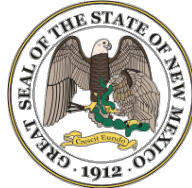


STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY



GENERAL

HECTOR H. BALDERAS
ATTORNEY GENERAL

December 2, 2022

Peter Mantos, Secretary
New Mexico Department of Information Technology
715 Alta Vista St.
Santa Fe, New Mexico 87505

Re: Opinion Request – Department of Information Technology provision of rent-free space on radio towers in exchange for cell phone providers serving remote areas of New Mexico and Article IX, Section 14 of the New Mexico Constitution

Dear Secretary Mantos:

Your predecessor, former Secretary-designate John Salazar, requested our opinion regarding the potential rent-free use of radio towers owned by the New Mexico Department of Information Technology (DoIT) by commercial cellular telephone service providers. In particular, you have asked whether allowing private cell phone providers to occupy rent-free space on remote DoIT towers in exchange for servicing rural areas would violate Article IX, Section 14, of the New Mexico Constitution (the “Anti-donation Clause”).¹ As discussed below, we conclude that allowing private cell phone providers space on cell phone towers may be permissible if DoIT enters into a service contract with the providers and receives adequate consideration for allowing providers space on DoIT cell towers.

The Anti-donation Clause provides, in pertinent part:

Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation...

¹ This analysis is limited to the use of DoIT infrastructure, such as towers, not the use of two-way radio tower capacity, for which leasing guidelines have been promulgated in NMSA 1978 § 9-27-15.

N.M. Const. art. IX, § 14. Pursuant to the Anti-donation Clause, a donation is “a gift, an allocation or appropriation of something of value, without consideration to a person, association or public or private corporation.” *Village of Deming v. Hosdreg Co.*, 1956-NMSC-111, ¶ 36. Critical to abovementioned definition is whether or not the gift or allocation is made in exchange for consideration. When analyzing an allocation, courts first look to whether the government receives something of value. *See* N.M. Att’y Gen. Op. No. 75-07 (1975) (finding that the clause is more likely to be violated in the event of an outright cash gift). Additionally, the consideration received by the government cannot be nominal. *See* N.M. Att’y Gen. Op. No. 64–92 (1964) (consideration received must bear a reasonable relationship to the actual value of the property).

Courts and our office also have opined that government receipt of a general public benefit is inadequate to render an allocation to a private entity in compliance with the Anti-donation Clause. *See* N.M. Att’y Gen. Op. No. 87-33 (1987) (highlighting that “there is no public benefit or public purpose exception to the Anti-donation Clause”). The New Mexico Supreme Court has reasoned that allowing government expenditures to private corporations based on a general public benefit would result in almost unlimited allowance for government funding of private ventures. *See Harrington v. Atteberry*, 1915-NMSC-058, ¶ 5 (holding that, although government finding of a county fair association “serves a public purpose”, a public purpose standard could result in a virtual lack of limit on government ability to fund private organizations); *See also State ex rel. Mechem v. Hannah*, 1957-NMSC-065, ¶ 39 (recognizing that state aid supporting a livestock industry, although a “wonderful thing”, opened the door for unlimited subsidizing of private industry). Therefore the general public benefit of cell service in those areas where DoIT grants the use of space on its towers would be inadequate to suffice as consideration pursuant to the Anti-donation clause.

In the alternative, while it is firmly established that a general public benefit is insufficient for a state allocation to conform to the requirements of the Anti-donation Clause, courts have considered the permissibility of government expenditures when there is adequately defined consideration. *See State ex rel. Office of State Engineer v. Lewis*, 2007-NMCA-008, ¶ 49, 141 N.M. 1 (observing that consideration “can be a defining element”). This consideration must amount to more than an ill-defined benefit with the potential to serve people. *See* N.M. Atty Gen. Op. No. 89-22 (1989) (a county spending money for relocation costs with the hope of encouraging physicians to practice in an area was impermissible, absent an agreement for the physicians to practice for a specified period of time).

Our office has previously opined that service contracts, in particular, may serve as adequate consideration in exchange for the government allowance. *See* N.M. Atty. Gen. Advisory Letter to Shawn Lerch, Miners' Colfax Medical Center (June 22, 2015) (concluding that a longevity bonus was permissible under the Anti-donation Clause where a physician's agreement to remain in community and provide services was adequate consideration) *See Also* N.M. Atty. Gen. Advisory Letter to Representative Susan K. Herrera, New Mexico House of Representatives (November 22,

2019) (opining that a nonprofit library could enter into a personal services contract to receive government funding.) Distinguishable from a nebulous public benefit, these cases examine the permissibility of government allocations where a private entity assumes a defined obligation.

Pursuant to NMSA 1978 § 9-27-20, DoIT already has an affirmative obligation to provide a telecommunications network to “all executive, legislative, and judicial branches”, many of which operate in remote areas of the state. Further, The New Mexico State Board of Finance rules governing real property transactions authorized by statute expressly allow state agencies to accept services as consideration for the lease of their real property. *See* 1.5.23.7(C), 1.5.23.10(B)(6) NMAC. These rules define “consideration” as “something which is of a value at least equal to the real property interest being conveyed, including but not limited to cash, another piece of real estate, services, or other form of compensation” 1.5.23.7(C) NMAC. Additionally, DoIT would not be bound by any particular method of valuing services provided, as long as the results of the valuation were reasonable and verified. *See* N.M. Atty Gen. Advisory Letter to the Honorable Mary Kay Papan, New Mexico State Senator (Apr. 29, 2016) (articulating that the Anti-donation Clause does not preclude the use of services as adequate consideration in exchange for the lease of government property provided the services provided are valued as adequate consideration to the property interest).

Because New Mexico law grants DoIT necessary flexibility to engage in a service contract whereby private cell phone providers undertook a service responsibility, it could therefore be permissible for DoIT to enter into a service contract with these private entities in exchange for adequate consideration.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,



Sally Malavé

Director, Open Government Division