

CONTRACT EXEMPTION NO. 2008-03

Issued On March 6, 2008 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **City of Hurricane** asks for an exemption to permit it to continue contracting with Netranom for purposes of allowing this company to continue servicing its phone system. The Mayor of Hurricane, Scott Edwards, is the owner of this company.

FACTS RELIED UPON BY THE COMMISSION

In 2003, the City of Hurricane contracted with Netranom Communications to install the City's phone system. The City also entered into a two year contract with Netranom on 10/01/03 wherein it was agreed that Netranom would service its phone lines for an initial two year period and then on a month-to-month basis at the expiration of the two year period. The contact is in the form of two written agreements. Pursuant to the terms of the agreements, Netranom charges the City a flat rate of \$345.00 per month to service its phones, including the phones located at the wastewater plant. The agreements in question are attached hereto and incorporated by reference into this exemption.

The City also entered into a contract with Netranom in February of 2006 for website hosting and email services. That contract has expired and the City no longer pays Netranom for these services. Netranom now provides these services for free. According to the City, Netranom spends an average of 4 to 8 hours per month to provide the website hosting and email services. The City states that comparable services would be from \$350.00 to \$750.00 per month.

Netranom is owned by Scott Edwards. When the contract was awarded to Mr. Edwards in 2003, he was not on City Council. He first became a City Official when he was appointed to City Council in March of 2006. After his appointment to City Council, and at all relevant times thereafter, these contracts were allowed to remain in place consistent with Ethics Commission precedent that the prohibition against having an interest in a public contract does not apply in the case of a pre-existing contract, so long as the terms are not modified and the public servant does not participate in any discussion, vote or decision to make payments under the contract.

Scott Edwards was elected Mayor and took office on July 1, 2007. Due to the passage of time, the City of Hurricane, through its City Manager, seeks a contract exemption in order to allow Netranom, consistent with the terms of the 2003 agreement, to continue to service its phone system. The City Manager states that Netranom provides professional and expedient service. Its headquarters are located in Hurricane. The City

requested a quote for service to its phone lines in 2007. A company submitted a quote to perform these services at a monthly rate of \$418.29.

The City has a City Manager form of government. The Mayor is a voting member of the City Council. He also has authority to sign checks.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-2-5(d)(1) provides in part that ... no elected ... official ... or business with which he or she is associated may be a party to or have an interest in ... a contract which such official or employee may have direct authority to enter into, or over which he or she may have control

W. Va. Code § 6B-2-5(d)(3) provides that where the provision of subdivision (1) of this subsection would result ... in excessive cost, undue hardship, or other substantial interference with the operation of a ... municipality... the affected government body ... may make written application to the ethics commission for an exemption from subdivision (1) ... of this subsection.

ADVISORY OPINION

The Ethics Act prohibits public servants from being a party to or having a financial interest in a public contract which they have the power to award or control. This prohibition prevents a City from doing business with a business in which one of its Council members or the Mayor has an ownership interest, as here. This prohibition, like the others in the Act, is designed by the Legislature to keep public servants out of harm's way. The prohibition is intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety. It aims to steer public servants away from inherently questionable situations.

The Ethics Commission finds that the Mayor exercises control over the City's contracts as he is a voting member of Council and has check signing authority. As such, in order to determine whether the City may continue to contract with Netranom, the Commission must consider whether requiring the City to contract with another company to provide these services would result in excessive cost, undue hardship, or other substantial interference with the operation of the City.

In granting exemptions, the Commission considers whether compliance with the prohibition is certain to produce substantial harm to the City. A City seeking an exemption must show that real and significant hardship will result. The hardship must outweigh the important role the prohibition plays in preserving propriety and the appearance of propriety in public contracts.

The monthly savings to the City if it continues to contract with Netranom, as opposed to the company which provided a quote in 2007, is \$73.29 per month which amounts to **\$879.48** per year. This amount in a City the size of Hurricane, a Class III City, normally

would not constitute a savings which would warrant the Commission granting an exemption based upon excessive cost.

The situation presented is unique insofar as Netranom hosts the City's website for free and its email services. There is no written or implied contract setting forth that Netranom will continue to provide these services as consideration for the City continuing to utilize the company for its phone service maintenance. This service is offered gratuitously. The approximate value to the City is \$350.00-\$750.00 per month or \$4200.00 to \$9000.00 per year.

The Commission finds that under the circumstances presented, the City has demonstrated a hardship and hereby grants it an exemption to allow it to continue contracting with Netranom for a two year period from the date of the approval of this exemption. At the conclusion of the two year period, if the City wants to continue contracting with Netranom, and if Scott Edwards is still an elected official in the City, then the City should seek another contract exemption. Before seeking an exemption, the City should seek at least two other quotes for this service. Moreover, if the City wants the Commission to consider the value of the free website hosting and email service maintenance, then it also needs to allow other companies to submit a quote for these services.

The Commission notes that exemptions must be granted on a case-by-case basis. Therefore, this opinion is limited to the facts and circumstances of this particular case, and may not be relied upon as a precedent by other persons or entities.

s/s
R. Kemp Morton, Chair