

N.D.A.G. Letter to Sanstead (July 17, 1991)

July 17, 1991

Dr. Wayne G. Sanstead
Superintendent of Public Instruction
State Capitol
600 E Boulevard Avenue
Bismarck, ND 58505

Dear Dr. Sanstead:

Thank you for your February 25, 1991, letter concerning the Educational Telecommunications Council's (ETC) authority to include a provision in its operating agreement with Prairie Public Broadcasting, Inc., authorizing Prairie Public to lease antenna space on state-owned broadcasting towers to commercial broadcasters. You also ask whether lease revenue from such an arrangement must be paid to the ETC or whether it may be retained by Prairie Public Broadcasting, Inc. I am sorry this response took so long to finalize.

The ETC is a public body created by N.D.C.C. ch. 15-65. The powers and duties of the ETC are contained in N.D.C.C. § 15-65-03, subsections 3, 8, 11, and 12 of which provide that the ETC:

3. Be concerned with the development and use of statewide educational telecommunication programs and systems.
8. Actively cooperate with the state department of public instruction and the state board of higher education and other agencies and private organizations for the purpose of developing statewide educational telecommunication projects.
11. Carry on a continuing study relating to the needs, resources, and facilities which are available or may be required to establish educational telecommunication programs and systems throughout the entire state.
12. Contract with eligible applicants to build and operate public television stations in this state. Eligible applicants are those licensed by the federal communications commission to operate noncommercial public television stations. Operational contracts shall not exceed the amount raised within the preceding fiscal year by the applicant from nontax sources in this state.

The North Dakota Supreme Court has determined:

"[T]hat public officials have only such authority as is expressly given them by the constitution and statutes together with those powers and duties which are necessarily implied from the express grant of authority."

American Federation of State, County, and Municipal Employees v. Olson, 338 N.W.2d 97, 100 (N.D. 1983).

The above-quoted powers and duties of the ETC indicate that the Legislature has provided the ETC with broad authority for encouraging and directing educational telecommunication programs and systems in North Dakota. The ETC is to be concerned with the development and use of statewide educational telecommunication programs, and, in that effort, is to cooperate actively with other state bodies, and private organizations to develop those systems and programs. To actually broadcast the educational telecommunication programs, the ETC is authorized to contract with noncommercial public television stations. Within legislative appropriations, the ETC may also pay contractors not more than the amount raised by that contractor during the preceding fiscal year from nontax sources in this state.

If a contractor for the operation of educational telecommunication systems and programs obtains more revenue from nontax sources in this state, the ETC may provide that contractor with more operating funds from legislative appropriations. Concern for educational telecommunications in this state would motivate the ETC to cooperate with a public broadcasting contractor to authorize that contractor to obtain further nontax revenue. This would allow use of the resources available to the ETC to be maximized for its operational contracts, and would satisfy the goal of providing educational programs in this state. The broad authority of the ETC to encourage and direct educational telecommunication programs and systems necessarily implies authority to use its resources and state-owned facilities in all reasonable ways to carry out its functions. Peterson v. McKenzie County Public School District No. 1, 467 N.W.2d 456 (N.D. 1991) and C. Haugland v. City of Bismarck, 429 N.W.2d 449 (N.D. 1988). (Although these cases discussed the powers of a school district and a city, the holdings concerned the range of reasonableness of the manner and means of exercising authority and are applicable here).

It is my opinion that the ETC may include in its operating agreement a provision which authorizes its contractor to lease antenna space on state-owned towers to commercial broadcasters. It is my further opinion that because increased nontax revenue sources available to a contractor will enhance the ability of the ETC to provide operating funds to the contractor, the provision concerning lease of antenna space may provide that revenue earned may be retained by the contractor.

If the ETC decides to include such a provision in its operating agreement, I urge the Council to be cautious concerning the nature of that provision. Additionally, the Council should include language indicating that the contractor must be fully insured against all liability, and that the contractor hold harmless and indemnify the state of North Dakota, the

ETC, and all state employees that may be involved in the administration of ETC programs and contracts. Furthermore, the ETC contractor should be required to guarantee that educational telecommunication programs will not be interfered with by a subcontracted commercial antenna, and that the structural integrity of the state's towers will not be endangered or impaired by the addition of a commercial antenna. The contractor should be required, at its own expense, to procure a structural engineering safety study prior to entering into a subcontract for the lease of antenna space on state towers. In summary, the authorization to an ETC contractor to subcontract antenna space should not result in any extra costs to the ETC or the state of North Dakota.

Sincerely,

Nicholas J. Spaeth

krb