HENRY MCMASTER
ATTORNEY GENERAL

January 11, 2010

The Honorable James H. Harrison
Member, House of Representatives
Post Office Box 11867
Columbia, South Carolina 29211

Dear Representative Harrison:

We understand from your recent letter to Attorney General Henry McMaster that you desire an opinion of this Office as to "whether a guarantee proposed to be provided by the South Carolina Public Service Authority ("Santee Cooper") to the United States Department of Agriculture's Rural Utilities Service ("RUS") on behalf of Orangeburg County Biomass LLC violates Art. 10, § 11 of the South Carolina Constitution."

You explained as follows in your letter:

> Orangeburg County Biomass LLC, a proposed biomass power plant to be built in Orangeburg County, is of the utmost importance to our State because it provides a source of "green" renewable energy to the citizens of South Carolina at a cost below what would otherwise be attainable. The guarantee is necessary in order to secure funding through the RUS. The guarantee mandated by RUS requires that Santee Cooper guarantee Orangeburg County Biomass's debt repayment to RUS. With the RUS's low interest rate funding, Orangeburg County Biomass will be able to produce electric energy from renewable forest resources and sell that energy to Santee Cooper at a rate of 7.5 cents per kilowatt hour, a full 1.5 cents cheaper than will be possible without the RUS interest rate. The power, in turn, will be sold to rural South Carolina customers, who will receive the benefit of the low-priced energy.

Law/Analysis

Before we consider whether Santee Cooper may execute a guarantee on behalf of Orangeburg County Biomass, LLC, we begin with the presumption that all statutes are constitutional and we, just as a court, must if possible construe them to render them valid. State v. Neuman, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009). "A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. A possible constitutional construction must prevail over an unconstitutional interpretation. Id. (quotations omitted).

Section 11 of article X of the South Carolina Constitution (2009) states, in pertinent part:

> The credit of neither the State nor of any of its political subdivisions shall be pledged or loaned for the benefit of any individual, company, association, corporation, or any religious or other private education institution except as permitted by Section 3, Article XI of this Constitution. Neither the State nor any of its political subdivisions shall become a joint owner of or stockholder in any company, association, or corporation. The General Assembly may, however, 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.
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> . . . .

This provision makes clear that neither the State, nor any of its political subdivisions, may pledge the credit of the State or make loans for the benefit of a private entity. In addition, this provision generally prohibits the State and its political subdivisions from jointly owning a private entity. We presume that Orangeburg County Biomass LLC ("Biomass") is a private entity. Thus, the question arises as to whether Santee Cooper is pledging the State's credit by signing a loan guarantee for Biomass and whether Santee Cooper is illegally entering into a joint ownership situation with Biomass in violation of section 11 or article X.[1] In your letter, you present several reasons why you do not believe that by signing the guarantee, Santee Cooper is violating section 11 of article X of the State Constitution.

First, you cite to section 58-31-130 of the South Carolina Code (1976), a provision in the Code pertaining to South Carolina Public Service Authority, which provides:

[1]In this opinion, we have not addressed whether or not Santee Cooper has the authority to make a guarantee of a loan on behalf of Biomass.

> Nothing contained in the provisions of this chapter shall, at any time or in any manner, involve the credit and taxing power of the State, or of any of its political subdivisions; nor shall any of the securities or other evidences of indebtedness authorized to be issued in and by this chapter ever be or constitute obligations of the State or of any of its political subdivisions; nor shall the State or any of its political subdivisions ever be liable or responsible, in any way, for the payment of the principal or interest of or on such security or other evidences of indebtedness.

Furthermore, we note the following language contained among the powers given to Santee Cooper: "the Public Service Authority shall have no power at any time or in any manner to pledge the credit and the taxing power of the State or any of its political subdivisions, nor shall any of its obligations or securities be deemed to be obligations of the State or of any of its political subdivisions; nor shall the State be legally, equitably, or morally liable for the payment of principal of and interest on such obligations or securities." S.C. Code Ann. § 58-31-30(A)(21) (Supp. 2008). Accordingly, as you stated in your letter, Santee Cooper is statutorily prohibited from pledging the State's credit.

In addition to these statutory prohibitions upon Santee Cooper's pledging the State's credit, you state that case law in South Carolina indicates that so long as payment from the guarantee is not required to be made out the State's General Fund, its does not violate section 11 of article X. You cite Clarke v. South Carolina Public Service Authority, 177 S.C. 427, 181 S.E. 481 (1935), in which the Court considered whether the Public Service Authority could issue bonds secured by a mortgage without violating section 11 of article X. The Court noted that the bonds and mortgage both provide that these obligations are payable solely from the revenues of the Authority and stated as follows:

> This court has also constantly held that bonds issued by the state or its political subdivisions which are payable out of special funds do not create debts of the state or its political subdivisions, although the full faith, credit, and taxing powers of the state or its political subdivisions are pledged for the payment of the same. See Briggs v. Greenville County, 137 S. C. 288, 135 S. E. 153; Evans v. Beattie, 137 S. C. 496, 135 S. E. 538; Lillard v. Melton, 103 S. C. 10, 87 S. E. 421; Brownlee v. Brock, 107 S. C. 230, 92 S. E. 477; McIntyre v. Rogers, 123 S. C. 334, 116 S. E. 277; Barnwell v. Matthews, 132 S. C. 314, 128 S. E. 712; Sullivan v. City Council of Charleston, 133 S. C. 189, 133 S. E. 340; State v. Moorer, supra.

Id. at 447, 181 S.E. at 489. Accordingly, the Court found the bonds and mortgage did not constitute a debt of the State or any of its political subdivisions. In addition, the Court found further support for this conclusion in the fact that the legislation creating the Public Service Authority contains

language prohibiting the obligations of the Public Service Authority from becoming obligations of the State. Id. at 453, 181 S.E. at 491.

In addition to Clarke, we also note several more recent Supreme Court decisions based upon the same principles. In Johnson v. Piedmont Municipal Power Agency, 277 S.C. 345, 287 S.E.2d 476 (1982), which you mentioned in your letter, the Court considered whether a joint agency of municipalities is prohibited from issuing bonds to fund the purchase of a nuclear power plant. The bonds stated they were "payable solely from the revenues collected by the municipalities from their customers; neither the full faith and credit nor the taxing power of the State or any municipality is, or may be, pledged for payment of the bonds." Id. at 350, 287 S.E.2d at 479. The Court found:

> The bonds issued to finance the project will be issued by PMPA and not the municipalities. The bonds will be payable from revenues derived by PMPA from the sale of electricity to the municipalities and others. This is the only source of revenue which is pledged to the payment of these bonds. PMPA has no authority to assess and collect ad valorem taxes. Hence, PMPA cannot use the taxing power to replace lost revenues which we held was improper in Robinson v. White, 256 S.C. 410, 182 S.E.2d 744 (1971). Section 6-23-110 states that the payments by the municipalities to PMPA shall be made from revenues derived from the operation of the municipal electric system and shall not invoke the municipalities' taxing power. The municipalities are only obligated to make payments from revenues derived from the rates and charges collected from the users of its electric system. Any attempt to equate these payments for electric utility services with taxes imposed on the citizenry in general is erroneous. It is conceded that the "bonds of PMPA are payable solely from the revenues collected by the municipality from their customers; neither the full faith and credit nor the taxing power of the state or any municipality is, or may be, pledged for payment of the bonds. Section 6-23-110."

Id. at 353, 287 S.E. 2d at 480-81. Citing Clarke, the Court stated: "'This Court has constantly held that bonds issued by [municipalities]-which are payable out of special funds do not create debts-.'" Id. at 353, 287 S.E. 2d at 481(quoting Clarke v. South Carolina Pub. Serv. Auth., et al., 177 S.C. 427, 447, 181 S.E. 481, 489 (1935)). Accordingly, the Court found the joint agency of municipalities could issue bonds without violating section 11 of article X.

In Brashier v. South Carolina Department of Transportation, 327 S.C. 179, 490 S.E.2d 8 (1997)(overruled on other grounds by I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000)), the Supreme Court addressed whether bonds issued by an association

established to construct a toll access road near the City of Greenville constituted a pledge of the State's credit. The Court looked to section 11 of article X and stated as follows:

> There is no lending of the State's credit unless "general credit and taxing powers are pledged." State ex rel Medlock v. South Carolina State Family Farm Dev. Auth., 279 S.C. 316, 320, 306 S.E.2d 605, 608 (1983). "The limitation imposed . . . by Article X, § 11 . . . 'relates solely to general obligation bonds payable from the proceeds of ad valorem tax levies.'" Carll v. South Carolina Jobs-Economic Dev. Auth., 284 S.C. 438, 443-44, 327 S.E.2d 331, 335 (1985) (quoting Elliott v. McNair, 250 S.C. 75, 85, 156 S.E.2d 421, 426 (1967)) (emphasis added). See also Johnson v. Piedmont Mun. Power Agency, 277 S.C. 345, 353, 287 S.E.2d 476, 481 (1982) ("bonds issued [by the State] which are payable out of special funds [such as revenue bonds] do not create debts"); Elliott, 250 S.C. at 86, 156 S.E.2d at 427 ("The word 'credit' as here used was intended to protect the state against pecuniary liability") (emphasis added).
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> Here, the Southern Connector Project is not being financed with general obligation bonds, nor is the State required to use any tax revenues to pay the bonds. To the contrary, the bonds will state on their face they are payable solely from and secured by toll revenues collected from users of the Southern Connector, and will not be a debt or loan of credit of the State. This Court has repeatedly held similar disclaimers sufficient to protect the State from pecuniary liability. See, e.g., Carll, 284 S.C. at 444, 327 S.E.2d at 335; Medlock, 279 S.C. at 320, 306 S.E.2d at 609; Bauer v. South Carolina State Housing Auth., 271 S.C. 219, 246 S.E.2d 869 (1978). Furthermore, Association will issue the bonds, not the State. In no way can the State be legally obligated to pay the bonds. While Appellant argues the State may be morally obligated to pay off the bonds should toll revenues fall short, this same argument was made to and dismissed by the court in Carll: "Appellant speculates that if the Authority defaults on its bonds, the State may choose to pay off the bonds. The purpose of [Article X, section 11] is to prevent the State from being obligated to use State tax revenues to pay off the bonds." 284 S.C. at 444, 327 S.E.2d at 335 (emphasis in original). There will be no pledge of the state's credit.

Id. at 187, 490 S.E.2d at 12.

We do not have a copy of the guarantee RUS requires Santee Cooper sign. However, you state it indicates that payments under the guarantee are to be "from funds generated from the sale of Santee Cooper's energy to customers, not from the State's General Fund . . . ." If this is the case, we agree with your assessment that according to the law of South Carolina, the signing of such a guarantee would not constitute a pledge of the State's credit. Moreover, as indicated above, Santee Cooper is statutorily prohibited from pledging the State's credit. As such, it has no legal authority to pledge the State's credit. Therefore, given the terms of the guarantee as you have relayed them to us, we do not believe a court would find such a guarantee violates section 11 of article X as an illegal pledge of the State's credit.

With 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).

In your letter to us, you did not indicate that the State, one of its political subdivisions, or Santee Cooper is proposing becoming a joint owner or stockholder in Biomass. Therefore, based upon the cases cited above, we do not believe that the joint ownership clause in section 11 of article X would be violated due to Santee Cooper's guarantee of Biomass's debt. Furthermore, we note that section 11 of article X specifically allows the Public Service Authority to become a joint owner in a privately owned utility company. However, the Legislature must authorize such an arrangement. S.C. Const. Art. X, §11.

Conclusion

While this Office has not had an opportunity to review the guarantee that must be signed by Santee Cooper in order for Biomass to obtain funds from RUS, based upon the information you provided to us in your letter, we do not believe that such a guarantee would constitute a pledge of the State's credit. In addition, we do not believe that because Santee Cooper guarantees a debt of

Biomass that it becomes a joint owner in a private company. As such, we are of the opinion that if Santee Cooper chooses to give a guarantee to RUS on behalf of Biomass, it would not be violating section 11 of article X of the South Carolina Constitution.

Very truly yours,

Henry McMaster
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REVIEWED AND APPROVED BY:

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