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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

March 10, 2005

The Honorable A. A. Morris, Jr.
Member, Newberry County Council
5639 New Hope Road
Pomaria, South Carolina 29126

Dear Mr. Morris:

You have asked a number of questions concerning the enabling Act of the Clinton Newberry Natural Gas Authority. By way of background, you state the following:

1. Please define the wording in the enabling legislation that says "benefit of the municipalities". Does this wording mean establishing gas service to the two municipalities where none existed previously? Does it mean providing a source of budgeted revenue for the General Funds of the two municipalities? Or does it mean a combination of both of the above, or something else? The two municipalities are currently defining it to mean providing a substantial cash flow to the General Funds of the two municipalities as a first priority. They view the Gas Authority as an extension of each city, as a revenue producing department of each city

   To elaborate this point, during the past five years (year ending 2003), the Authority Board has distributed $4,238,000 to the two cities while only spending $1,184,512 on system expansion. The data over the last twenty years is even bleaker when you compare what money was spent on system expansion versus distribution to the two cities. During the past twelve years the Authority has had a net growth of new residential customers of zero. During this same period, the Authority has lost a majority of its industrial load. Refer to items 9, 10, 11 & 12 on the Data Sheet for additional information.

2. Is it legal for the Authority to include in its annual budget a line item titled "Distribution to the Cities" in the amount of $980,000 annually? It is my understanding that an attorney informed the Gas Authority that this practice is not legal. Also, the current gas rate charged to customers is ten cents on the dollar higher than it would be in order to cover the distribution to the two

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cities. Is it also legal for action on the distribution to the two cities to be done without a vote by the Authority Board in open session? At present no formal board action is taken to make the distribution to the two cities.

3. The Enabling Act in 1952 created the Gas Authority Board as it is comprised today. It consists of seven members. Three members are from the City Council of Clinton and three are from the City Council of Newberry. Board member number seven, selected by the six board members from the two cities, is the at large board member. The seventh board member has always been a resident of one of the two cities. At present 56% of the customers of the Gas Authority are outside the city limits of the two municipalities. These customers have no representation on the Gas Authority Board. A new at large board member was appointed in September and continues to be a resident of one of the two cities, even though the board was requested to appoint someone from outside the two cities. The request was ignored. In light of current customer makeup and present economic conditions, is it time for a fifty three year old act to be reviewed and revised to reflect the current customer base and to address current conditions? Should the board makeup reflect the current customer base in order for all stakeholders to have a voice in the operations of the Gas Authority? Since 56% of the customers are outside the two municipalities, pay ten cents on the dollar of gas charge to go to the two municipalities and have no board representation, this is in effect taxation without representation. Is this also not a violation of the equal protection clause? See items #15 & 16 on Data Sheet for additional information.

Law / Analysis

The Clinton Newberry Natural Gas Authority was created by Act No. 789 of 1952. The title describes the purpose of the Act, as follows:

> An Act to create the Clinton Newberry Natural Gas Authority, to define its service area, to prescribe its functions and powers, to authorize said Authority to borrow money, to confer upon it all powers contained in Chapters 187 and 189, Code of Laws of South Carolina for 1942, as now or hereafter amended, to make provision for the disposition of the revenues and earnings of such Authority, and to make it unlawful to hurt or damage the system or property of the Authority or to obtain gas therefrom except in accordance with the regulations of the Authority, and to prescribe penalties for violations thereof.

The constitutionality of Act No. 789 was challenged in *Welling v. Clinton Newberry Natural Gas Authority*, 221 S.C. 417, 71 S.E.2d 7 (1952). There, the Supreme Court upheld the Act in its

entirety, concluding that the legislation survived scrutiny against a number of constitutional challenges. The Authority was described by the Court as follows:

> [s]tated generally, the Authority is authorized to construct, operate and maintain a transmission line and distribution system to serve Clinton and Newberry and the surrounding areas.... Within this service area are the incorporated towns of Clinton, Newberry and Prosperity and the unincorporated towns of Joanna, formerly Goldville, and Kinards.
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> The Authority is authorized to enter into contracts for the acquisition of either natural or manufactured gas, to sell such gas on such terms and rates as may be fixed by it, to exercise the power of eminent domain, to borrow money and issue bonds payable from the revenues to be derived from the operation of said system, to avail itself of the provisions of Chapters 187 and 189 of the 1942 Code, and to make rules and regulations for the management and operation of said gas system. Both the property and the obligations of the Authority are exempted from taxation.

71 S.E.2d at 9. In *Welling*, the Court concluded that the *ex officio* membership on the Authority did not contravene the dual office holding provision of the South Carolina Constitution. Moreover, the Court found that the Act's exemption of the Authority's property and obligations from taxation was valid because the provision of gas "is a public and governmental function." *Id.* at 10. Furthermore, the Court held that the Authority "is not given a monopoly" and that "[p]rivate firms, desirous of selling gas within the service area, are free to do so." In the Court's view, exclusion of other public agencies from operating in the service area presented "no constitutional objection ...." *Id.*

Additionally, the *Welling* Court concluded that the Authority's possession of the power of eminent domain is constitutionally valid. Likewise, the Court saw nothing constitutionally invalid in the Authority's fixing of rates charged for gas. The Court also rejected any contention that the towns of Clinton, Newberry and Prosperity were denied their right to operate a municipal gas system by the Act, concluding that "[t]he systems so constructed 'belong' to Clinton and Newberry just as much as if they were constructed by the respective municipal councils of these towns. They receive both the benefit and the profits therefrom. Hence, no power granted to other municipal corporations is denied to Clinton and Newberry." *Id.* at 11.

In other words, as we recognized in a previous opinion, "[t]he Clinton Newberry Natural Gas Authority, created by 1952 Act No. 789 ... was held in *Welling v. Clinton Newberry Natural Gas Authority* [*supra*] ... to be valid in all respects. *Op. S.C. Atty. Gen.*, May 25, 1970. As was stated in that same opinion, the Authority's "surplus revenues must be divided on an equitable basis between the municipalities of Clinton and Newberry." This statement in the 1970 opinion is consistent with the Court's recognition in *Welling* that "under the terms of the act, the revenues from the operation of the gas system are first to be applied in discharging the Authority's obligation for debt service, operation and maintenance, but after the revenues are to be divided on an equitable

basis between the towns of Clinton and Newberry, *for whose benefit the Authority was created.*" *Id.* at 11 (emphasis added).

In an opinion, dated March 12, 2003, we further commented upon the division between the cities of Clinton and Newberry of net revenues generated by the Authority. In that opinion, we stated the following:

> [y]our constituent is particularly concerned about the Authority's disposition of overage or surplus revenue. In section 5 of the Enabling Act, the Legislature designated the manner in which the Authority's funds are to be appropriated. The Act provides that "[a]ll net revenues derived from the system whose disposition the authority shall not have covenanted to otherwise dispose of shall be disposed of as follows:" Subsection (a) states that the "sum which reflects the proportion of revenue derived from the sale of firm gas shall be divided between Clinton and Newberry on the basis of firm gas sold within their respective municipal service areas." Subsection (b) adds that the "sum which reflects the proportion of the revenue derived from the sale of interruptible gas shall be divided equally between Clinton and Newberry, irrespective of where such interruptible gas shall be sold." Finally, subsection (c) states that a portion of the revenue to which Newberry is entitled shall be used to reimburse the authority for the cost of the construction of the transmission line located "between the northwestern municipal limits of Newberry and the line dividing the Counties of Newberry and Laurens." Of course, this Office cannot resolve factual questions in an opinion, Op. S.C. Atty. Gen., December 5, 1983 and it would be a factual issue as to whether these provisions are being followed by the Authority in a particular instance.
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> Nevertheless, it is well recognized that where the General Assembly has appropriated funds in a particular manner, such funds must be spent in the manner designated by the General Assembly. *See* Condon v. Hodges, 349 S.C. 232, 562 S.E.2d 623 (2002). Accordingly, for the Authority to transfer to the cities of Clinton and Newberry net revenues "whose disposition the authority shall not have covenanted to otherwise dispose of"would, on its face, seem to be in keeping with the Authority's enabling legislation.

Turning now to your specific questions, it must be stated at the outset that the concerns expressed in your letter necessarily would have to be addressed primarily by legislative action. Quoting our Supreme Court in *Fort Hill Natural Gas Authority v, City of Easley*, 310 S.C. 346, 426 S.E,2d 787 (1993), if a portion of an enabling act is considered to be "... unwise or substantially interferes with ... [the] operation of the system, [the] ... proper recourse is to seek an amendment from the legislature." This being the case, ultimate recourse for addressing your concerns would be to the General Assembly.

Moreover, as noted, the Supreme Court has already upheld Act No. 789 against a variety of constitutional challenges. The likelihood of a portion of the Act in question being declared invalid or unconstitutional is thus somewhat remote. As to your question regarding the definition of "benefit of the municipalities," as found in Act No. 789, we note that the Act does not expressly define such term. However, as the Supreme Court stated in *Welling*, after payment of the Authority's "debt service, operation and maintenance ... the revenues are to be divided on an equitable basis between the towns of Clinton and Newberry *for whose benefit the Authority was created.*" (emphasis added). In other words, in addition to the "benefit" obtained by Authority providing gas service to the towns of Clinton and Newberry, the Court has read the Act as written as providing for *the financial benefit* of the two Towns named. Accordingly, with respect to your statement that the two municipalities view "the Gas Authority as an extension of each city, as a revenue producing department of each city," the Court has concluded that the raising of revenues for the municipalities is indeed one goal which the General Assembly had in mind in the passage of Act No. 789 of 1952. Of course, we cannot make factual determinations in an opinion of the Attorney General. *Op. S.C. Atty. Gen.*, December 12, 1983. However, it seems clear, based upon the *Willing* case, that the Supreme Court views revenue production for the two municipalities as at least one principal purpose of the Act. Any change in that purpose will thus have to come from the General Assembly.

The decision of the South Carolina Supreme Court, *Fort Hill Natural Gas Authority v. City of Easley, supra*, is particularly instructive in this regard. In that case, the Fort Hill Authority brought an action for a declaratory judgment against the City of Easley with respect to a particular issue not relevant to that appeal; however, the City counterclaimed, contending that "the Authority exceeded its power by reserving funds [for new pipeline] which should have been disbursed to the member towns [Clemson, Seneca and Liberty] under Section 6 of the Act." *Id.* at 327. Section 6 of the Enabling Act of the Fort Hill Natural Gas Authority (as is the case with the Clinton-Newberry Natural Gas Authority) requires that all net revenues not subject to contract or covenant be disbursed to the member municipalities of Clemson, Seneca and Liberty. *See*, Act No. 799 of 1952.[1] However, the Fort Hill Authority had "set aside" $1,000,000 in revenues for new pipeline in 1989 and $2,000,000 for a similar purpose in 1990. The member towns challenged the Authority's power to set aside those revenues, arguing to the Supreme Court that such a diversion exceeded the statutory requirement of disbursement to the towns of all net revenues.

Writing for the Court, Justice (now Chief Justice) Toal agreed. The Court concluded as follows:

> Section 6 of the Act clearly requires all net revenues not subject to a contract or covenant to be disbursed to the Towns. Furthermore, this mandate is wholly

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[1] As the Court noted in *Fort Hill*, the Fort Hill and Clinton Newberry Natural Gas Authorities were two of "several similar entities created throughout the state during this period." 310 S.C. at 346, *Id.*, n. 1.

> consistent with the purpose of the Act which was to provide the area with the most economical method of securing gas for the Towns and the surrounding area's inhabitants. The Towns by becoming members of the Authority, have relinquished their right to operate a municipal gas system and receive any profits which might be derived from such a system. Accordingly, as the preamble to the Act clearly indicates, the Authority is charged with the responsibility to operate and maintain the system "for the benefit fo the municipalities which it serves...." 1952 S.C. Acts § 799 at 1987.
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> The Authority maintains that interpreting section 6 literally and requiring the Authority to divest itself of all net profits creates absurd results not intended by the legislature. The Authority's current balance sheets show equity of over $24,000,000. Thus, the Authority is far from penniless. Additionally, the Authority enjoys a steady cash flow of over $600,000 each months. The Authority is given plenary power to borrow money and issue bonds for capital improvements. *Id.* § 5(s). Finally, several experts in the field of utility management and economics testified the ability to set aside funds without a contract or covenant was not essential to the Authority's financial well-being.
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> Accordingly, we see no justification to alter what we find is the plain and unambiguous directive of the Act. We agree with the Towns; the Authority did not have the power to withhold net revenues as they did in 1989 and 1990. Thus, we affirm the order of the Referee. If the Authority feels that section 6, requiring divestment of revenues, is unwise or substantially interferes with its operation of the system, its proper recourse is to seek an amendment from the legislature. *Manufacturers Finance Acceptance Corp v. Bramlett*, 157 S.C. 419, 154 S.E. 410 (1930) (the power to change a statute rests with the lawmaking body). In that regard, we note that any amendment to this statute would not violate Article VIII, Section 7 of the South Carolina Constitution, as the Authority extends beyond the confines of one county. *Kleckley v. Pulliam*, 265 S.C. 177, 217 S.E.2d 217 (1975).

Id. at 349-350. Thus, the Court construed similar language in the enabling act of the Fort Hill Natural Gas Authority as mandating that all net revenues must go to the participating municipalities. Clearly, the Court interpreted the phrase "for the benefit of the municipalities" as including "financial benefit," in the sense that net revenues must be distributed to the towns in question.

With respect to your question regarding the practice of a line item in the annual budget for "Distribution to the Cities" being "not legal," I am unaware of what such purported illegality would be based upon. Again, the Court has upheld the Legislature's mandate in Act No. 789 of 1952 regarding "distribution" of revenues to Clinton and Newberry. Moreover, the Court has ruled in *Fort Hill* that net revenues may not be withheld from participating municipalities. If the conclusion of "illegality" is based upon the fact that the distribution of revenues consists of the same amount

each year, we are able here only to point out that such distribution must be of "net" revenues. *See*, *Welling*, *supra*. However, as noted, the resolution of factual issues is beyond the scope of an opinion of this Office. It would, of course "be a factual issue as to whether these provisions are being followed by the Authority in a given instance." *Op. S.C. Atty. Gen.*, March 12, 2003, *supra*. As to whether the process of distribution of revenues to the municipalities comports with proper accounting procedures or good business practices, such is beyond the scope of an opinion.

With respect to your question concerning compliance with the Freedom of Information Act, of course, the Authority would be considered a "public body" for purposes of the FOIA and would be required to comply with the Act. *See*, S.C. Code Ann. Sec. 30-4-10 *et seq*. You note that "[a]t present no formal action is taken to make the distribution to the two cities." Section 30-4-70 requires that "no formal action may be taken in executive session" and that "[n]o vote may be taken in executive session." Such action may only be taken in open session. The Act defines "formal action" as "a recorded vote committing the body concerned to specific action." Obviously for the reasons stated above, we do not address herein any specific factual situation regarding the FOIA.

As to your other questions, you note that because the "at large" member of the Authority "has always been a resident of one of the two cities," customers outside the city limits of the two municipalities "have no representation on the Gas Authority Board." Your concern is that this situation "in, in effect, taxation without representation" or "a violation of the equal protection clause."

In an opinion, dated May 9, 1988, we addressed the question of whether there is any legal requirement that appointments to the Horry County Election Commission must "reflect the various geographic areas of the county" and in a "county in which there are several municipalities or other geographic areas with a significant proportion of the population of the county, is it legal for all appointees to reside within the same geographic area of the county?" In response to these questions, we stated the following:

> [a] review of the statutes governing the appointments of various boards or commissions of the State of South Carolina or its political subdivisions reflects that in some instances, the General Assembly did not impose such a geographic residency requirement. See, for examples, Sections 5-31-210 and 5-31-240 of the Code (municipal commissions of public works); Section 6-7-360 (local planning commissions); Section 6-7-740 (zoning boards of appeals or boards of adjustment); Section 6-13-30 (rural community water districts); Section 43-3-10 (county boards of social services); Section 7-3-10 (State Election Commission); Section 48-27-20 (State Board of Forestry); Section 44-3-10 (municipal boards of health), and Section 44-9-30 (South Carolina Mental Health Commission), among others.
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> In numerous other instances however, the General Assembly has imposed geographic residency requirements or restrictions. A good example is Section 4-9-

> 35, as to county library boards, which provides in part (B) that '[t]o the extent feasible, members shall be appointed from all geographical areas of the county.' See also Section 58-3-20 (Public Service Commission); Section 5-15-20 (city council members, sometimes required to reside in particular wards); Section 4-9-90 (county council members, sometimes must reside in districts under single member district scheme); Section 43-25-10 (South Carolina Commission for the Blind); Section 43-21-10 (South Carolina Commission on Aging); Section 44-15-60 (community mental health boards, geographic representation in proportion to contribution to the budget); Section 44-21-830 (county mental retardation boards in proportion to county's share of total population of counties served); and many others.
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> The express inclusion of such a geographic residential requirement for many boards and commissions of the State and its political subdivisions would impliedly exclude that type of requirement from statutes governing appointments of boards and commissions in which that type of requirement is not mentioned. See Home Building & Loan Association v. City of Spartanburg, 185 S.C. 313, 184 S.E. 139 (1938). Thus, we are of the opinion that Sections 7-5-10 and 7-13-70 do not require the appointees to the county boards of registration and the county election commission to reflect the geographic residential composition or population areas of the particular county.
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> In so reaching this conclusion, we are mindful of the fact that each of these boards serves the county as a whole. While it may be argued that the fair or equitable practice would be to appoint members to represent the broadest segments of geography or population of the county as possible, it is not legally or statutorily required. Of course, the General Assembly could amend either or both of the statutes, to impose such a requirement, if the General Assembly wished to do so. Such an amendment must necessarily be made by the General Assembly rather than by an opinion of the Attorney General.

Thus, we have previously recognized that it is a matter for the General Assembly, if it so desires, to impose any requirement specifying that an "at large" member must be chosen from an unincorporated area.

Moreover, it is well recognized that the "one person, one vote" requirements of the federal Constitution are not invoked when members of a governing board are appointed rather than elected. As the United States Supreme Court stated in *Hadley v. Jr. College Dist. of Metro. Kansas City*, 397 U.S. 50, 58 (1970), "where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not 'represent' the people does not deny those people equal protection of the laws." As we concluded in *Op. S.C. Atty. Gen.*, March 4, 2003, "[s]election by appointment ... does not constitutionally require weighted voting." And, as the Supreme Court found in *Sailors v. Bd. Ed. of County of Kent*, 387 U.S. 105, 107 (1967), "[s]ince the choice of members of the county school

board did not involve an election and since none was required for these nonlegislative offices, the principle of 'one man one vote has no relevancy." *See also*, *Hagley Homeowners Assn., Inc. v. Hagley Water and Sewer Authority,* 326 S.C. 67, 485 S.E.2d 92, 96 (1997) ["the imposition of a charge in exchange for a service does not constitute taxation for constitutional purposes. Accordingly, legislative delegation of authority to impose charges and assessments to an appointed body does not run afoul of the prohibition against taxation without representation."]. Thus, based upon the foregoing authorities, the fact that the "at large" appointee is consistently someone from one of the two municipalities, rather than a person who resides outside the corporate limits of these municipalities would not likely be held by a court to rise to the level of a constitutional violation. Act No. 789 of 1952 expressly states only that "[t]he six members so designated shall, at their first meeting, elect a seventh member, *who shall reside in the service area of the authority.*" (emphasis added). In view of the fact that nothing contained in Act No. 789 of 1952 requires that such appointee be a resident of an area outside the geographical boundaries of the two municipalities, and indeed simply requires only that the seventh member "reside in the service area of the authority," no such requirement of residency from an unincorporated area may be implied. It would be a matter for the General Assembly, within its discretion, to address this question.

Conclusion

Of course, this Office is unable to make factual determinations in an opinion of the Attorney General. However, it is clear that Act No. 789 of 1952, which creates the Clinton Newberry Natural Gas Authority, has been upheld by our Supreme Court against numerous constitutional challenges. Moreover, our Court has concluded that the Fort Hill Natural Gas Authority, which is created by a similar enabling act to that creating the Clinton Newberry Authority, requires that *all* net revenues must be distributed to the participating municipalities. Thus, the Court concluded that the Authority's revenues could not be set aside or diverted for new pipeline in light of the express language of the enabling act that all revenues not subject to a contract or covenant must be disbursed to the towns. Instead, all net revenues must be distributed to the municipalities in accordance with the express terms of the Act.

In addition, a number of authorities, referenced herein, have concluded that, absent express legislative authority, there is no requirement that appointees be residents of a particular geographic area within the boundaries of the particular entity in question. In other words, the law appears clear that, without a specific statute requiring that the seventh or "at large" member of the Authority be a resident of an area outside the corporate limits of Clinton and Newberry, no such requirement exists. In this instance, no provision relating to the issue of the at large member's residency within the Authority's operating area is contained in Act No. 789 of 1952. Instead, the Act simply requires that the seventh member "shall reside in the service area of the authority." Thus, we cannot infer that any requirement that this member reside outside the towns of Clinton or Newberry exists. Furthermore, the legal authorities are to the effect that no constitutional violation, such as an Equal Protection or "taxation without representation" infringement occurs by virtue of the "at large" appointee being a person from one of the two municipalities in question.

In summary, your concerns must be addressed through legislative action by the General Assembly. As the Court recognized in *Fort Hill*, *supra* "proper recourse is to seek an amendment from the legislature." 310 S.C. at 350. We regret our response herein may not be more favorable to the issues you have raised.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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