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OPINION COMMITTEE

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RQ-0593-GA

June 18, 2007

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P.O. Box 12548  
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Via CMRRR No. 7005 1160 0001 8579 9869

FILE # ML-45242-07  
I.D. # 45242

RE: Request for Attorney General Opinion

QUERE: May a County contribute funds to the acquisition of a generator to be leased to a radio station for its use in the event of a power failure?

Dear Sir or Madam:

In order for your office to respond to the quere posed above, it is necessary for your office to take into consideration the entire proposed factual scenario. This is necessary for your response to have a meaningful influence on the decision of the Commissioner's Court of Guadalupe County, Texas with respect to this issue.

UNDERLYING FACTS/HISTORICAL PERSPECTIVE:

KWED is an AM radio station located in Seguin, Guadalupe County, Texas. Broadcasts from the radio station can be received/heard throughout Guadalupe County and although other radio stations' broadcasts can be heard in Guadalupe County, KWED is the only station located within Guadalupe County and which has county-wide transmission. It can probably be safely assumed that not all residents of Guadalupe County listen to (at least regularly) KWED and since its broadcasts are in English, there may be a certain percentage that would not listen in that they do not understand English. I do not have any statistical data with regard to the foregoing, nor any statistical data indicating how many people, who otherwise do not listen to KWED, do in fact tune in that station in the event of any emergency.

Historically, during severe weather conditions, information from the County, the City of Seguin, Schools, employers, etc. is relayed to the station to be announced on the air addressing issues such as delayed work times, school closures, road closures, river/waterway conditions and the like.

KWED is specifically mentioned in the "Guadalupe-Blanco River Authority (GBRA) Interim Flood Preparedness Plan" as the "go to" Station for information in the

event of certain conditions. The current version of this plan was a cooperative effort between GBRA, Guadalupe County, the City of Seguin and others.

I have confirmed that the FCC does not require an "AM" radio station to have an alternative power source in the event of a power failure and/or to go "on the air" in the event of some defined emergency. KWED has two generators "on standby" in the event of a power failure. One was paid for by entities other than Guadalupe County. However, I have learned that the other was, approximately 10 years ago, partially paid for by Guadalupe County. This latter generator is owned by the County and is on the roll of property owned by the County, but has been maintained by KWED since its placement. This latter generator needs to be replaced and the County has received a request to contribute funds for the replacement. And, as before, the generator would be the property of the County. I say "contribute" funds because the balance of the purchase price would be paid for by the City of Seguin and private individuals or entities (who would have no ownership interest in the generator).

The issue has been raised, and hence this request for an opinion, relative to the legality of the County spending tax dollars for a generator to be used exclusively by a radio station, a private, for-profit company.

#### PROPOSED ARRANGEMENT:

Guadalupe County would receive funds from the City of Seguin and private individuals/entities for 2/3 of the cost of the generator. The County would contribute 1/3 (\$4000) and purchase the generator. A contract would be entered into between the County and the radio station leasing the generator to the station for either \$0 or a nominal sum. In said contract, the radio station would be obligated to test, maintain, repair if necessary and insure the generator during the life of the lease. In addition, and notwithstanding whether there is a power failure, the contract would require the radio station to go "on the air" live in the event of a defined emergency. At the same time, the generator would be available to the radio station if a power outage was caused by some event that did not affect any other people in the community. For example: an electrical short.

#### LEGAL ARGUMENT:

Article III, §52 and Article XI, §3 of the Texas Constitution prohibits an entity of State Government from "lending its credit" or "grant public money or anything of value in aid of an individual, association or corporation". Over the years, some exceptions to this Constitutional restriction have been developed if the expenditure is determined to serve a legitimate public purpose.

The following is a list of cases and prior AG Opinions that have touched upon this issue:

- Barrington v. Cokinos*, 338 S.W. 2d 133, (Tex. 1960);
- City of Corpus Christi v. Bayfront Assoc., Ltd.*, 814 S.W. 2d 98 (Tex.App.-Corpus Christi, writ denied);
- Fausett v. King*, 470 S.W. 2d 770 (Tex.Civ.App.-El Paso 1971, no writ);
- Kordus v. City of Garland*, 561 S.W. 2d 260 (Tex.App.-Tyler, 1978, writ ref'd n.r.e.).

## AG OPINIONS:

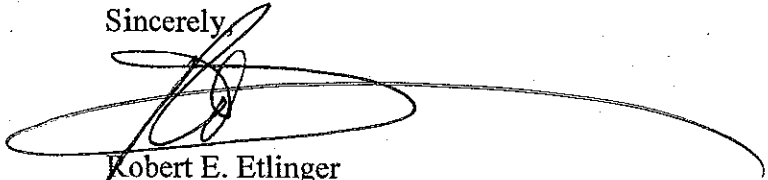
LO-94-008 (1994);  
LO-88-94 (1994);  
JM-1156 (1990);  
JM-1199 (1990);  
LO-94-078 (1994);  
LO-96-136 (1996);  
JM-1113 (1989);  
LO-96-007 (1996);  
H-397 (1974);  
JM-716 (1987);  
JM-753 (1987).

The current "state of the law" appears to be that expenditures that *incidentally* benefit a private person or entity AND are found to serve a legitimate public purpose will not run afoul of the Texas Constitution.

The question posed to you is whether, in your opinion, and based upon the information set forth above, this expenditure would violate the Texas Constitution.

There is no doubt that a new generator will have to be acquired in order to power the radio station in the event of a power outage. Given the purposes to be served by the generator, a relatively quick response time would be greatly appreciated.

Sincerely,



Robert E. Etlinger  
Asst. County Attorney  
Guadalupe County, Texas