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HENRY MCMASTER
ATTORNEY GENERAL

July 19, 2006

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Dear Mr. Young:

We received your letter requesting an opinion of this Office in regard to the legality and constitutionality of the Competitive Cable Services Act. In your letter, you indicate: "This legislation appears to invade municipal authority with respect to franchising and control of the municipal right-of-way."

Law/Analysis

Because the Legislature recently enacted the Competitive Cable Services Act, we find it pertinent in addressing your question to look at a municipality's authority with regard to cable franchising prior to the enactment of this legislation. In examining a municipality's authority, we keep in mind that "[a] municipal corporation is a creature of statute and has only the powers expressly granted it, those which are necessarily or fairly implied in or incident to the express powers, or those powers essential to the accomplishment of its purpose." Piedmont Pub. Serv. Dist. v. Cowart, 319 S.C. 124, 131, 459 S.E.2d 876, 880 (Ct. App. 1995). Furthermore, article VIII, section 9 of the South Carolina Constitution (1976) states: "The structure and organization, powers, duties, functions, and responsibilities of the municipalities shall be established by general law . . . ." The Legislature afforded municipalities numerous powers with its enactment of section 5-7-30 of the South Carolina Code (2004). This section provides:

> Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it . . . .

Request Letter

S.C. Code Ann. § 5-7-30. This provision also lists specific activities within a municipality's authority, which includes the "grant franchises for the use of public streets and make charges for them . . . ." Id.

Our courts, on several occasions, addressed issues involving grants of franchises by municipalities. In City of Cayce v. AT&T Communications of Southern States, Inc., 326 S.C. 237, 241-42,486 S.E.2d 92, 94 (1997), our Supreme Court noted:

> Traditionally, 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 this privilege. Types of services which are typically franchised include electricity [e.g., SCE & G v. Berkeley Elec. Coop. Inc., 306 S.C. 228, 411 S.E.2d 218 (1991)]; water and sewer services [e.g., Touchberry v. City of Florence, 295 S.C. 47, 367 S.E.2d 149 (1988)]; and cable television [e.g., Condon v. Best View Cablevision, 292 S.C. 117, 355 S.E.2d 7 (Ct. App.1987)].

Moreover, the Court on another occasion explained:

> A franchise constitutes 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. While a franchise is a privilege, it also is viewed as a function delegated to private individuals to be performed for the furtherance of the public welfare and subject to public control. A municipality in South Carolina may enact ordinances and regulations which grant franchises for the use of public streets and make charges for them, provided the ordinances and regulations are consistent with the Constitution and general law of the state.

South Carolina Elec. & Gas Co. v. Town of Awendaw, 359 S.C. 29, 35, 596 S.E.2d 482, 485-86 (2004) (citations omitted). That Court continued by pointing out that article VIII, section 15 of the South Carolina Constitution "vests the authority to make such decisions in a municipality's governing body." Id. at 35, 596 S.E.2d at 486.

Article VIII, section 15 Of the South Carolina Constitution (1976) states:

> No law shall be passed by the General Assembly granting the right to construct and operate in a public street or on public property a street or other railway, telegraph, telephone or electric plant, or to erect water, sewer or gas works for public use, or to lay mains for any purpose, or to use the streets for any other such facility, without first obtaining the consent of the governing body of the municipality in control of the streets or public places proposed to be occupied for any such or like purpose; nor shall any law be passed by the General Assembly granting the right to construct and operate in a public street or on public property a street or other railway, or to erect waterworks for public use, or to lay water or sewer mains for any purpose, or to use the streets for any facility other than telephone, telegraph, gas and electric, without first obtaining the consent of the governing body of the county or the consolidated political subdivision in control of the streets or public places proposed to be occupied for any such or like purpose.

S.C. Const. art. VIII, § 15 (emphasis added). Thus, this provision prohibits the Legislature from enacting a law granting a utility provider the authority to construct, operate, or use public streets or public property without obtaining the affected municipality's consent.

The Legislature also enacted legislation particularly dealing with cable television franchising. These provisions are found in chapter 12 of title 58 of the South Carolina Code. Section 58-12-10 of the South Carolina Code (Supp. 2005) states, among other things, the governing body of the municipality or county must approve the construction, maintenance, and operation of cable over or beneath public lands or public roads by a cable television company. Furthermore, section 58-12-30 of the South Carolina Code (Supp. 2005) gives counties and municipalities "the power and authority to regulate the operation of any cable television system which serves customers within its territorial limits by the issuance of franchise licenses . . . ."

As you mentioned in your letter, the Legislature recently enacted the Competitive Cable Services Act (the "Act"). This Act amends chapter 12 of title 58. Within the stated purposes of the Act, the Legislature provided: "The General Assembly finds that revising the current system of regulation of these services will relieve consumers of unnecessary costs and burdens, encourage investment, and promote deployment of innovative offerings that provide competitive choices for consumers." S.C. Code Ann. § 58-12-5(A). Inapposite of the previous version of chapter 12, the Act prohibits municipalities and counties from issuing any cable franchises after its effective date, but allows existing cable franchises to continue until they expire or terminate. Id. § 58-12-5(B). Furthermore, the Act specifically states: "This chapter occupies the entire field of franchising or otherwise regulating cable service and pre-empts any ordinance, resolution, or similar matter adopted by a municipality or county that purports to address franchising or otherwise regulating cable

service." Id. § 58-12-5(C). The Act sets forth the procedures by which all providers of cable services are to file an application for a state-issued certificate of franchise authority. Id. § 58-12-310. The South Carolina Secretary of State, not the municipalities or counties, is charged with processing these applications and issuing certificates. Id.

Before we examine the constitutionality of the Act, we note "[a]ll statutes are presumed constitutional." Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue, 358 S.C. 647, 652, 595 S.E.2d 890, 892 (Ct. App. 2004). Our courts recognize the principle that statutes "will not be found to violate the constitution unless their invalidity is proven beyond a reasonable doubt." Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 398, 596 S.E.2d 42, 47 (2004). Thus, courts, if at all possible, construe statutes as valid. Hendrix v. Taylor, 353 S.C. 542, 550, 579 S.E.2d 320, 324 (2003). Furthermore, this Office recognizes that only a court may deem a statute unconstitutional. Op. S.C. Atty. Gen., May 4, 2005. Accordingly, despite our conclusions with regard to the Act, it remains valid and enforceable until and unless a court determines it is unconstitutional. Id.

Initially, we believe the Legislature's enactment of the Act is legally within the scope of the Legislature's authority.

> The supreme legislative power of the State is vested in the General Assembly; the provisions of our State Constitution are not a grant but a limitation of legislative power, so that the General Assembly may enact any law not expressly, or by clear implication, prohibited by the State or Federal Constitution; a statute will, if possible, be construed so as to render it valid.

State v. Charron, 351 S.C. 319, 323, 569 S.E.2d 388, 390 (Ct. App. 2002). Additionally, as noted above, municipalities are creatures of statute and are limited to the authority given to them by the Legislature. Clearly, the Legislature may amend the authority it chooses to give municipalities. Therefore, we do not take issue with the Legislature's decision to take cable franchising authority away from municipalities pursuant to the Act. However, because the Legislature's authority is limited by the Constitution, we must consider whether the Act runs afoul of article VIII, section 15.

Article VIII, section 15, cited in full above, limits the Legislature's authority by requiring a municipality's consent before it enacts legislation allowing a utility company to construct, operate, or use public roads or lands. In our review of the Act, it appears to consider this provision. The Act requires the Secretary of State to send notice of a provider's application for a certificate of franchise authority to any affected municipality and county. S.C. Code Ann. § 58-12-310(C). The municipality, in response to such information, shall indicate whether it consents to the issuance of the certificate. Id. Furthermore, the Act mandates: "If a municipality or county denies consent or does not timely indicate its unconditional consent to the state-issued certificate of franchise authority

sought in the application or amended application, the Secretary of State shall deny the application or amended application with regard to that municipality or county . . . ." Id. § 58-12-310(D).

The Act, by incorporating the municipal consent requirement of article VIII, section 15, thereby appears not to be in violation of this constitutional provision. However, the Act imposes requirements on the municipalities not mandated in article VIII, section 15. First, if the municipality denies consent to the issuance of a certificate, section 58-12-310(C) requires the municipality to give "an explanation of the reasons for the denial . . . ." In addition, the Act places a time limit on the municipality's response to the Secretary of State's notification. "A municipality or county must respond to a request issued by the Secretary of State pursuant to subsection (C) within sixty-five days of the date of such request." S.C. Code Ann. § 58-12-310(D). Given past decisions of our courts, which we discuss further below, an issue may arise as to whether or not these additional requirements render the Act constitutionally suspect.

In State ex rel. Riley v. Pechilis, 273 S.C. 628, 258 S.E.2d 433 (1979), the South Carolina Supreme Court considered the constitutionality of advisory elections to determine nominees for the office of magistrate. The Court considered article V, section 23 of the South Carolina Constitution, which grants the Governor authority, with the advice and consent of the South Carolina Senate, to appoint magistrates for each county. Id. In its review of this provision the Court stated:

> Any statute or requirement which, directly, or by necessary implication, operates so as to defeat the purpose and intent of the foregoing constitutional provision is unconstitutional.
>
> This constitutional provision therefore sets forth the exclusive method for selection of magistrates, and compliance with its terms is mandatory.

Id. at 630, 258 S.E.2d at 434. The Court explained: "In spite of the constitutional mandate whereby the office of magistrate is expressly made an appointive office, political parties have for many years used preferential primary elections in some counties as a method to select nominees for the office of magistrate to be submitted to the Governor for appointment." Id. at 631, 258 S.E.2d at 434. Furthermore, the Court noted: "In addition to the foregoing action by political parties, statutes have been enacted in several instances providing for magisterial nominating elections . . . ." Id. The Court determined the effect of these elections is "to coerce the Governor into appointing and the Senate into confirming the nominee of the election, regardless of his or her qualifications for office, thereby chilling the constitutionally granted discretionary power of the Governor to appoint magistrates." Id. at 632, 258 S.E.2d at 434-35. Furthermore, the Court added: "The fact that the Governor is not bound to accept the individual named in such election is not decisive of the present issue. The decisive fact is the effect of such election upon the exercise of the power of appointment." Id. Thus, the Court concluded: "The clear effect of such primaries is to chill the

constitutional selection process and abridge the discretionary power of the Governor to appoint magistrates." Id. at 633, 258 S.E.2d at 435. Based on this conclusion, the Court held these primaries are in violation of article V, section 23 and therefore, are unconstitutional. Id.

In its analysis, the Court in Riley cited to a previous decision by the South Carolina Supreme Court, State v. Green, 220 S.C. 315, 67 S.E.2d 509 (1951). In that case, the Court considered whether a trial judge erred in asking the jury, after it convicted Green, to recommend a sentence. Id. The Court acknowledged the fact that the trial judge informed the jury that is was not required and may not follow its recommendation. Id. However, the Court determined:

> The jury had nothing to do with the question of punishment, but only with that of guilt. The court alone has the power and discretion to fix the punishment, and in our opinion the jury cannot infringe on this prerogative by any recommendation, in the absence of statute,-either on its own initiative or by invitation of the court.

Id. at 319, 67 S.E.2d at 511.

With regard to the Act, the requirement of a municipality's consent prior to the issuance of a certificate by the Secretary of State appears to mirror article VIII, section 15. But, in light of the Supreme Court's decisions in Riley and Green, a court may find the additional requirements imposed on municipalities to provide a reason for denying consent and to provide consent within sixty-five days act to usurp the municipality's authority to deny a cable provider the privilege to construct, operate, or use public streets or public land within its control. Nevertheless, we believe asking a municipality to give a reason for denying consent in no way impairs its ability to do so. Furthermore, although the municipality is required to respond to the Secretary of State within sixty-five days, this time limit does not effectively cut off the municipality's authority to deny consent. Moreover, should the municipality not respond within the sixty-five-day period, the Act requires the Secretary of State to deny the application. See S.C. Code Ann. § 58-12-310(D).

We keep in mind the presumption that a statute is constitutional. In light of this presumption, in our opinion, these requirements do not reach the level of coercing the municipality into consenting to the issuance of the certificate for a particular provider and thereby "chilling the constitutionally granted discretionary power" of the municipality to deny a provider the right to conduct its business on public property. However, a court may find otherwise, and as we noted, only a court may make the ultimate determination of the Act's constitutionality.

Conclusion

You inquire as to whether the Act unconstitutionally invades a municipality's authority to franchise and control the municipal right of way. Presuming this legislation is valid unless its

invalidity can be proven beyond a reasonable doubt, we believe the Legislature acted within its authority in amending chapter 12 of title 58 by enacting the Competitive Cable Services Act. Additionally, the Act does not appear to run afoul of the constitutional consent requirement provided in article VIII, section 15 of the South Carolina Constitution. However, we caution, in light of the Supreme Court's holdings in Riley and Green, a court, which is the ultimate decision maker with regard to the constitutionality of a statute, may conclude differently.

Very truly yours,

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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