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The State of South Carolina
# OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

June 8, 2005

The Honorable David C. Sojourner
Mayor, Town of St. George
Post Office Box 904
St. George, South Carolina 29477

Dear Mayor Sojourner:

In response to an inquiry regarding the status of a water purchase and supply agreement ("Water Agreement") between St. George ("St. George") and Lake Marion Regional Water Agency ("Agency") this office concluded that the agreement was a municipal franchise and, thus, subject to the provisions of S.C. Code Ann. § 5-31-50. This decision was based upon the information available at the time. Since that initial opinion was issued we have been provided with a copy of the Water Agreement and reviewing it has clarified the relationships that it would establish between St. George and the Agency. In light of this additional information, we conclude that the Water Agreement is not a municipal franchise agreement as defined in South Carolina law. Instead, the information before us indicates that the Water Agreement is a long term water purchase and supply agreement and therefore is not subject to the provisions of S.C. Code Ann. § 5-31-50.

The leading and most recent case on franchise agreements is *South Carolina Electric and Gas v. Town of Awendaw*, 596 S.E.2d 482, 485 (2004). In that case, the South Carolina Supreme Court defined a franchise as "a special privilege granted by the government to particular individuals or companies to be exploited for private profits. Such franchisees seek permission to use public streets or rights of way in order to do business with a municipality's residents, and are willing to pay a fee for this privilege." This definition of a municipal franchise is consistent with other South Carolina cases. For example, in *City of Cayce v. AT&T*, 486 S.E.2d 92, 94 (1997) the South Carolina Supreme Court held "governmental franchises are obtained by service-type businesses which seek the municipality's permission to do business with the municipality's citizens, and are willing to pay the municipality for its privileges." In *Quality Towing Inc., v. City of Myrtle Beach*, 547 S.E.2d 862, 867 (2001) the Court explained, "[g]overnment franchises are traditionally service-type businesses that are willing to pay the municipality for the privilege of doing business with its citizens. A franchise is a privilege of doing that which does not belong to citizens generally by common right." *See also, City of Abbeville v. Aiken Electric Cooperative, Inc.*, 338 S.E.2d 831 (185).

Thus, under the law of South Carolina, a typical franchise agreement for a water company involves a company that seeks to build a water distribution system in a municipality. The company obtains a franchise which allows it to use municipal streets and spaces to lay mains and install meters. The company then connects private customers in the city to the water system, bills them for services rendered, and shares part of the resulting profit with the city as a franchise fee.

The Water Agreement as we now understand it, does not fit this definition. The Water Agreement does not grant the Agency permission to construct a water distribution system in St. George and place mains and other distribution infrastructure on public property. The Agency will not provide water service to citizens or businesses in St. George, but will provide service only to the town's utility system. St. George will continue to have the direct contractual relationship with the citizens and businesses receiving water service, and will continue to operate the water distribution utility serving St. George. The Agency will not pay a franchise fee to St. George. Rather, St. George will pay the Agency for the water it uses.

For these reasons, we conclude that the Water Agreement is not a municipal franchise. In addition, there are also provisions in the Agreement which establish that it is not exclusive and therefore does not implicate S.C. Code Ann. § 5-31-50 (2004). Specifically, the City is only contractually bound to purchase its contracted volume of potable water from the Agency. After taking that volume of water, the City is free to purchase potable water from another entity. The Agency does not have the right to exclude other water companies from operating within St. George.

For these reasons, it is our conclusion that the Water Agreement is a utility supply contract, not a municipal franchise, and so does not fall under the provision of S.C. Code Ann. § 5-31-50 (2004).

If there are any questions, please advise.

Sincerely,

Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General