

Senator Curt Menard
Alaska Legislature

October 22, 1992

661-93-0224

Ron Garzini
Executive Director
Alaska Energy Authority

259-5161

Alaska Energy Authority
Electrical Service
Extension Fund

Carolyn E. Jones
Assistant Attorney General
Transportation Section, Anchorage

SUMMARY

This memorandum responds to your separate but related requests for legal advice regarding the Electrical Service Extension Fund ("the Fund") administered by the Alaska Energy Authority (AEA).¹ We conclude that the AEA is required to evaluate applications for grants from the Fund based on the date they are received. If there is insufficient money in the Fund to award grants to all the contemporaneous applications, then the applications must be evaluated competitively on a cost/benefit analysis. The application for a \$1.1 million grant from the Fund to Golden Valley Electric Association (GVEA) for the extension of electrical service to McKinley Village was one of four applications filed in May and June 1992. Because there was sufficient money in the Fund to award all four grants if the applicants were otherwise eligible, the applications did not have to be evaluated on a cost/benefit analysis.

The money remaining in the Fund would be available for any subsequent applications. Applications received in July, 1992

¹ We understand that Senator Menard also requested and received advice from the Division of Legal Services regarding expenditures from the Fund. We have reviewed the October 14, 1992, memorandum by Teresa Cramer. None of the opinions in the Cramer memorandum are inconsistent with or contradict the opinions here. The Cramer memorandum did not consider the relevance of 3 AAC 94.640(a) to the advice requested of our office nor did that memorandum address the factual background regarding the actual applications on file with the AEA. Those issues are fully addressed in this memorandum.

should be evaluated in the order received. Those applications submitted in response to the August 3, 1992, solicitation will all have to compete for the remaining money in the Fund. Those applications that are otherwise eligible but not funded because the Fund is exhausted will be eligible for priority consideration for next year's appropriation to the Fund.

Despite the size of the grant for McKinley Village, nothing in the legislation, appropriations bill, or AEA regulations prohibits the grant award. GVEA may also meet the matching fund requirement of AS 44.83.370(b) with a separate appropriation not related to the Fund.

ANALYSIS

A. Establishing Priority Between Competing Applications

In 1991 the Alaska Legislature established the Electrical Service Extension Fund as a separate fund in the AEA. AS 44.83.370. The authority may make grants from the Fund first for the costs of site preparation and construction for the extension of service to private residences and small businesses not then served by an electric utility. AS 44.83.370(b). If the Fund is not exhausted by these grants, then the AEA may make grants for improvements to existing utilities.

The AEA adopted emergency regulations to implement the statute in September 1991 and the regulations became permanent in April 1992. The regulations set out how the grants may be used, the information required in the grant application, the standards for review of the application by the AEA, the requirement for inspection of the applicant's records and facilities, and the establishment of a grant priority in case of competing applications. 3 AAC 94.600 -- 3 AAC 94.640.

Of particular relevance here are those provisions that describe the relative priority of competing grant applications. 3 AAC 94.640 specifically provides that "applications for a grant under AS 44.83.370 will be reviewed in the order received by the authority." This provision should be read as establishing a threshold priority for evaluating the applications and awarding limited funds based upon the order of receipt of the grant applications. While not a model of clarity, this priority is a

reasonable effort to address the concern that at some point there has to be a cutoff date and the grants awarded.²

If competing applications were filed contemporaneously, then applications for new line extensions take priority over applications for improvements to existing lines. Finally, competing applications for new service or competing applications for improvements are evaluated on a cost/benefit analysis.

Both requests for advice concern the AEA's authority to give McKinley Village a \$1.1 million grant from the Fund. As we understand the facts, the 1992 Legislature appropriated \$1.85 million to the Electrical Service Extension Fund on May 16, 1992, during the First Special Session. Line 4, p. 38, sec. 152, ch. 5, FSSLA 1992. The Governor signed the bill on July 16, 1992 with an effective date of July 1, 1992, for sections 141 and 152 of the bill. Line 10, p. 128, sec. 201, CSSB 483.

When Mr. Garzini became executive director of AEA on July 6, 1992, these four applications were already on file for grants from the Fund:

Bean Creek: \$99,224, filed on 5/29/92;

Willow Lake: \$106,470, filed on 6/4/92;

Copper Center: \$58,449, filed on 6/4/92;

McKinley Village \$1.1 mill., filed on 6/30/92.

Mr. Garzini understood that his predecessor had made a prior commitment to grant \$1.1 million to GVEA for the McKinley Village grant but that no priority existed as to the other three

² In light of the serious problems noted here, we urge the AEA to consider amending its regulations if the agency is dissatisfied with the current evaluation procedure.

applications. In a letter dated August 3, 1992, he then invited eligible utilities to submit applications for the approximately \$750,000 remaining in the Fund no later than September 15, 1992.

The three applicants who had previously filed for grants would compete with the applicants who responded to the August letter while the McKinley Village application would not compete with any other application.

These assumptions were incorrect. Notwithstanding any informal agreements made by Mr. Garzini's predecessor, each of the four applications named above should have been evaluated for a grant according to the terms of 3 AAC 94.600 -- 3 AAC 94.640. The application for Bean Creek was the first filed and the first in priority. 3 AAC 94.640(a). If the application met the criteria for a grant, then the AEA should have awarded the applicant \$99,224. The remaining three applicants should have been similarly evaluated in the order received. Since the requests for the four grants did not exceed the entire Fund balance, the applications were not competing and did not have to meet the cost/benefit criteria of 3 AAC 94.640(c).

Assuming the four applicants all qualified for grants from the Fund, the amount allocated would be \$1,364,193. The balance remaining in the Fund would be \$485,807. This is the only money available for grants to subsequent applicants.

The AEA has two additional pools of applicants. Three applications were received in July after Mr. Garzini became the AEA's Executive Director:

S. Big Lake, filed on 7/8/92;

Yakutat, filed on 7/9/92;

Emswiler, filed on 7/29/92.

These applications should also be evaluated in the order received.

The third pool of applicants responded to a solicitation sent out by the AEA on August 3, 1992. In that letter, Mr. Garzini invited interested utilities to submit applications no later than September 15, 1992, for the unallocated moneys in the Fund. By the September 15 deadline, the AEA had received 12 new requests for

money to extend service to residences and businesses not currently served.

The intent of the solicitation was to find a fair method to allocate a finite amount of money in the Fund. Thus, the September 15 filing date created a single filing date for all applicants regardless of whether an application was received, for example, on August 4 or September 15. All the applicants would then compete with each other and be evaluated on a cost/benefit analysis under 3 AAC 94.640(c).

Unfortunately the creation of a single filing date for the applicants -- regardless of when the application was filed -- violated the provisions of 3 AAC 94.640(a), which provides that applications will be evaluated in the order received.

It would be pointless and fundamentally unfair, however, to require the AEA to reject the 12 applications and start the process all over. Since the applications are already prepared, it is likely that most of them would arrive in the AEA office on or about the same date and would still have to be evaluated as competing applications. It would also be unfair to now evaluate these 12 applications on the basis of which one was received first.

The solicitation was quite specific that applicants had until September 15 to file the application. There was no indication that filing before that deadline would give an application filed in August a priority over an application filed, for example, on September 15. Therefore, we recommend that the AEA evaluate the 12 remaining applications as if they were all filed on September 15, 1992, and award the grants to the applications that have the best cost to benefit ratio under 3 AAC 94.640(c).

B. Determining the Size of the Grant

Assuming that the McKinley Village application meets the criteria described above, the amount of the grant would be \$1.1 million -- about 61 percent of the entire appropriation. Nothing in the language of the enabling legislation, the appropriations bill, or in the AEA's regulations restricts the size of the grant.³

³ The only legislative history found in this regard actually supports the size of this grant as well as its allocation to McKinley Village. The Governor's capital projects bill provided

In these circumstances, legislative intent is resolved by looking at the authority's enabling language. 1984 Inf. Op. Att'y Gen. (May 30; 661-84-0476). We have previously concluded that the AEA has broad powers to accomplish its statutory purposes. "In the absence of legislative expression of a preference as to how the authority should accomplish its objectives, we believe that the authority has the discretion to choose the means that will best serve the public interest." Id. at 4. Since neither the statutes nor the regulations limit the amount of the Fund that may be granted for any one electrical service extension project, we believe that the authority may grant 61 percent of the Fund or \$1.1 million to GVEA for the McKinley Village project.

for \$1,500,000 for McKinley Village electrification -- the total amount represented by the grant and the appropriation for matching funds. See l. 5, p. 7, HB 561; p. 7, SB 450. An excerpt from the minutes of the Senate Finance Committee reports that the proposed appropriation to the Fund was increased by \$1.1 million contemporaneously with an appropriation of \$400,000 to the AEA "to be used as matching funds for electric line extension projects within the Denali Borough." Co-chairman Pat Pourchot noted his understanding that the increase in the appropriation was a high priority of the Governor.

C. Meeting the Requirement for Matching Funds

Senator Menard also asked whether GVEA meets the 40 percent window matching fund requirement of AS 44.83.370(b), where part of the matching funds comes from a separate legislative appropriation of \$400,000. See Lines 2-3, p. 29, sec. 141, ch. 5, FSSLA 1992. ("The sum of \$400,000 is appropriated from the general fund to the Alaska Energy Authority to be used as matching funds for electric line extension projects within the Denali Borough").

AS 44.83.370(b) provides only that the grant may not exceed 60 percent of the total cost of extending electrical service. It does not stipulate the source of the remaining 40 percent, nor does it specifically prohibit the use of other appropriations to provide the matching funds. On the other hand, the language appropriating the \$400,000 to McKinley Village is quite specific that the money is to be used as matching funds for electric line extension projects within the Denali Borough. Given the general language of AS 44.83.370(b) and the specific appropriations language that the \$400,000 be used as matching funds, the Energy Authority may appropriately conclude that GVEA has supplied the necessary matching funds to qualify for the grant.

CONCLUSION

Notwithstanding any informal agreements to award \$1.1 million of the Fund to the McKinley Village application, the grant must comply with the AEA's current regulations. The AEA's regulations require applications for grants from the Electrical Service Line Extension Fund to be reviewed in the order received.

Competing contemporaneous applications that request more money than is available in the fund are subjected to a cost/benefit analysis. The Bean Creek, Willow Lake, Copper Center and McKinley Village application must be reviewed in the order received. If eligible, there is enough money in the Fund for these four grants.

Similarly, the July applications should be evaluated in the order received. Any applications received in response to the August 3, 1992, solicitation would be reviewed only after the original four applicants and the July applications, and must be evaluated according to a cost/benefit analysis.

The AEA may award an electrical service extension grant to McKinley Village even where the grant would use 61 percent of the moneys in the fund. Furthermore, GVEA may meet the 40 percent

Senator Curt Menard
Ron Garzini

-8-

October 22, 1992
661-93-0224

matching fund requirement with separate moneys appropriated by the legislature for electric line extension projects within the Denali Borough.

CEJ:bb