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Advisory Opinion 12-09 (Acceptance of a Vehicle)

SUMMARY: It would not be a violation of Colorado Constitution Art. XXIX for the State of Colorado to accept a vehicle from Tri-State Generation and Transmission Association, Inc. under the circumstances of this request.

I. BACKGROUND

The Independent Ethics Commission (“IEC” or “Commission”) has received a request for advisory opinion, asking whether it would be permissible for the State to accept a vehicle from Tri-State Generation and Transmission Association, Inc. (“Tri-State”).

According to the request, Chrysler Group, LLP, the designer and manufacturer of an “advanced plug-in-hybrid electric vehicle” (“HPEV” or “vehicle”), has entered into an agreement with Tri-State to evaluate six such vehicles under differing “geographic, climatic and operating environments.” It appears from the request that Tri-State received the cars free of charge in exchange for these data. Tri-State is a for-profit company that supplies energy to electric cooperative distribution systems throughout Colorado and other states. It is based in Westminster, Colorado.

Tri-State, in turn, has offered the use of one of the PHEVs to the State of Colorado for official state use.¹ The contract requires the users of the vehicle to maintain fuel efficiency and usage data for the vehicle. These data then would be forwarded to Tri-State and Chrysler as part of the performance evaluation process. According to information before the Commission, the car would be added to the state motor pool, and would be available for use by any of the employees in the Governor's Office, as well as other state agencies. Anyone driving the vehicle would have to receive training prior to using the vehicle. The Governor's agreement with Tri-State is dependent upon approval of the transaction by the IEC.

II. JURISDICTION

The IEC finds that the Governor is a "public officer" and that members of his staff and state agencies are "government employees" subject to the jurisdiction of the Commission. CO Const. Art. XXIX (2) (1), (6).

III. APPLICABLE LAW

Section 3 of Article XXIX (Gift ban) reads in relevant part:

(2) No public officer, member of the general assembly, local government official, or government employee, either directly or indirectly as the beneficiary of a gift or thing of value given to such person's spouse or dependent child, shall solicit, accept or receive any gift or other thing of value having either a fair market value or aggregate actual cost greater than fifty dollars (\$50) in any calendar year, including but not limited to, gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment, or special discounts, from a person, without the person receiving lawful consideration of equal or greater value in return from the public officer, member of the general

¹ In fact, the state has already executed a contract with Tri-State that sets forth the terms and conditions of use of the vehicle and the gathering and transmission of the performance data. The contract was executed by Roxanne White, the Governor's chief of staff, on behalf of the State of Colorado. The contract is of indeterminate duration and the use of the vehicle can be rescinded by Tri-State at any time. The rights and obligations of the contract are conditioned upon a determination by the Commission that the transaction comports with Amendment XXIX.

assembly, local government official, or government employee who solicited, accepted or received the gift or other thing of value.

IV. DISCUSSION

A. Gift to a Covered Individual

Article XXIX section 3(3) prohibits the acceptance of any gift valued at over \$53² by a public official or employee (“covered individual”), unless there is a valid consideration for the item (which makes the item not a gift) or the gift falls under an enumerated exception

In its request for an advisory opinion, counsel for the Governor indicated that the Governor’s security team is considering using the PHEV to transport the Governor. In fact, the offer of use of the vehicle was the result of a conversation between representatives of Tri-State and the Governor. These facts, in isolation, indicate that the benefit of agreement would inure personally to the Governor and, therefore, would be proscribed by section 3(3) of Amendment XXIX.

However, the contract that has been executed by Tri-State does not confer any special benefit to the Governor. Instead, it provides for use of the vehicle by any insured and trained employee of the executive branch and requires such user to maintain and transmit the performance data set forth in the contract. In effect, Tri-State is adding a vehicle to the state’s motor pool rather than providing a personal car for the Governor. In such circumstances, the contractual benefit is not a gift to a covered individual.

Counsel for the Governor also urged the Commission to approve the transaction as being supported by consideration (i.e., the maintenance and submission of

² The \$50 threshold was adjusted for inflation in April of 2011. See Position Statement 11-01.

performance data to Tri-State and Chrysler). Unlike courts of general jurisdiction considering the common law of contracts that refrain from evaluation of the sufficiency of consideration, the Commission must determine whether the covered individual provides consideration *of equal or greater value* in order to exclude a gift from the proscriptions of Amendment XXIX. It is unclear that maintenance and submission of data is of equal or greater value than the indeterminate and at-will use of the vehicle. However, because the Commission has determined that the benefit of the contract does not inure to a specific covered individual, we need not opine as to the relative value of the rights and obligations contained in the contract.

B. Appearance of Impropriety

While the contract between the state and Tri-State comports with Article XXIX, the Commission is concerned about the appearance of impropriety that could arise in the context of this arrangement. Tri-State is a high-profile business in the state that is active in public policy, including robust representation in administrative proceedings and at the legislature. A high-profile demonstration that emphasizes the amicable relationship between Tri-State and the Governor may raise questions in the eyes of the public. Efforts to endorse publically the nature of the contract, i.e., general state use of the vehicle in exchange for the maintenance and submission of data, will be helpful in addressing such questions

IV. CONCLUSION

It would not be a violation of Colorado Constitution Art. XXIX for the State of Colorado to accept an electric car from Tri-State under the circumstances of this request. The Commission cautions public officials and employees, however that this

opinion is based on the specific facts presented in this request, and that different facts could produce a different result. The IEC therefore encourages individuals with particular questions to request more fact-specific advice through requests for advisory opinions and letter rulings.

The Independent Ethics Commission

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Commissioner Smith recused himself from consideration of this request.

Dated: September 20 2012