at 3801 West O Street. The agreement, if

amended, would extend the termination date of the agreement from 2029 to 2046. Currently, the annual payment by DEC to the county for the lease of land on which it operates its facility is \$1.00. The amendment would extend this arrangement which is financially favorable to DEC as it works to expand its customer base.

The second issue relates to the transfer of assets. Under the current energy service agreement, DEC is required to transfer certain assets to the county upon the termination of the agreement. These include the power plant that provides heating and cooling to the Adult Detention Facility. The proposed amendment would eliminate the transfer requirement. With the elimination of this provision, DEC would be able to retain these assets for its own use. This would be a financial benefit to DEC.

The third issue is a request by DEC to amend the site lease agreement to which DEC, Lancaster County and the City of Lincoln are parties. By this agreement Lincoln and Lancaster County lease property to DEC for the purpose of operating a facility. This facility is used to provide heating and cooling to City-County buildings in the area of 555 S 10<sup>th</sup> Street. The agreement, if amended, would extend the termination date of the agreement from 2010 to 2046. Currently, the annual payment by DEC to the county and city for the lease of premises on which it operates its facility is \$1.00. The amendment would extend this arrangement which is financially favorable to DEC as it works to expand its customer base.

**District Energy Corporation:** The District Energy Corporation was formed in 1989 pursuant to an Interlocal Agreement between the City of Lincoln and Lancaster County. The purpose was the construction, the financing and operating of energy facilities and related services for governmental entities. As stated, Commissioners Schorr and Avery were appointed to the DEC Board pursuant to DEC's Articles of Incorporation and Bylaws.

I have been advised that there is some difference of opinion among county officials, county employees and DEC personnel as to whether DEC is a corporation or a governmental entity created through an Interlocal Agreement. The Interlocal Cooperation Act permits the creation of governmental entities. I see no indication that this was done. For the purposes of this opinion I am treating DEC as a corporation. My reasons for doing so are as follows; 1) the Interlocal Agreement calls for the establishment of a corporation under the Nebraska Non-Profit Corporation Act; 2) DEC has articles of incorporation and by-laws which identify it as a corporation; 3) the energy service agreement and the site lease agreements identify DEC as a corporation; and 4) the records of the Nebraska Secretary of State list DEC as a non-profit domestic corporation.

**Statutory Provisions:** Section 49-1499.03 of the Nebraska Political Accountability and Disclosure Act (NPADA) provides that an official of a political subdivision designated in section 49-1493 (including an elected county official) has a potential conflict of interest if he or she is faced with taking an official action or making an official decision which may result in a financial benefit or detriment to: a) the public official; b) a member of his or her immediate family; or c) a business with which he or she is associated. This benefit or detriment must be distinguishable from that experienced by the general public or a broad segment of it.

Section 49-1407 of the NPADA defines the term business as “any corporation, partnership, limited liability company, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint-stock company, receivership, trust, activity, or entity.” The definition does not distinguish between a non-profit entity and a for-profit entity. By this definition, DEC is a business.

Section 49-1408 of the NPADA defines the term “business association” as a business in which the individual is “...a partner, limited liability company member, director, or officer.” An individual may also have a business association if the individual based upon holding stock in a corporation. Its Articles of Incorporation state that no stock will be issued by DEC. However, as members of its Board of Directors, Commissioners Schorr and Avery have a business association with District Energy Corporation.

**Analysis:** In each of these three matters Commissioner Schorr and Commissioner Avery are faced with taking an official action or making an official decision which would result in a financial benefit or detriment to District Energy Corporation. They should each file a Potential Conflict of Interest Statement with this office and they should abstain from participating or voting on the three matters noted.

Further discussion may be useful. It is clear that nothing in this situation will result in a financial benefit or detriment to Commissioners Schorr or Avery personally. It is also clear that they serve on the DEC board as designees of Lancaster County. Nevertheless, their service on the DEC board creates for them a business association with DEC. The Legislature has provided a limited exception to the conflict of interest provisions when an official is serving on the board of directors of a corporation by virtue of his or her public office. However, this exception only applies to members of State commodities boards. The exception has not been extended to members of county boards.

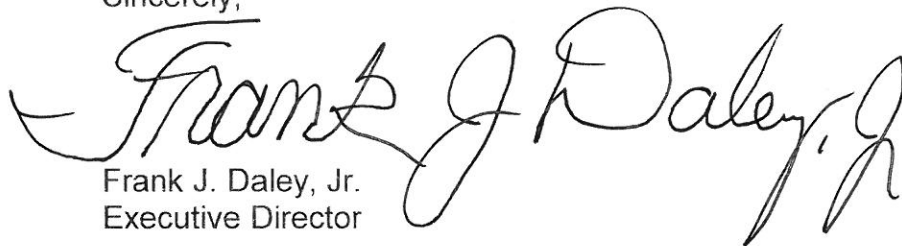
**Summary:** County Commissioners Deb Schorr and Bill Avery have a business association with District Energy Corporation. The proposed amendments to the two site lease agreements and to the energy service agreement would have a financial effect on

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District Energy Corporation. Accordingly, Commissioner Schorr and Commissioner Avery would have a conflict of interest and should abstain from participating or voting on the matters.

Please understand that this is a staff opinion only and not a formal Commission Advisory Opinion. It is based upon the information provided. If any material fact stated in this opinion is incorrect, please contact me as this may result in a change of the opinion. If you have any questions, please feel free to contact me.

Sincerely,

A handwritten signature in black ink that reads "Frank J. Daley, Jr." in a cursive style. The signature is written over the printed name and title of the signatory.

Frank J. Daley, Jr.  
Executive Director