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October 15, 1980

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ATTORNEY GENERAL OPINION NO. 80-228

Mr. Norbert R. Dreiling, Chairman
Smoky Hills Public Television Board
111 West 13th Street
P.O. Box 579
Hays, Kansas 67601

Re: State Departments; Public Officers and Employees
--Public Television--Construction Grants by Public
Television Board

Synopsis: The provisions of 1980 House Bill No. 3280 (L. 1980, ch. 27) which reinstated a requirement that State Finance Council approval be obtained prior to disbursement of moneys for the construction of a public television station at Hays, Kansas, are of no force and effect. Prior to the time said bill took effect, the Public Television Board had lawfully granted said moneys for such purpose, without Finance Council approval, to the Smoky Hills Public Television Corporation under authority of 1980 House Bill No. 3196 (L. 1980, ch. 7), which took effect nearly two months prior to the effective date of House Bill No. 3280. Cited herein: K.S.A. 1979 Supp. 75-4910; L. 1978, ch. 28, §34; L. 1979, ch. 30, §8; L. 1980, ch. 7, §§4, 5; L. 1980, ch. 27, §§72, 73.

* * *

Dear Mr. Dreiling:

As Chairman of the Board of Directors of Smoky Hills Public Television Corporation (Smoky Hills), a nonprofit Kansas corporation, you have

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requested our opinion regarding the expenditure of a construction grant received by Smoky Hills from the Kansas Public Television Board (KPTB). Ordinarily, it is inappropriate for this office to provide advice and counsel or to render formal opinions to persons other than public officials. However, because we have been contacted by several public officials who have expressed a concern regarding the issues you have presented, we believe it proper, in this instance, to respond to your inquiry by this formal opinion.

Prior to considering the questions you have presented, we think it necessary to briefly recount the relevant facts giving rise to your inquiry. First, we note, as you state, that "Smoky Hills qualifies under K.S.A. 1979 Supp. 75-4910 as a nonprofit corporation organized for the purpose of establishing a public television station, which is located in an area of the state presently unserved by existing public television stations." Smoky Hills was formed for the purpose of establishing a public television station on the campus of Fort Hays State University in Hays, Kansas.

In 1978, the legislature appropriated to KPTB \$888,860 to be used as a grant for the construction of a public television station to be located at Hays, Kansas. L. 1978, ch. 28, §34(b). The expenditure of such appropriated moneys was limited, however, by two provisos: One such proviso precluded the expenditure of moneys in this account until such public television station had obtained a license from the Federal Communications Commission and had obtained a construction grant from the federal government; the other proviso required State Finance Council approval prior to expenditure of the moneys. Id.

The foregoing sum was not expended by the KPTB prior to the convening of the 1979 Session of the Legislature (for reasons not pertinent here); thus, in 1979, the legislature reappropriated such moneys and also appropriated an additional \$196,683 for the same purpose. L. 1979, ch. 30, §8(b). The 1979 appropriations imposed the same limitations prescribed in the 1978 appropriation measure, and it also imposed an additional requirement that none of the moneys so appropriated could be expended "until \$25,000 or more has been obtained by the Smoky Hills public television corporation from donations or other local revenue sources for construction of a public television station to be located at Hays, Kansas." Id.

None of the moneys appropriated or reappropriated in 1979 were expended by the KPTB (again, for reasons not pertinent here), and in 1980, the legislature accomplished a reappropriation of the previously appropriated moneys for construction of a public television at Hays by the passage of 1980 House Bill 3196 which, inter alia, amended both the 1978 and 1979 appropriation measures discussed above. L. 1980, ch. 7, §§4,5. The principal change accomplished by these amendments was to

remove the proviso that required Finance Council approval prior to the KPTB's disbursement of the construction grant to Smoky Hills. Id. at §4(b). Also, this enactment changed the requirement that the expenditure be conditioned upon Smoky Hills obtaining a "license" from the Federal Communications Commission to a requirement that a "construction permit" be obtained from the FCC. Id.

At this point, it should be noted that, from the documentation you have provided us, it is apparent all remaining requirements imposed by these appropriation measures were satisfied by Smoky Hills: The financial statement of Smoky Hills for the year ended June 30, 1980, prepared by Fox and Company, Certified Public Accountants, reflects the acquisition of \$28,365 in contributions in 1979 and additional contributions of \$1,985 in 1980; on September 28, 1979, the National Telecommunications and Information Administration of the U.S. Department of Commerce notified Smoky Hills that it had been awarded a construction grant in the amount of \$578,327; and on January 30, 1980, the FCC issued to Smoky Hills a permit for the construction of a public television station at Hays.

1980 House Bill No. 3196 was passed by the legislature, signed by the governor and took effect upon its publication in the official state paper on March 27, 1980. Thus, at its meeting on March 28, 1980, the KPTB unanimously passed a motion awarding a grant to Smoky Hills in the amount of \$1,085,543, the entirety of the moneys appropriated to the KPTB to be used as a grant for the construction of a public television station at Hays. (Minutes of Kansas Public Television Board, March 28, 1980.) Within a few days thereafter, said moneys were disbursed to Smoky Hills. It also is to be noted that the KPTB's action was unanimously ratified by the KPTB at a subsequent meeting. (Minutes of Kansas Public Television Board, April 25, 1980.)

Subsequent to the disbursement of the construction grant to Smoky Hills, it is our understanding that the appropriate committees of the 1980 Legislature were asked by the KPTB to review a ten-year plan for the construction of additional public television stations throughout the state similar to the station contemplated by Smoky Hills, i.e., public television stations having local origination capabilities. It also is our understanding that these legislative committees rejected such plan, and as an apparent consequence thereof, the 1980 Legislature, in 1980 House Bill No. 3280, once again amended the appropriation measures providing moneys to the KPTB to be used as a grant for the construction of a public television station at Hays. L. 1980, ch. 27, §§72, 73.

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The change effected in these appropriation measures by House Bill No. 3280 was to reinstate the proviso that the approval of the State Finance Council be obtained prior to disbursement of the construction grant for the public television station at Hays. Id. It also imposed a similar limitation on the amount previously appropriated to the KPTB to be used as a grant for the construction of a public television station to be located at Garden City, Kansas. Id. at §74. This bill was duly enacted, signed by the governor and took effect upon its publication in the official state paper on May 23, 1980.

It also is to be noted that, on September 19, 1980, Patrick J. Hurley, Secretary of Administration and Chairman of the KPTB, presented to the Legislative Budget Committee of the legislature, a new plan endorsed by the KPTB for the development of public television broadcasting within the state. As recounted in the preliminary minutes of this meeting, Secretary Hurley explained to the Legislative Budget Committee that KPTB "envision[s] the development of a network operating center (NOC) which would transmit a signal to repeater stations that would be constructed at Hays, Garden City, Chanute, Colby, Beloit, Pratt, and Eldorado." (Emphasis added.) (Preliminary minutes of meeting of Legislative Budget Committee on September 19, 1980.) As we understand it, "repeater stations" are essentially stations which pick up and transmit television signals originated by other stations and do not have the origination capabilities to the extent contemplated by Smoky Hills for the station at Hays.

It is within this factual context that you have sought our advice, in light of the fact that the Smoky Hills Board has proceeded to solicit bids for the construction of various phases of the public television station at Hays, and has entered into contracts with several local school districts to provide instructional television programs, all in accordance with the Board's application to the KPTB for a grant to construct a station having substantial origination capabilities. Although you have posed several questions for our determination, they all appear to revolve around a single issue, i.e., whether Smoky Hills has authority to expend the moneys received as a grant from the KPTB in accordance with its grant application.

The principal legal issue involved in your inquiry is whether 1980 House Bill No. 3280 (L. 1980, ch. 27) has any legal effect upon the expenditure of the grant moneys disbursed to Smoky Hills pursuant to action of the KPTB at its meeting on March 28, 1980. In our judgment, it does not. As noted previously, this act did not take effect until nearly two months after the effective date of House Bill No. 3196 (L. 1980, ch. 7), pursuant to which KPTB authorized disbursement of the grant funds to Smoky Hills. At the

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time the KPTB authorized disbursement of these funds, all restrictions imposed by the legislature on the KPTB's expenditure thereof had been satisfied. Therefore, in our opinion, the subsequent reinstatement of the proviso requiring prior Finance Council approval as a condition to the KPTB's expenditure thereof could have no legal effect on the moneys already disbursed.

The proviso in question reads as follows:

"Provided further, That expenditures from this account shall be made only upon approval of the state finance council acting on this matter which is hereby characterized as a matter of legislative delegation and subject to the guidelines prescribed in subsection (c) of K.S.A. 75-3711c." L. 1980, ch. 27, §72(b).

From the foregoing language it is abundantly clear that the requirement imposed thereby operates only to restrict expenditures from the account which contains moneys appropriated to the KPTB to be used as a grant for the construction of a public television station at Hays. However, at the time this requirement became law, May 23, 1980 (the effective date of House Bill No. 3280), there were no moneys remaining in this account, since they had been lawfully disbursed by the KPTB, and such requirement cannot now be extended so as to restrict the expenditure by Smoky Hills of moneys that have otherwise been lawfully disbursed from such account.

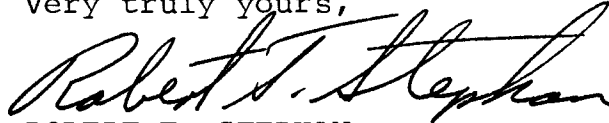
It is our further opinion that since the grant to Smoky Hills was made by KPTB under lawful authority, title to the moneys encompassed by such grant passed to Smoky Hills, and the expenditure thereof by Smoky Hills is subject only to the conditions of such grant. Even though the policy of the KPTB may have changed since the time it approved the grant application, such subsequent policy change can have no legal effect on the use of the moneys granted to Smoky Hills for the purpose of constructing a public television station having origination capabilities.

In summary, therefore, it is our opinion that the provisions of 1980 House Bill No. 3280 (L. 1980, ch. 27) which reinstated a requirement that State Finance Council approval be obtained prior to disbursement of moneys for the construction of a public television station at Hays, Kansas, are of no force and effect. Prior to the time said bill took effect, the Public Television Board had lawfully granted said moneys for such purpose, without Finance Council approval, to the Smoky Hills Public Television Corporation under authority of

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1980 House Bill No. 3196 (L. 1980, ch. 7), which took effect nearly two months prior to the effective date of House Bill No. 3280.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General

RTS:WRA:phf