ALAN WILSON
ATTORNEY GENERAL

June 16, 2011

Curtis M. Dillard, P.E.
General Manager, Woodruff-Roebuck Water District
Post Office Box 182
Woodruff, South Carolina 29388

Dear Mr. Dillard:

We received your letter requesting an opinion of this Office concerning the Woodruff-Roebuck Water District's (the "District's") ability to "determine the appropriate sources of water to be secured to serve the needs of its customers." Moreover, you are also concerned about the "legal obligations of municipal suppliers to customers located outside their boundaries and the deference that should be given in permitting matters to the District's decision as to suitable water supplies to meet the needs of its citizens."

You provided the following information concerning the District's current water supply:

> [T]he District has historically obtained wholesale water supplies from a municipal supplier pursuant to the terms of a contract that will expire in 2013. After careful consideration, the District has determined that it is not in the best interest of its system or its customers to continue to rely predominately on municipal sources to meet its future bulk water needs. For that reason, the District has for some years communicated its intent to allow its current wholesale service agreements to expire in 2013. The District is presently constructing a 4.4 million gallon per day water treatment plant with intakes on the North and South Tyger Rivers. The District's future needs for water will also require construction of a reservoir on Ferguson Creek to ensure raw water supplies for the new plant in drought conditions. A Corp of Engineers permit will be required for the reservoir.
>
> An issue may arise in evaluating the permit application concerning the deference that should be granted to the District's decision that continuing to rely on wholesale municipal contracts is

not in its citizens' best interests. For that reason, we are asking for guidance on the following questions:

(1) Under South Carolina law, what entity is vested with the authority to determine who to best provide for the water supply needs of the District's residents within its statutory-defined service area?

(2) Under South Carolina law, what obligation does a municipal supplier have to provide service on reasonable terms to wholesale customers like the District that are located outside of its boundaries?

(3) Under the allocation of responsibilities set up by South Carolina law, what deference should a resource agency give to the District's decisions concerning acceptable sources of future supply?

Law/Analysis

As you explained in your letter, the Legislature established the District by act 1101 of 1956. 1956 Acts 2841. This legislation, which you provided a copy to us, states that the General Assembly determined that the area encompassed by the District "has become populated to an extent that makes it necessary and desirable for the health and welfare of the inhabitants thereof to be served by publicly operated water and sewer systems . . . ." Thus, the Legislature created the District to construct, operate, maintain, improve, and extend "a water distribution system, a sewer system, and a system for fire protection within the district." The enabling legislation gave the District the authority to

8. Build, construct, operate and maintain water lines and water mains throughout the district, and all apparatus necessary for the proper functioning of the same, and from time to time to enlarge and extend the same.

. . .

11. Purchase, or otherwise acquire a supply of water for its water distribution system, and to that end to build, construct, maintain and operate water tanks, reservoirs, pumps, and such other apparatus as may be necessary to obtain and distribute water, and to enter into contracts for the purchase of water at wholesale.

. . . .

1956 S.C. Acts 2841. Accordingly, the Legislature made the District responsible for supplying water to residents within the District's boundaries. In addition, the Legislature gave the District the authority necessary to fulfill this responsibility. Although the Legislature amended the District's enabling legislation on several occasions, it did not change the authority given to the District in this regard. Accordingly, we believe the Legislature intended for the District to determine the needs of its residents.

Section 5-7-60 of the South Carolina Code (2004) specifically allows municipalities to provide water service outside of their corporate limits. This provision states:

> Any municipality may perform any of its functions, furnish any of its services, except services of police officers, and make charges therefor and may participate in the financing thereof in areas outside the corporate limits of such municipality by contract with any individual, corporation, state or political subdivision or agency thereof or with the United States Government or any agency thereof, subject always to the general law and Constitution of this State regarding such matters, except within a designated service area for all such services of another municipality or political subdivision, including water and sewer authorities, and in the case of electric service, except within a service area assigned by the Public Service Commission pursuant to Article 5 of Chapter 27 of Title 58 or areas in which the South Carolina Public Service Authority may provide electric service pursuant to statute. For the purposes of this section designated service area shall mean an area in which the particular service is being provided or is budgeted or funds have been applied for as certified by the governing body thereof. Provided, however, the limitation as to service areas of other municipalities or political subdivisions shall not apply when permission for such municipal operations is approved by the governing body of the other municipality or political subdivision concerned.

S.C. Code Ann. § 5-7-60.

In addition, section 5-31-1910 of the South Carolina Code (2004) addresses a municipality's ability to furnish water outside of its municipal boundaries. This provision states:

> Any city or town in this State owning a water or light plant may, through the proper officials of such city or town, enter into a

> contract with any person without the corporate limits of such city or town but contiguous thereto to furnish such person electric current or water from such water or light plant of such city or town and may furnish such water or light upon such terms, rates and charges as may be fixed by the contract or agreement between the parties in this behalf, either for lighting or for manufacturing purposes, when in the judgment of the city or town council it is for the best interest of the municipality so to do. No such contract shall be for a longer period than two years but any such contract may be renewed from time to time for a like period.

S.C. Code Ann. § 5-31-1910. Thus, a municipality may provide water service outside of its corporate limits.

In a 1989 opinion, we determined that a municipality providing water outside of its corporate limits is a matter of contract. Op. S.C. Atty. Gen., July 17, 1989. In that opinion, the requester asked whether a municipality must charge non-resident water and sewer customers the same rate as its resident customers. We noted the authority given to municipalities in sections 5-7-60 and 5-31-1910 and cited to a 1976 opinion construing section 5-31-1910 and stated:

> The conclusion reached in that opinion was that a non-resident purchaser of water from a municipality would have only those rights set forth or necessarily implied from the contract to sell and furnish water, and further that the non-resident has no rights beyond those in the contract. The opinion, relying upon Sossamon, noted that "a profit could be realized by the municipality in the sale of water to nonresidents."

Id. (citing Op. S.C. Atty. Gen., July 17, 1989). Accordingly, we concluded as follows:

> It thus appears that the establishment of higher rates or charges for the provision of water or sewer services to non-resident customers is not covered by statute but is instead a matter of contract. This Office has advised previously that a municipality has considerable discretion in entering into contracts to provide its services to persons residing outside municipal boundaries. Op.Atty.Gen. No. 86-126. As noted therein, the use of the term "may" in Section 5-7-60 "indicates that extra-territorial provision of services by a municipality, by contract with an individual, is within the discretion of the municipality." The setting of rates thus appears to be within the discretion of the municipality, as well; we have identified no authority which requires city residents and non-residents to be charged the same rates. See also Opinion No. 4246.

Later, the Court of Appeals in Calcaterra v. City of Columbia, 315 S.C. 196, 432 S.E.2d 498 (Ct. 1993), came to a similar conclusion. The Court considered whether the City of Columbia could charge higher water rates to non-residents. The Court stated:

> The Supreme Court has held that the municipal governing body in setting rates for services outside the corporate limits is to be guided by the best interests of the municipality and has an obligation to sell surplus water for the highest price obtainable. Childs v. City of Columbia, 87 S.C. 566, 70 S.E. 296 (1911) (non-resident alleged a charge of four times that charged residents was excessive and exorbitant).

Id. at 197; 432 S.E.2d at 498. Like our 1989 opinion, the Court also considered the authority given to municipalities under sections 5-7-60 and 5-31-1910 of the South Carolina Code and determined that rates are matter of contract. Id. at 197-98, 432 S.E.2d at 499.

In addition, the Court concluded that the provisions of the South Carolina Unfair Trade Practices Act are not applicable in this situation. Id. (citing S.C. Code Ann. § 39-5-40(a)). The Court explained:

> Under this body of law, we find no violation of the SCUPTA in Columbia's charging non-residents a higher rate for water than it charges its residents. We agree with appellants that every contract carries an implied covenant of good faith and fair dealing, but we find no violation of the implied covenant and no breach of contract as Columbia only agreed to sell water to the appellants at published rates established by ordinance, and has no duty to sell water to non-residents at the same rate it furnishes water to its residents.

In your second question, you asked if municipalities must provide service on reasonable terms. Our 1989 opinion and the Court's decision in Calcaterra recognize that the terms offered to nonresidents are a matter of contract. Therefore, to answer your question, as long as the District agrees to the terms offered by the municipality, a court is not likely to question the agreement.

Lastly, you ask us about whether deference should be given to the District when a resource agency determines whether or not to grant the District a permit. The deference given by a permitting agency, in this case the Corp of Engineers, we believe is a matter of the federal law governing that agency and that agency's policies. The examination of federal law and the policies of a federal agency are beyond the scope of an opinion of this Office. Op. S.C. Atty. Gen., July9, 2010. However, we can advise that State law clearly gives the District the responsibility to provide water to its residents. Furthermore, the District's enabling legislation

specifically gives it the authority to construct reservoirs and take any other steps necessary to meet its obligation to provide water to its residents. Therefore, we hope that the Corp of Engineers would take the District's responsibilities and powers into account, but nothing under State law specifically requires that agency to give deference to the District.

Conclusion

The Legislature specifically gave the District the authority and responsibility to provide water to its residents. The District's enabling legislation contemplates that the District can either provide water through its own means or purchase water from an outside source. Therefore, we believe that the Legislature intended for the District to have discretion as to how to meet its residents' water needs.

South Carolina law specifically allows municipalities to provide water outside of their corporate limits by means of a contract with the non-residents requesting service. Thus, while municipalities are permitted to provide water service, that service provided is governed by contract. Therefore, the terms upon which the service is provided depends upon the agreement between the District and the municipality.

Lastly, State law gives the District discretion as to how it provides water service to its residents. However, we believe that whether a permitting agency gives deference to the District is a matter of the permitting agency's policy and the law governing that particular agency. Therefore, we cannot opine as to whether the Corp of Engineers, in the situation you described, must give the District deference in deciding whether the District may receive a permit to construct a reservoir.

Very truly yours,

Cydney Milling

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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