OPINION NO. 96-051

Syllabus:

1. An arrangement under which a board of education and a private, for-profit corporation agree that the corporation will attempt to secure for the board a license from the Federal Communications Commission and, if the license is granted, the board will lease excess instructional television fixed service (ITFS) air time to the corporation, will not violate the lending credit or joint ownership prohibitions of Ohio Const. art. VIII, §§4 and 6, provided that the property interests of the two entities remain separate.

2. A contract under which a board of education agrees to lease excess ITFS air time to a commercial enterprise must include a provision permitting the board to modify or terminate the agreement upon a determination by the board that additional time on the ITFS channels is needed for school purposes.

To: Maureen O'Connor, Summit County Prosecuting Attorney, Akron, Ohio
By: Betty D. Montgomery, Attorney General, October 8, 1996

I have received your letter requesting an opinion concerning an arrangement between a board of education and a private corporation for the transmission of television programming. You have asked essentially the following:

> 1. Is an agreement providing for a private, commercial enterprise and a public board of education to cooperate in completing an application to obtain from the Federal Communications Commission (FCC) a license for four instructional television fixed service (ITFS) channels, and for the board to lease excess air time to the commercial enterprise in consideration for the board's receiving royalty payments from the commercial enterprise for its utilization of the excess air time to provide commercial television programming to paying subscribers, a violation of Ohio Const. art. VIII, § 4, which prohibits "joint ventures" between the state and commercial enterprises?
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> 2. Does an FCC license for ITFS channels confer a "property right" in the board, such that if the board enters into a long-term agreement to lease excess air time to a commercial enterprise, the board is required by law to include in the agreement a provision which permits the board to terminate the agreement upon a determination by the board that the ITFS channels are needed for school purposes?

Your questions concern the authority of the board of education of a city school district to enter into a contract with a private, for-profit corporation under which the board of education would obtain an FCC license for four ITFS channels and would lease excess air time to the

corporation.[1] Under the proposed arrangement, the corporation would pay all application fees and take all necessary action to obtain the license, which, in accordance with federal law, would be issued to the board of education. The board of education would use some of the air time to transmit educational programming to its schools and schools of neighboring school districts. The board of education would lease the remaining air time to the corporation in exchange for royalty payments. The corporation would use that excess air time to provide commercial television programs to paying subscribers. The proposed agreement has a ten-year duration.

Your letter states that the board of education signed a letter of intent to proceed with the proposed agreement, with the understanding that the board will execute the agreement only if it receives a favorable opinion from the Attorney General. A copy of a proposed agreement is attached to your opinion request. I note, however, that I am unable to provide a detailed review of the agreement or a determination of its validity. Pursuant to R.C. 3313.35, a city director of law is the legal adviser of a city school district, unless a city charter varies the provisions of that section. *See* 1983 Op. Att'y Gen. No. 83-038. The board of education of a city school district also has authority to hire an attorney of its choice. *See* R.C. 309.10; 1983 Op. Att'y Gen. No. 83-038. It is appropriate, therefore, that a contract of the sort in question be reviewed by counsel for the school district. Because of the specialized nature of the subject matter involved, the school board should make certain that any such contract is examined on behalf of the school district by counsel with expertise in the area of ITFS channels and lease provisions, to ensure that the rights and interests of the school district are properly protected.

In any case, it is inappropriate to use a formal opinion as a means for determining the validity of a particular contract. *See, e.g.*, 1990 Op. Att'y Gen. No. 90-111, at 2-502 (the Attorney General is "unable to make findings of fact or to interpret provisions of a particular contract or agreement"); *see also* 1992 Op. Att'y Gen. No. 92-016; 1989 Op. Att'y Gen. No. 89-010. Issues concerning appropriate contractual language are best decided by counsel who works closely with a particular client and is familiar with facts, goals, and practical limitations, as well as with relevant issues of law. Therefore, notwithstanding the general nature of your request, I am constrained to limit my opinion to the particular questions you have raised and to consider those questions in general terms, without determining the validity of particular contractual language.[2]

In order to address your concerns, it is helpful to examine the technology involved in the proposed arrangement. ITFS channels are segments of the wireless cable microwave band that have been reserved for educational purposes. Wireless cable broadcasts are accessible only to users equipped with specialized antennas and converters. Therefore, they cannot be picked up by the general public. *See American Scholastic TV Programming Found. v. FCC*, 46 F.3d 1173, 1175-76 (D.C. Cir. 1995). ITFS was created in 1963 and designed principally for use by

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[1] Your letter states that the board of education would "lease back" excess air time to the corporation. I question the use of this term and am not using it in this opinion. The right to the air time would be acquired by the board as part of its FCC license. Since the time would not be acquired initially from the corporation, there does not appear to be an element of leasing "back."

[2] This opinion makes no representation concerning any specific contractual provision. In particular, but not by way of limitation, this opinion makes no attempt to analyze any confidentiality provisions or to determine the applicability of the public records provisions of R.C. 149.43.

educational institutions. *See Hispanic Information & Telecommunications Network, Inc. v. FCC*, 865 F.2d 1289, 1290-91 (D.C. Cir. 1989). With limited exceptions, ITFS licenses are available only to public or private educational entities. 47 C.F.R. §74.932 (1995). A license ordinarily grants the licensee use of a channel for twenty-four hours of every day during the term of the license, but channel capacity may be divided among equally-qualified applicants. 47 C.F.R. §74.913(d) (1995).

The provisions of federal law authorizing the licensing of ITFS channels to boards of education expressly permit a board of education to contract with a private entity to lease unused air time to the private entity in order to supply the board with funds to provide its own programming. 47 U.S.C.A. §301 (West 1991); 47 C.F.R. §§74.902(d)(2), .931(e) (1995); *see In re Botetourt County School Bd.*, 8 F.C.C. Rec. 6265, 6268, 73 Rad. Reg. 2d (P&F) 978 (Aug. 30, 1993) ("the right to lease excess capacity came about as a result of our recognition that educational entities holding ITFS licenses often lack the financial wherewithal to build and operate ITFS systems, and we envisioned the leasing of excess capacity as a means of creating business relationships between educational institutions and wireless cable companies that would permit ITFS service to flourish"), *aff'd sub nom. American Scholastic TV Programming Found. v. FCC*, 46 F.3d 1173 (D.C. Cir. 1995). Thus, the proposed arrangement is intended to comply with federal law and effect its purpose.

Under the arrangement in question, the school board and corporation would select a mutually acceptable location for the transmission site. The corporation would lease that site, the board would submit FCC applications specifying the facilities, and the corporation would pay the costs of preparing and submitting the applications. The corporation would construct the transmission facilities and purchase and install the equipment and would lease the equipment to the board for a small fee. At no expense to the board, the corporation would provide the board with sufficient space at the transmission site for reasonable equipment for the board's ITFS transmissions. Receive sites designated by the board to receive its programs would be installed at the expense of either the board or the corporation, as agreed upon, and would be maintained by the corporation. The corporation would maintain and operate the equipment. In order to comply with FCC rules and policies, however, the board would have ultimate control of the construction, operation, management, and maintenance of the transmission facilities. *See* 47 C.F.R. §§74.901-.996 (1995).

The board would determine its own programming. The corporation would be entitled to market programming as agreed upon, and if the content of a network were to change significantly, the board could demand that transmittal of that network's programming be terminated or that the transmission be scrambled so that it would not be accessible to recipients of the board's transmissions. Royalties paid by the corporation to the board of education would be the greater of: (1) a minimum monthly fee; or (2) a specified amount for each subscriber of the corporation's programming service.

Having outlined the general terms of the arrangement in question, I turn now to the basic issue of whether a board of education is authorized to acquire and hold an FCC license for ITFS channels and use those channels to transmit educational television programs to schools of its district and neighboring districts. A board of education is a creature of statute that has only the authority expressly granted by statute or necessarily implied from an express grant of authority.

See Verberg v. Board of Educ., 135 Ohio St. 246, 20 N.E.2d 368 (1939). Therefore, a board of education may enter into the proposed arrangement only if it has statutory authority to do so. R.C. 3313.606 authorizes a board of education to "provide educational television courses and programs for any class or classes in the school district." That statute expressly permits a board of education to secure the courses and programs from nonprofit educational television corporations, but it appears to be broad enough to allow the board to use any reasonable means of providing educational television programs, including obtaining and operating its own ITFS channels.[3] *See also* R.C. 3313.17 (authorizing a board of education to contract and to hold, possess, and dispose of real or personal property); R.C. 3313.171 (authorizing a board of education to expend funds for consultant services related to the business administration of the school district); R.C. 3313.37 (authorizing a board of education to acquire real property, schoolhouses, and apparatus and to "make all other necessary provisions for the schools under its control"). A board of education has authority to contract with other school districts to cooperate in providing educational programs. *See* R.C. 3313.842; *see also* R.C. 3315.09. Thus, a board of education may transmit educational programs to schools in its district and neighboring districts.[4]

I turn now to your first question, which pertains to Ohio Const. art. VIII, §4. That portion of the Ohio Constitution provides that "[t]he credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever," and that the state is not permitted to "become a joint owner, or stockholder, in any company or association ... formed for any purpose whatever." This provision has been construed to apply to agencies or

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[3] R.C. 5705.05 expressly provides that, in the case of counties, the general levy for current expenses includes amounts necessary for the support of educational television. R.C. 5705.05(E). No corresponding reference to educational television is made in the provision authorizing school districts to levy a general tax, although the statute does authorize the general levy to include the amounts necessary for the maintenance, operation, and repair of schools. R.C. 5705.05(F). The absence of an express reference is consistent with the construction of R.C. 3313.606 adopted in this opinion -- that is, since the authority to provide educational television is granted by R.C. 3313.606, the authority to include that purpose in the general levy is necessarily implied and no express reference is required. *See also* R.C. 3353.05 (authorizing any taxing authority to make payments to a noncommercial educational television or radio broadcasting station or radio reading service that is located in the county or serves any part of the county in an amount not to exceed five cents annually on each one thousand dollars of property tax valuation).

[4] R.C. Chapter 3353 governs the Ohio Educational Telecommunications Network Commission (formerly the Ohio Educational Broadcasting Network Commission, *see* Am. Sub. H.B. 117, 121st Gen. A. (1995) (eff. June 30, 1995)), which has authority to own and operate facilities for an educational television, radio, or radio reading service network and to enter into agreements with noncommercial stations operating such facilities. *See* R.C. 3353.04(A), (C)-(E). One of my predecessors concluded that, because the commission is authorized to enter into agreements only with noncommercial entities, it may not lease its excess electronic transmission and reception facilities to business entities organized for profit. 1987 Op. Att'y Gen. No. 87-056. Without reexamining that conclusion, I note that a board of education has general authority to contract with nonprofit or for-profit entities. *See* R.C. 3313.17; 1982 Op. Att'y Gen. No. 82-030. Accordingly, the provisions of R.C. Chapter 3353 do not affect the authority of a board of education to obtain an FCC license for ITFS channels or to lease excess air time to a private corporation.

instrumentalities of the state, including boards of education. *See* 1992 Op. Att'y Gen. No. 92-016. The related language of Ohio Const. art. VIII, §6 imposes similar restrictions upon counties, cities, and townships, and authorities discussing §4 and §6 are often cited interchangeably. *See, e.g., State ex rel. Eichenberger v. Neff*, 42 Ohio App. 2d 69, 74-75, 330 N.E.2d 454, 458 (Franklin County 1974).

Courts have held that Ohio Const. art. VIII, §§4 and 6 were aimed at preventing situations in which there is a "business partnership" between a political subdivision and a private party or a "union of public and private capital or credit in any enterprise whatever." *Walker v. City of Cincinnati*, 21 Ohio St. 14, 54 (1871). Arrangements in which public and private property are intermingled have been found to be prohibited by these constitutional provisions. *See, e.g., State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 159 N.E.2d 741 (1959); 1978 Op. Att'y Gen. No. 78-040. In contrast, a variety of leases and other contractual arrangements have been found constitutional on the grounds that they preserve the separate property interests of the governmental and private bodies. *See, e.g., Kittel v. City of Cincinnati*, 78 Ohio App. 251, 69 N.E.2d 771 (Hamilton County), *appeal dismissed*, 147 Ohio St. 246, 70 N.E.2d 372 (1946); *Hines v. City of Bellefontaine*, 74 Ohio App. 393, 412, 57 N.E.2d 164, 172-73 (Logan County 1943); 1992 Op. Att'y Gen. No. 92-016; 1977 Op. Att'y Gen. No. 77-047; 1972 Op. Att'y Gen. No. 72-096.

In 1992 Op. Att'y Gen. No. 92-016, my predecessor concluded that the Ohio Constitution permitted a board of education to agree with a private cellular telephone company on a contract under which the school board would lease to the company real property located at its high school football stadium, the company would erect a monopole communications tower and a building to house the company's equipment, and the company would lease to the school board a portion of the tower for the installation of lights and loudspeakers. Under the contract, the company would allow the school district to use a portion of the company's building as a ticket booth for athletic events. The opinion concluded that such an arrangement would be permissible, where the arrangement did not effect a union of private and public property. In that case, the ownership of each item of property was clearly defined and there was no sharing of risks or profits.

In contrast, 1978 Op. Att'y Gen. No. 78-040 concluded that the constitutional prohibition against joint ventures prohibited an arrangement under which an oil and gas company would have constructed a gas station on the property of a joint vocational school district. The proposal was that the gas station be operated by students, with supervision by the vocational staff and periodic consultation with the company's management team, and that the profits be shared between the company and the school district. In that case, the interests of the school board and the private company were not separable, but were joined in a common enterprise.

In the instant case, if the interests of the two entities are kept separate, there will be no violation of Ohio Const. art. VIII, §§ 4 or 6. The essence of the proposed transaction is that the board would acquire the services of the corporation to prepare an application and acquire an FCC license. By agreement, the work would be done at the expense of the corporation but for the benefit of the board. The board would hold the license in its name and would lease excess air time to the corporation. The corporation would acquire a site, build transmission facilities, install equipment, and lease the equipment to the board. The corporation would maintain and operate the equipment, but the board would have ultimate authority to determine that FCC requirements were satisfied.

The fact that there is a contract that may benefit both parties does not mean that there is a violation of the joint ownership provisions of the Ohio Constitution. *See, e.g.*, 1982 Op. Att'y Gen. No. 82-030 (a board of education may charge a fee for letting a cable television company videotape an athletic event); 1959 Op. Att'y Gen. No. 922, p. 619 (in appropriate circumstances, a board of education may build a water main and charge private property owners a fee to tap in). A board of education is permitted to lease to another entity property that it holds and does not currently need for school purposes, where the lease arrangement does not effect a union of private and public property. *See* 1992 Op. Att'y Gen. No. 92-016. Thus, an arrangement under which a board of education leases excess air time in exchange for royalty payments set at fair market value does not, in itself, violate the lending credit or joint ownership prohibitions of the Ohio Constitution. *See Frankenstein v. Goodale*, 30 Ohio App. 110, 115, 164 N.E. 363, 364 (Hamilton County 1928) (a sale or lease made in good faith and for fair value does not constitute an unconstitutional loan of the credit of a governmental entity).[5]

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[5] I am not examining the compensation provisions of the agreement in question and make no judgment regarding their fairness. I assume that the board of education will act in a prudent manner to obtain a reasonable return on the air time that it leases. I note, however, that a royalty payment based on a fixed amount for each subscriber of the corporation, while it might vary depending upon the fortunes of the corporation, does not appear to grant the board of education an interest in the business operations of the corporation of the sort that is prohibited by the Ohio Constitution. By definition, a royalty is "[c]ompensation for the use of property..., expressed as a percentage of receipts from using the property or as an account per unit produced." *Black's Law Dictionary* 1330 (6th ed. 1990). The conclusion that receipt of a royalty by a public entity from a private party as consideration under a contract is not unconstitutional is evident from the fact that R.C. 3313.45 and R.C. 3313.451 expressly authorize a board of education to enter into contracts or leases for petroleum, gas, or mineral rights and to receive rents or royalties in return. Further, cases construing the constitutional lending credit and joint ownership prohibitions have concluded that the Ohio Constitution does not prohibit the sale or lease of property in exchange for a percentage of the profits or earnings of the property. *See City of Cincinnati v. Dexter*, 55 Ohio St. 93, 44 N.E. 520 (1896) (finding that a city could constitutionally sell a railway for compensation including a percentage of the railway's future gross earnings); *Frankenstein v. Goodale*, 30 Ohio App. 110, 164 N.E. 363 (Hamilton County 1928) (finding that the lease of a railroad did not violate Ohio Const. art. VIII, §6, even though the lease provided for the sharing of profits between the city and the lessee); *see also* 1972 Op. Att'y Gen. No. 72-096 (finding no constitutional violation if the state leases information centers in interstate highway rest areas to a corporation for a fixed percentage of gross receipts, and providing examples of similar arrangements).

It might be argued that the proposed compensation arrangement could influence the board of education to lease additional time to the corporation in order to increase the royalties received by the board, instead of using that time for the purposes of the school district. Both the agreement and federal provisions require that a certain amount of time be reserved to the board of education. *See* 47 C.F.R. §74.931(e) (1995). I assume that these requirements will be satisfied, and I further assume, that, with respect to matters involving the exercise of discretion, members of the board of education will exercise their judgment responsibly and seek to accomplish their statutory duties regarding the provision of educational programs. *See State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 (1955) (syllabus, paragraph 10) ("[i]n the absence of evidence to the contrary, public officials, administrative officers, and public authorities, within the limits of the jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully"); *State ex rel. Stine v. Atkinson*, 138

There are several portions of the proposed agreement that require cooperation or joint efforts on the part of the parties. For example, the parties agree to work together in selecting a mutually acceptable location for the transmission site. While the concept of working together might suggest that there is a joint venture, a provision of this sort could be viewed as simply providing that the site must be acceptable to both parties, so that each is able to fulfill its part of the agreement. Similarly, the proposed agreement requires that the parties use their best efforts to obtain any FCC approval necessary to the performance of the contract and that both parties approve in advance any announcements to the media. The parties are, thus, agreeing to cooperate; however, if their roles, functions, and responsibilities are defined and structured separately, no constitutional violation will occur. They may agree to work together not as joint venturers, who share risks and profits in a common undertaking, but as parties to a contract, who seek to have the terms complied with by both parties so that each party's individual goals can be accomplished. Such an agreement would not violate the lending credit or joint ownership provisions of the Ohio Constitution. *See, e.g., Ford v. McCue*, 163 Ohio St. 498, 127 N.E.2d 209 (1955); 1959 Op. Att'y Gen. No. 922, at 622 (distinguishing between an owner-tenant relationship and a joint undertaking).[6]

In the case at hand, the arrangement is permissible if the responsibilities and interests of the two parties are clearly defined and kept separate and within the bounds permitted by the Ohio Constitution.[7] Under the proposed arrangement, no property would be held jointly, and neither party would be at risk for losses of the other party. Clearly, if either party did not perform its obligations under the agreement, the contractual goals would not be achieved. In those circumstances, however, each party would retain its own assets and could proceed to use or sell them or to enter into a similar agreement with another entity.

In response to your first question, I conclude, therefore, that an arrangement under which

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Ohio St. 217, 219, 34 N.E.2d 207, 208 (1941) ("[p]ublic officials are presumed to perform the duties of their offices in good faith"); 1988 Op. Att'y Gen. No. 88-037.

It might be argued, in addition, that under the proposed compensation arrangement the board of education would have an interest in promoting the success of the corporation in order to increase royalty payments to the school district, and that this interest might in some circumstances conflict with the board's responsibilities to the school district. Again, it is presumed for purposes of this opinion that members of the board of education will faithfully perform their responsibilities and that they will not take action that is inconsistent or in conflict with their statutory powers and duties. *See State ex rel. Speeth v. Carney*; *State ex rel. Stine v. Atkinson*; 1988 Op. Att'y Gen. No. 88-037.

[6] The proposed contract includes language stating that it provides for an air-time use relationship and not a joint venture. While such language is not determinative of the question whether there is joint ownership as prohibited by Ohio Const. art. VIII, §§ 4 and 6, it is instructive of the intent of the parties to preserve their independence and maintain the relationship of lessor and lessee.

[7] As discussed above, I am not able in this opinion to examine in detail every aspect of the proposed arrangement or to guarantee that there is no possible circumstance in which a board of education entering into an agreement with a private corporation for the operation of ITFS channels might run afoul of the constitutional prohibitions against joint ownership and lending credit.

a board of education and a private, for-profit corporation agree that the corporation will attempt to secure for the board a license from the FCC and, if the license is granted, the board will lease excess ITFS air time to the corporation, will not violate the lending credit or joint ownership prohibitions of Ohio Const. art. VIII, §§4 and 6, provided that the property interests of the two entities remain separate. Each arrangement, however, must be examined with care to determine whether the parties' interests are impermissibly intermingled.

Assuming that the prohibitions of Ohio Const. art. VIII, §§ 4 and 6 are not violated by the arrangement at issue, there are other matters of concern regarding the validity of the proposed arrangement. Federal provisions that authorize the leasing of excess air time to finance the operation of ITFS channels establish limits on the ability of a board of education to acquire excess air time. *See* 47 C.F.R. §74.902(d) (1995); 47 C.F.R. §74.931(e)(4) (1995) ("an ITFS applicant should request only as many channel [sic] as it needs to fulfill its educational requirements"); 47 C.F.R. §74.932(b) (1995) ("[a]pplicants are expected to accomplish the proposed operation by the use of the smallest number of channels required to provide the needed service"). When an applicant which leases excess capacity proposes a schedule that complies with relevant requirements, the applicant is found to have "presumptively demonstrated need...for no more than four channels." 47 C.F.R. §74.902(d)(2) (1995).

Your letter indicates that the district will obtain a license for four ITFS channels and that three of those channels will be deemed "excess air-time capacity" and leased to the corporation. Provisions of the proposed contract do not guarantee three channels for the corporation but provide, instead, that one hundred sixty-eight hours per week of air time is reserved for the school board on the four channels, with eighty hours per week to be used for ITFS programs and eighty-eight hours reserved for expanded programs. The one hundred sixty-eight hour quantity reserved for the school board is the equivalent of twenty-four hours per day for a full week, or the total weekly time of one ITFS channel. Because of school schedules, however, it seems likely that more than one -- and perhaps all four -- of the channels would be used by the school district during school hours, even though the total amount of time used would not exceed that available in a week on a single channel. Therefore, the board of education's need for a number of ITFS channels must be determined not solely on the total number of hours of transmittal time that would be available, but also with regard to the time periods during which the board might wish to use several channels at the same time. If the board of education is granted the lease of four ITFS channels and uses them primarily during school hours, it will have excess capacity during other time periods.

It is clear that, for the proposed arrangement to be effective, there must be compliance with FCC minimum air time requirements, and the parties must allocate air time within those limits. *See* 47 C.F.R. §74.931(e) (1995). Even if federal law is satisfied, there may be questions under Ohio law as to whether a board of education may deliberately acquire large amounts of excess capacity with the intention of leasing that excess capacity to a private entity.

Under Ohio law, the authority of a board of education to acquire rights and property for educational television purposes extends only to those purposes that are authorized by statute -- namely, providing programming to its schools and, by agreement, to schools of other school districts. If a board of education in good faith acquires property for these purposes and has excess property that is not needed for school purposes at a particular time, it may sell or lease that property. *See, e.g.*, 1992 Op. Att'y Gen. No. 92-016. A board of education, however, has no authority to acquire property of any sort for the purpose of leasing that property to a private entity

as a business venture. As was stated by one of my predecessors in 1932 Op. Att'y Gen. No. 4588, vol. II, p. 1006 at 1007: "In the absence of any specific or statutory authority therefor, it is clear that a board of education does not possess the power to acquire and hold property which is not necessary for school purposes, with the intention and for the purpose of leasing the same with a view to profit." *Accord* 1963 Op. Att'y Gen. No. 662, p. 624. While R.C. 3313.606 permits a board of education to acquire and operate ITFS channels, it does not grant the board of education authority to go into the business of leasing air time, except as an incident to its educational activities.

Thus, the board of education's authority to acquire ITFS channels does not extend beyond the number of channels that the board of education finds reasonably necessary for the exercise of its educational functions. An attempt to acquire additional channels solely for the purpose of leasing the air time would exceed the board's statutory authority. As indicated above, if the board of education needs four channels simultaneously at some time during the school day, then the acquisition of four channels would be permitted under Ohio law, even if it would result in excess time during non-school hours. Therefore, in determining the number of channels that a board of education may acquire, consideration must be given to the number of channels that the board may wish to use at the same time.

Your second question is whether the granting of an FCC license for ITFS channels confers a "property right" upon the board, so that if the board enters into a long-term agreement to lease excess air time to a commercial enterprise, the board must include in the agreement a provision permitting the board to terminate the agreement upon a determination by the board that the ITFS channels are needed for school purposes. You have referred to this provision as a "walkaway" clause.

In has been established, generally, that a long-term lease for school district property must include a clause allowing the board of education to terminate the agreement if it determines that the property is needed for educational purposes or for sale. This requirement is premised on the understanding that a board of education does not have authority to go into the business of owning and leasing property but, instead, may own property only for purposes related to its educational functions, and may lease that property to a private entity only if the property is not needed for educational purposes. *See* 1992 Op. Att'y Gen. No. 92-016; 1956 Op. Att'y Gen. No. 7225, p. 738; 1953 Op. Att'y Gen. No. 2534, p. 158.

While opinions and cases considering the need for a "walkaway" clause have pertained primarily to leases of real property, the language has encompassed all sorts of property and the principle may be applied to interests in property other than real property. Application of the principle to ITFS air time is appropriate particularly because, like real estate, ITFS channels are unique and cannot readily be replaced. Since the board of education will not be able to easily acquire a substitute, prudence requires that it retain the capacity to reclaim the air time should the need arise.

Your letter suggests that the requirement for a "walkaway" clause might not apply to a contract for excess ITFS air time because FCC license holders do not have property rights in an FCC license and are prohibited from granting a security interest in the license. Pursuant to federal law, an FCC license permits the licensee to use a channel, but does not grant the licensee

ownership of the channel. 47 U.S.C.A. §301 (West 1991). Licenses are of limited duration. They are subject to revocation, and a request for renewal need not be granted. Thus, it has been stated that "no person is to have anything in the nature of a property right as a result of the granting of [an FCC] license." *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). The FCC has consistently held that a broadcast license "is not an owned asset or vested property interest so as to be subject to a mortgage, lien, pledge, attachment, seizure, or similar property right." *Stephens Industries, Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986) (quoting *In re Merkley*, 94 F.C.C.2d 829, 830, 54 Rad. Reg. 2d (P&F) 68, 70 (1983)). The rationale behind this principle is that the licensee must remain responsible for, and accountable to, the FCC for operations undertaken pursuant to the license. Further, the FCC is required to approve the qualifications of every applicant for a license, so transfer by operation of law cannot be permitted. *In re Cheskey*, 9 F.C.C. Rec. 986, 74 Rad. Reg. 2d (P&F) 1031 (Feb. 24, 1994).

It does not follow, however, that the licensee has no interest in the license. Although the licensee's interest may not be ownership, the licensee does have the right to operate within the provisions of the license and the right to transfer the license to a third party, subject to the FCC's approval. *In re Tak Communications, Inc.*, 138 Bankr. 568, 571 (W.D. Wis. 1992), *aff'd*, 985 F.2d 916 (7th Cir. 1993). Thus, an FCC license is an asset in which the licensee has an interest. *See Stephens Industries, Inc. v. McClung*, 789 F.2d at 392.

Regardless of how the rights of an FCC license holder are characterized, a board of education that holds an FCC license and leases ITFS air time to a corporation has an interest in that air time, and that interest must be protected by provisions that would permit the board to apply the air time to its educational purposes, should the need arise. "Consistent with its fiduciary duties as the owner of school property, it is incumbent upon the Board of Education, while holding title to the property, to preserve its availability for school purposes where a present or probable future need therefor exists or is likely to arise." *State ex rel. Baciak v. Board of Educ.*, 55 Ohio L. Abs. 185, 188-89, 88 N.E.2d 808, 810 (Ct. App. Cuyahoga County 1949); *accord* 1992 Op. Att'y Gen. No. 92-016.

In response to your second question, I conclude, therefore, that a contract under which a board of education agrees to lease excess ITFS air time to a commercial enterprise must include a provision permitting the board to modify or terminate the agreement upon a determination by the board that additional time on the ITFS channels is needed for school purposes. It is presumed that the board will make such determinations in good faith and in accordance with the proper exercise of its statutory duties to provide educational programs. *See* note 5, *supra*.

Correspondingly, the board should also retain the right to terminate its educational television transmissions if it determines that the transmissions are not serving the educational purposes of the district. The board has no statutory authority to hold an FCC license for the sole purpose of leasing air time to a private company. If the board ceases to use its ITFS channels for school district purposes, the constraints on its statutory authority require that it remove itself entirely from ITFS licensing and operation.

The proposed agreement that you have provided contains a requirement that the board of education maintain the FCC licenses in effect for the ten-year term of the lease, obtaining any required renewals. This provision should be reviewed in light of the requirement that the board must be free to terminate its contractual obligations in the event that it determines that its generation of educational television is no longer appropriate.

While I am not able to review in detail all provisions of the draft agreement you have provided, I note as a general principle that a board of education has no authority to enter into a contract that would abrogate the duties and responsibilities imposed upon the board by law. *See Dayton Classroom Teachers Ass'n v. Dayton Bd. of Educ.*, 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975); *Xenia City Bd. of Educ. v. Xenia Educ. Ass'n*, 52 Ohio App. 2d 373, 370 N.E.2d 756 (Greene County 1977). Any contract provisions that restrict the rights of the board of education to make decisions about the future operations, agreements, or obligations of the board should be examined carefully in light of this general principle. *See* 1992 Op. Att'y Gen. No. 92-016.

For the reasons discussed above, it is my opinion, and you are advised:

1. An arrangement under which a board of education and a private, for-profit corporation agree that the corporation will attempt to secure for the board a license from the Federal Communications Commission and, if the license is granted, the board will lease excess instructional television fixed service (ITFS) air time to the corporation, will not violate the lending credit or joint ownership prohibitions of Ohio Const. art. VIII, §§4 and 6, provided that the property interests of the two entities remain separate.

2. A contract under which a board of education agrees to lease excess ITFS air time to a commercial enterprise must include a provision permitting the board to modify or terminate the agreement upon a determination by the board that additional time on the ITFS channels is needed for school purposes.