

MEMORANDUM

State of Alaska
Department of Law

TO: The Honorable Bob Poe, Commissioner
Department of Administration

Douglas Samimi-Moore, Coordinator
Division of Information Services

DATE: February 8, 1999

FILE NO: 663-98-0235

TEL. NO: (907) 465-3600

SUBJECT: Alaska Rural Communications
Service (ARCS) Council:
Programming Decisions

FROM: Marjorie L. Vandor
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Your predecessor, Commissioner Mark Boyer, asked for an opinion from this office with respect to whether it is lawful for the Alaska Rural Communications Service (ARCS) Council to have access to space on a transponder which is leased from AT&T Alascom with an appropriation made by the Alaska Legislature. An issue has been raised that the appropriation allowing ARCS access to the state-funded transponder may directly or indirectly provide an unlawful competitive advantage to commercial stations whose programs are broadcast by ARCS. These issues have been raised by Smith Broadcasting, a company that operates the "Alaska Superstation" from its KIMO studios in Anchorage, Alaska. Smith Broadcasting must lease its own transponder space from Alascom and, currently, has no access to the state's leased transponder. Smith Broadcasting alleges that the ARCS Council's decision to rebroadcast a competitor's one-hour newscast on the ARCS channel in rural Alaska is an unfair practice due to the fact the competitor's newscast is shown at the same time slot as Alaska Superstation's newscast. Smith Broadcasting claims that the competitor broadcast station is acquiring a competitive advantage through state-funded resources and that this constitutes an unfair practice by the state and the ARCS Council.

For the reasons discussed below, we do not believe the ARCS Council or the state has engaged in an unfair practice, nor do we believe that the State of Alaska has the legal authority to become involved with the programming decisions of the ARCS Council; in fact, such action by the state is specifically prohibited by statute.¹ The competitive advantage, if any, to a competitor of the Alaska Superstation is not a direct result of an

¹ See AS 44.21.305(2); AS 44.21.310(c); AS 44.21.315(f); and AS 44.21.320(c).

improper legislative appropriation or use of public funds. Programming decisions of the ARCS Council are authorized by law and are made by a committee not under the control of the state. Funding for public broadcasting purposes is authorized in law (AS 44.21), and is in compliance with the public purpose clause for appropriations. A detailed explanation of the reasons for our determination are discussed below.

Background and ARCS Policy Overview

The ARCS Council is the successor to the Rural Alaska Television Network (RATNET) Council. RATNET dissolved in 1995 and ARCS took its place. The ARCS Council operates under authority derived from AS 44.21.320 and its meetings are public under AS 44.62.310. The ARCS Council operates in essentially the same manner as its predecessor.

AS 44.21.320(b) authorizes the Department of Administration (DOA), within the limits of available financing, to administer and operate the satellite television project by coordinating with the satellite television user groups and entities. However, by law, the DOA may not make decisions as to programming or scheduling. AS 44.21.320(c) reads in relevant part:

[d]ecisions and policies relating to programming under the satellite television project, including scheduling and allocation policies, may not be made by the department [DOA], but may only be made by a network that is representative of participating rural television users, by commercial broadcast users, or by other affected participating user groups and entities under procedures provided by statute or, if no statute applies, then by agreement of the affected user networks or groups.

The ARCS Council is a policy committee created under authority of AS 44.21.320 and currently has 18 members. The members are selected as follows: one consumer member selected from each of the 12 regional nonprofit Native associations in Alaska; one representative from the Department of Education; one representative from the University of Alaska; one member from the Alaska Public Broadcasting Commission; a representative from the Bethel Broadcasting Inc. (the current manager station for the Council); and two public members selected at large by the Governor. There are no terms set for members and they receive no compensation for serving on the Council. Members do, however, receive standard per diem and travel under AS 39.20.180.²

² The Department of Administration has not provided money to pay for travel or per diem for

In 1995 and 1996 numerous changes to public radio and television in the state occurred due to declining revenues. During this time, RATNET, the predecessor to ARCS, dissolved. Programming decisions were made by the RATNET Council in a manner similar to that used by the ARCS Council today.

In 1996 the federal government provided a matching grant to the state's appropriation for digital conversion of the transponder -- converting the transponder from an analog system to a digital system. Digital compression allows a transponder to handle more users, thus bringing down the overall cost per user of the transponder. Three of the public television stations in the state, KYUK-Bethel, KTOO-Juneau, and KUAC-Fairbanks, have uplinks to the state's leased transponder. The stations, KYUK, KTOO, and KUAC, agreed to divide programming responsibilities in order to reduce each station's expenses and overall public broadcasting system fees. KUAC operates "Alaska One - PTV"; KYUK is the network representative for ARCS; and KTOO started "Alaska Two."

In July 1997 "Alaska Three" was created by the University of Alaska Southeast (UAS) and the Distance Delivery Consortium (DDC). The DDC is made up of K-12 school districts, UAS, Kuskokwim, Yukon-Kuskokwim Health, KYUK and the Alaska National Guard. The DDC pooled their individual technology resources, such as the Internet server. The DDC develops courses for grades kindergarten through twelfth grade (K-12) with delivery through an uplink to the transponder, and UAS develops courses for transmission on Alaska Three.

Programming and scheduling decisions for the ARCS channel are made by the ARCS Council under the process set out in its policy guidelines. These guidelines also set out the Council's responsibilities.³ In years past, a representative from the Alaska Superstation would attend RATNET or ARCS Council meetings and show its line-up of programs to the council. The news programs traditionally bring in the most money to a commercial station due to prime advertising rates. Competitors of Alaska Superstation (i.e., KTUU - Channel 2 in Anchorage) also come to council meetings and present their line-up of programs.⁴ The ARCS Council, through its established procedures, determines which news show will be broadcast on ARCS.

ARCS council members for several years.

³ We are referring to the ARCS Council's "POLICY GUIDELINES -- Regarding the Operation and Programming of the Alaska Rural Communications Service," Rev. and Adopted November 13, 1997. Adoption of policies establishing procedures is authorized in AS 44.21.320(b) when no statute provides for them.

⁴ We understand that KTUU made presentations to the council for five years before it was

Finally, we understand that Smith Broadcasting is also upset by actions unrelated to the ARCS Council. For example, the cable company in Juneau, Alaska (GCI Cable), provides Alaska Superstation's newscast on its Tier I channels. As part of another tier of channels, GCI Cable includes the ARCS broadcast channel. This channel includes KTUU's newscast broadcast on ARCS and is shown at the same time slot as Alaska Superstation's newscast. Therefore, in Juneau at least, the local cable company provides competing statewide newscasts during the same time slot. However, programming decisions of GCI Cable are not decisions of the ARCS Council or the state and not relevant to the analysis under this opinion.

State Funding of Lease of Transponder

The State of Alaska, Department of Administration, Information Technology Group (ITG) leases Transponder #24 on Aurora II. This is an annual lease between AT&T-Alascom and ITG and is paid from the ARCS appropriation. The current year appropriation for the ARCS is \$1,578,000 (sec. 31, ch. 127, SLA 1998, p. 18, l. 13). This appropriation is used to pay for the transponder lease, protection upgrade insurance,⁵ miscellaneous operation costs, and part of the salary of an employee of ITG. The ARCS Council itself is not included as part of the operating budget component of ITG or any other state agency. The one ITG employee, as part of assigned job duties, assists the ARCS Council at meetings and handles inquiries and viewer questions when the ARCS Council members or member-stations are not available. For this service, approximately \$15,000 is used from the ARCS appropriation to pay for the ITG employee's time. In general, however, ARCS operates independently with non-state funds.

Legal Analysis

The primary legal consideration in analyzing the appropriation made by the Alaska Legislature to the Department of Administration for the Alaska Rural Communications Service is that any appropriation and expenditure of state money must be only for public purposes. Alaska Const. art. IX, § 6. While the term "public purpose" has not explicitly been defined by the Alaska courts, it has been broadly interpreted to encompass any expenditure of public money that serves a governmental interest. 1992 Inf. Op. Att'y Gen. (April 10; 663-92-0379) (citations omitted). To satisfy the public purpose clause, it

chosen.

⁵ In the event fiber optic cable breaks, AT&T will take over Transponder #24 and all the programming of ARCS will be bumped. This insurance requires AT&T to provide ARCS with space on another transponder.

must benefit the public generally. In this case, the public purpose is to provide a means for public broadcasting to serve rural Alaska.

Even though all state appropriations must serve a public purpose, it is, however, permissible if the expenditure of state money also has an indirect private benefit. 1991 Inf. Op. Att'y Gen. (April 1; 883-91-0002). Even payments of public money may be made to non-state entities if the direct benefit of the payments inure to the public rather than to private individuals or companies. The Alaska Supreme Court has found such a public purpose in a variety of situations.⁶

Several informal opinions of the attorney general have found a public purpose in appropriations that were made to private entities or would benefit private entities. For example, a public purpose was found in a proposed appropriation to expand a private recreational ski area. 1982 Inf. Op. Att'y Gen. (Mar. 8; J66-82-463). In 1992 the legislature made a municipal grant to the North Slope Borough for a coal project - mine site development/power plant design study at a mine site owned by the Arctic Slope Regional Corporation. Even though the borough was not the owner of the site, the purpose of the appropriation was public in nature as it was the goal to resolve energy problems that persist throughout the borough. 1992 Inf. Op. Att'y Gen. (April 10; 663-92-0379).⁷

Here, the state legislature annually appropriates money for the state's lease of the transponder from Alascom for the purpose of providing ARCS access to space on that transponder. Providing adequate television service to rural Alaska is a valid public purpose and is specifically authorized by AS 44.21.320. The ARCS Council is an organization that operates in furtherance of its stated statutory purpose and is the entity with the authority to determine scheduling and programming decisions. These include decisions as to cultural, educational, informational, political, entertainment, and other relevant programs to serve

⁶ *Comtec, Inc. v. Mun. of Anchorage*, 710 P.2d 1004 (Alaska 1985) (marketing of customer telephone equipment through Anchorage's municipally-owned telephone company provides a public benefit); *Lake Otis Clinic v. State*, 650 P.2d 388 (Alaska 1982) (state aid to private hospitals fulfills a public purpose); *Walker v. Alaska State Marketing Ass'n*, 416 P.2d 245 (Alaska 1966) (Alaska State Mortgage Association, which promotes housing, fulfills a public purpose by promoting the general welfare); *Suber v. Alaska State Bonding Comm.*, 414 P.2d 546 (Alaska 1966) (plan to provide mortgage relief to owners of homes destroyed by earthquake satisfied a public purpose); *DeArmand v. Alaska State Dev. Corp.*, 376 P.2d 717 (Alaska 1962) (creation of development corporation to promote business growth fulfills a public purpose).

⁷ *See also* 1983 Inf. Op. Att'y Gen. (July 27; 663-84-036) (proposed grant by the City and Borough of Juneau to private corporation for construction of parking garage served a public purpose).

residents of rural Alaska. The state does not own or control the public broadcasting stations that participate in ARCS and, as previously noted, the state is specifically prohibited in law from making any programming or scheduling decisions.

Even if the state had some degree of input on programming or scheduling decisions, such facts would not lend support to Superstation's arguments that it is entitled to access on the state-funded transponder. *Arkansas Educational Television Comm. v. Forbes*, 523 U.S. 666, 140 L.Ed.2d 875 (1998), is illustrative of this point. In *Forbes*, the U.S. Supreme Court held that a state-owned public television broadcast station was not a traditional public forum. The issue in *Forbes* was whether a non-mainstream candidate's exclusion from a televised debate was consistent with the First Amendment. In Arkansas, the state owns and operates a network of five noncommercial television stations overseen by an eight-member commission appointed by the governor. To insulate its programming decisions from political pressure, the commission employs an executive director and professional staff who exercise broad editorial discretion in planning the network's programming. This type of insulation is relevant to how programming decisions are made by the ARCS Council. While our opinion here does not concern First Amendment issues, there is informative dicta in the *Forbes* case which we believe is relevant to the state funding questions. The Court in *Forbes* explained that among a public broadcaster's responsibilities is the duty to schedule programming that serves the "public interest, convenience, and necessity." 140 L. Ed.2d at 884, *citing* 47 U.S.C. sec. 309(a). The Court went on to explain that public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming. *Id.*

The appropriation for the state's lease of the transponder certainly extends a benefit to commercial as well as public broadcasting stations. However, whether private, commercial entities receive a benefit from an expenditure of public money is not, in our view, the dispositive factor. *See* 1984 Inf. Op. Att'y Gen. (Sept. 13; 366-127-83). The test instead is whether the expenditure will directly enhance the general welfare. *E.g. Wright v. City of Palmer*, 468 P.2d 326, 329 (Alaska 1970); *Suber v. Alaska State Bond Comm.*, 414 P.2d at 552. We believe it does.

Conclusion

It is our opinion that the state-funded transponder, used by ARCS, is neither in violation of public purpose clause nor does it constitute an unfair trade practice by the state. And, programming decisions are solely made by the ARCS Council. According to the ARCS Council's policies and procedures, programming decisions are periodically reevaluated and Smith Broadcasting, as well as other commercial stations, have the same opportunity to petition for the Council to select their programs for broadcast.

As noted above, the indirect benefit, if any, to Smith Broadcasting's competitor station is not the product of state action, is not an anti-competitive or unfair trade practice,⁸ and is not, in our opinion, the result of improper expenditure of state funds.⁹

If you need further assistance in this matter, please do not hesitate to call us.

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⁸ AS 45.50.481 lists as an exemption from AS 45.50.471 -- 45.50.561 (Unfair Trade Practices and Consumer Protection) the following:

(a) Nothing in AS 45.50.471 -- 45.50.561 applies to (1) an act or transaction regulated under the laws administered by the state, by a regulatory board or commission except as provided by AS 45.50.471(b)(27) [charges set by postsecondary institutions for tuition and fees] and (30)[certain telephone services], or officer acting under statutory authority of the state or of the United States, unless the law regulating the act or transaction does not prohibit the practices declared unlawful in AS 45.50.471.

⁹ The issue raised by Smith Broadcasting is similar to protest issues raised when the department procures lease space for state agencies. It is common for a winning bidder of lease space to gain some degree of competitive advantage in future leasing bids, particularly where an agency pays a landlord for build-outs to the space (e.g., customizes the space, or adds phone and HVAC systems or other fixtures). When the lease expires and new space must be procured through a competitive process, the current landlord may have a competitive advantage over other bidders due to the improvements that were already made to the space. And, the current landlord will not have to factor in moving costs in its bid. Many contractors of the state can be said to have gained some degree of competitive advantage in future procurements. But, that advantage, if any, does not constitute an anti-competitive or unfair trade practice by the state government. The government must be able to contract for necessary services in order to do the business of government.