ALAN WILSON
ATTORNEY GENERAL

October 3, 2023

Pamela J. Williams, Chief Public Affairs Officer &
General Counsel
Santee Cooper
P.O. Box 2946101
Moncks Corner, SC 29461-1601

Dear Ms. Williams:

You note that "Santee Cooper is preparing to enter an agreement to purchase [Cherokee County Cogeneration Partners, LLC]," which is located in Gaffney, South Carolina in Cherokee County. The purpose of the purchase is to generate electricity. By way of background , you provide the following information:

> In an effort to meet its power supply needs to serve customers across South Carolina, Santee Cooper identified the opportunity presented by the acquisition that is the subject of this inquiry. The Company owns a natural gas-fueled, combined-cycle 98-MW unit (the "Unit") and maintains all necessary land rights, asset rights, permits, and contracts for the Unit's operation. The Company sought a purchaser for itself or its assets. Based on extensive due diligence, Santee Cooper and Central concluded the Unit constitutes a near-term capacity option that would allow Santee Cooper to provide and maintain safe and reliable electric service in a cost-effective manner.
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> The Company currently is owned by Cherokee Generating, LLC ("CG, LLC"), a Delaware Limited Liability Company. Santee Cooper and CG, LLC, have agreed to the form of a Purchase and Sale Agreement C'PSA") through which Santee Cooper would acquire 100% of CG, LLC's membership interests in the Company, the Unit, related business interests, and the real property upon which the Unit operates for the price of $17 million. The Company also is a Delaware Limited Liability Company, but CG, LLC could be converted to a South Carolina LLC as a closing condition, if Santee Cooper so requests. Upon closing the acquisition under the PSA, Santee Cooper intends to keep the current name, ownership of assets, and liabilities[ ] of the Company. The PSA also is subject to a number of conditions including the receipt of all required regulatory approvals.[ ]

You pose the following legal questions:

(1) Does the South Carolina Public Service Authority ("Santee Cooper") have the statutory authority to acquire 100% of the membership interests in Cherokee County Cogeneration Partners, LLC ("the Company"), which is located in Gaffney, South Carolina, in Cherokee County?

(2) Does the constitutional limitation against joint ventures in Article X, § 11, apply to Santee Cooper's acquisition of 100% of the membership interests in the Company?

Your proposed answers are "yes" to the first question, and "no" to the second. Based upon the information provided, we agree with you.

Law/Analysis

In Cooper v. S.C. Public Services Authority, 264 S.C. 332, 215 S.E.2d 197 (1975), our Supreme Court, in a per curiam decision, adopted the order of the Circuit Court regarding the powers of Santee Cooper. There, the Circuit Court noted that Santee Cooper "'is a public corporation in the nature of a quasimunicipal corporation, exercising certain governmental functions as an agency of the State.'" (quoting Creech v. South Carolina Public Service Authority, 200 S.C. 127, 20 S.E.2d 645, 648 (1942)). In Cooper, the Court concluded that Santee Cooper possessed the requisite authority in question.

As you note in your letter, Santee Cooper's Enabling Act empowers the agency to:

- "acquire ... any property, real, personal, or mixed, or any interest therein." (§ 58-31- 30(A)(4)).
- "acquire ... power houses and any and all structures, ways and means, necessary, useful or customarily used and employed in the manufacture, generation, and distribution of . . . power, including . . . generally all things used or useful in the manufacture, distribution, purchase, and sale of power." (§ 58-31-30(A)(7)).
- "manufacture, produce, generate, transmit, distribute and sell ... mechanical power within and without the State of South Carolina." (§ 58-31-30(A)(8)).
- "do all acts and things necessary or convenient to carry out the powers granted to it by this chapter or any other law." (§ 58-31-30(A)(20)).

You also observe that the "Enabling Act does not specifically address Santee Cooper's power to acquire the membership interests in an LLC." However, it is your argument that

> [t]he general and enumerated powers, . . . reflect that Santee Cooper has this authority in this context. In particular, pursuant to § 58-31-30(A)(4), Santee Cooper may "acquire . . . any property, real, personal, or mixed. Based on S.C. Code Ann. § 12-37-10(6), S.C. Code Ann. § 33-44-101(6), and S.C. Code Ann. § 33-44-501(b),

> the membership interests and assets of the Company represent property within the meaning of § 58-31-30(A)(4).

In Cooper, the question before the Court was whether Santee Cooper "had the power and authority to (1) periodically harvest pulpwood and timber upon lands owned by it; (2) buy, sell and dispose of by lease any property real, personal or mixed or any interest therein. . . ." The Court noted that

> [w]hile the powers of the Authority are to be strictly construed, it is expressly granted the power 'to do all acts and things necessary or convenient to carry out the powers granted to it by (the legislature) . . . ' This is somewhat of an exception to the general law which olds 'that powers merely convenient or useful are not implied if they are not essential having in view the nature and object of incorporation. ' See Creech, supra, page 652. . . .
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> This Court finds that the power of periodically harvesting pulpwood and timber is both necessary and convenient to the implementation of the duty and power of the Respondent to reclaim and reforest its lands and is certainly implied, if not expressed, under it legislative power to be exercised in the discretion of the Respondent.

264 S.C. at 337-38, 215 S.E.2d at 199-200.

Likewise, we believe there is ample authority in Santee Cooper's enabling Act to acquire the membership interests in an LLC. Not only would a court likely conclude that such interests constitute "property" for purpose of § 58-31-30(A)(4), but as in Cooper, a court would likely find that § 58-31-30(A)(4) is sufficiently broad to encompass membership interests. Such power, as in Cooper, would be "necessary and convenient" to Santee Cooper's enumerated powers. See §§ 58-31-30(A)(7) and 58-31-30(A)(8).

With respect to your second question – whether Art. X, § 11 is violated by Santee-Cooper's purchase of 100% of the membership interests in the Company – your contention is that "Santee Cooper will not jointly own or jointly hold stock in anything with any other public or private entity; it will own 100% of the LLC's membership interests. Thus, no joint venture will exist, and this prohibition is not implicated." We agree.

Article X, § 11 of the South Carolina Constitution forbids the State or its political subdivisions from becoming "a joint owner of or stockholder in any company, association, or corporation." The provision further provides that "[t]he General Assembly may . . . authorize the South Carolina Public Service Authority to become a joint owner with privately owned electric utilities, including electric cooperatives, of electric generation or transmission facilities, or both, and to enter into and carry out agreements with respect to such jointly owned facilities." Based upon the information you provide, we do not conclude that the "joint owner" provision of Art. X, § 11 is violated.

In Op. S.C. Att'y Gen., 2010 WL 440998 (Jan. 11, 2010), we concluded that a guarantee proposed by Santee Cooper to the United States Department of Agriculture on behalf of Orangeburg County Biomass LLC did not violate Art. X, § 11's "joint owner" provision. In that opinion, we noted that neither the State nor Santee Cooper was "proposing becoming a joint owner or stockholder in Biomass." There, we referenced a number of decisions rendered by the South Carolina Supreme Court regarding "joint ownership", in support of this conclusion. We stated the following:

> [w]ith regard to the issue of joint ownership, you argue the guarantee would not cause Santee Cooper to become a joint owner with Biomass. In your letter, you cited several Supreme Court decisions discussing whether particular arrangements between a public body and a private entity constitute joint ownership in violation of section 11 of article X. In Johnson v. Piedmont Municipal Power Agency, 277 S.C. 345, 354 S.E.2d 476, cited above, the Supreme Court considered whether a joint municipal agency may issue bonds to fund the purchase of an interest in a power plant owned and operated by a private entity. The taxpayers brining the suit argued the arrangement for the sale and operation of the power plant constituted joint ownership between the joint agency and a private entity. Id. at 354, 287 S.E.2d at 481. However, as you brought to our attention in your letter, the Supreme Court explained: "The joint ownership clause of Article X, § 11 simply states that neither the State nor any political subdivision may become a 'joint owner of or stockholder in' a private company." Id. Thus, the Court concluded that the arrangement did not constitute joint ownership. Id. You also cited to Supreme Court opinions holding neither a long-term lease agreement between a hospital district and a private entity nor a county's granting of exclusive control of its courthouse constitute a joint ownership arrangement in violation of section 11 of article X. Gilbert v. Bath, 267 S.C. 171, 227 S.E.2d 177 (1976); Chapman v. Greenville Chamber of Commerce, 127 S.C. 173, 120 S.E. 584 (1923).

Further, in Brashier v. SCDOT, 327 S.C. 179, 490 S.E.2d 8 (1997), we note that the Court rejected the argument that the State would be a "joint owner' in the Connector 2000 Association, a nonprofit public benefit corporation. According to the Court, the fact that SCDOT could remove a director of the Association for cause or that, upon dissolution, the Association's assets would be distributed to SCDOT, did not create "joint ownership" in either the Association or the Southern Connector. The Brashier Court explained as follows:

> SCDOT is not a stockholder in Association. The agreements make it clear the Southern Connector will be owned by SCDOT but operated by Association. "[T]his Court has never held a public entity's naked title to property operated by a private entity resulted in unconstitutional joint ownership." Johnson v. Piedmont Mun. Power Agency, 277 S.C. 345, 355, 287 S.E.2d 476, 481 (1982) (also noting public entity had acquired neither stock nor any other form of ownership in private company). At no time will SCDOT and Association jointly own anything. Nichols v. South Carolina Research Auth., 290 S.C. 415, 351 S.E.2d 155 (1986), cited by Appellant, is clearly distinguishable. In Nichols, a state agency admitted that in

> carrying out joint ventures, it planned to procure ownership interests in private entities. Id. at 421, 351 S.E.2d at 158.
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> "This project is admittedly a complex undertaking, but complexity alone does not condemn it under our Constitution." Johnson, 277 S.C. at 354, 287 S.E.2d at 481. The State will not be a joint owners in any private entity.

327 S.C. at 188, 490 S.E.2d at 13. (emphasis added). These decisions clearly enunciate the rule that the "joint owner" provision of Art. X, § 11 requires a literal joint ownership between the State or its political subdivisions and a private entity. As the Court stated in Chapman, the words "joint owner" are what is important, and the Court is "not to be controlled by any unexpressed spirit or public policy supposed to underlie and pervade the instrument." 120 S.E. at 588. In short, according to the Court in Chapman, as well as Brashier, there must be a real "joint ownership" or "partnership." According to the information you provide, Santee Cooper is purchasing 100% of the membership in Cherokee County Cogeneration Partners, LLC. In our view, such does not contravene Article X, § 11.

Conclusion

Of course, this Office cannot determine facts in the issuance of a legal opinion. We must base our legal analysis herein upon the information which you have provided.

Based upon the facts as you have presented them, however, we believe Santee Cooper possesses the authority to acquire 100% of the membership interests in Cherokee County Cogeneration Partners, LLC. Further, we are of the view that such acquisition does not violate the "joint owner" provision of Article X, § 11 of the Constitution. As you present the issue, and as was recognized by as the Court in Brashier, at no time will Santee Cooper and the Company "jointly own anything." Thus, there is no "joint ownership."

Sincerely,

Robert D. Cook
Solicitor General