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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

October 7, 1996

Emil W. Wald, Esquire
P. O. Box 790
Rock Hill, South Carolina 29731-6790

Re: Informal Opinion

Dear Mr. Wald:

You have been instructed by the Board of Lancaster County Natural Gas Authority to seek an opinion regarding whether the Board can donate money "toward the construction of a modern and technologically advanced Arts and Science Building at the University of South Carolina at Lancaster (USC-L)." Your specific questions are as follows:

1. May the Lancaster County Natural Gas Authority, a Special Purpose District, contribute or donate funds to another public agency, the University at Lancaster?

2. May the Lancaster County Natural Gas Authority contribute funds to USCL as an advertising expense if the University names a room (or equivalent) for the Authority?

You state that as a matter of policy "the Board will not necessarily approve the payment even if the Attorney General says it may." Of course, in any legal opinion of this Office, we do not comment upon the wisdom or advisability of a particular decision by a governing Board such as is contemplated here. We obviously make no comment

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Request Letter

upon any particular plan for such a donation or any amount that might be donated by the Board to USC-L. This is a matter for the Board to determine, not this Office.

LAW/ANALYSIS

The Lancaster Natural Gas Authority, by Act No. 879 of 1954, is created as a body politic and corporate to "furnish natural gas service throughout Lancaster County ... ." A governing board is established therein and the Authority is given the power to sue and be sued, to adopt and use a corporate seal, and to make bylaws for the management of the affairs of the Authority. In addition, the Authority may "acquire, purchase, hold, use, lease, mortgage, sell, transfer and dispose of any property, real, personal or mixed or any interest therein." Further, among other powers, the Authority is "[t]o transport gas and to sell gas on such terms and rates as it shall approve." Rates and charges are to be "on a basis reasonably commensurate with the cost of providing service to any such areas."

In Welling v. Clinton Newberry Natural Gas Authority, 221 S.C. 417, 71 S.E.2d 7 (1952), our Supreme Court addressed the validity of an Act similar to that creating the Lancaster Natural Gas Authority. The Court upheld the Act as not being an unconstitutional local law, but an example of the General Assembly's being "fully empowered to deal with the special situation presented." Moreover, the Court held that the sale of natural gas by the Clinton Newberry Authority was a "governmental function". Further, any argument that the Act in question gave that Authority a monopoly was, concluded the Court, defeated by the fact that "[t]he General Assembly may limit and define the functions of the agencies created by it." 71 S.E.2d at 10. Furthermore, citing Clarke v. South Carolina Public Service Authority, 177 S.C. 427, 181 S.E. 481, the Court rejected the argument that "[t]hat portion of the Act which permits the Authority to fix rates on gas sold ... is a function exclusively vested in the Public Service Commission."

In another more recent case, Boyce v. Lancaster County Natural Gas Authority, 266 S.C. 398, 223 S.E.2d 769 (1976), the Court dealt with the identity of Lancaster County Natural Gas Authority itself. In holding that the Authority was exempted from suit by the doctrine of sovereign immunity, which of course, has since been modified, the Court stated:

> [t]he Lancaster County Natural Gas Authority ... was created by Act No. 879 of the 1954 Acts of the General Assembly as a 'body corporate and politic of perpetual succession.' The Authority was created for the purpose of securing a supply of natural gas for the benefit of the incorporated and unincorporated municipalities, and other populated areas within its

> service area, with authority to construct transmission lines and distribution systems in order to furnish natural gas service. ...
>
> [t]he defendant [Lancaster County Natural Gas Authority] was created by the State, with its governing board appointed by State officials. It was created to perform a governmental function for the benefit of Lancaster County, a political subdivision of the State, and its net revenues are to be used by the municipalities which it serves. We agree that the defendant is a quasi municipal corporation ... . (emphasis added).

Courts have differed with regard to the question of whether municipal corporations can make a donation or gift or contribution to a state institution such as a college or university. See, McQuillin, Municipal Corporations, §39.25 and cases cited therein, both for and against such authority. Our own Supreme Court, in a number of instances has upheld the authority of both a county and a municipality to assist another governmental entity in the building or construction of public institutions. In Grey v. Vaigneur, 243 S.C. 604, 135 S.E.2d 229, the Court upheld the authority of Jasper County to issue bonds to assist the school district in its school improvement program. There, the Court traced the various cases where it had upheld a local subdivision's power in similar instances, emphasizing the need for such contribution to be within the corporate purpose of the entity as well as supporting a public purpose. Said the Court,

> [c]ertainly, the county has an interest in promoting and providing for the education of its citizens. Since both governmental units may issue bonds for educational purposes, and both have a common interest in doing so, the legislature has simply provided for the results to be accomplished, in effect, through a joint project. We agree with the defendants that there is no basic distinction in point of law in the contribution of the county here from that sustained in the case of Allen v. Adams, 66 S.C. 344, 44 S.E. 938, in which the Town of Edgefield issued bonds to help the school district of the Town of Edgefield build a school building; or in the case of Smith v. Robertson, 210 S.C. 99, 41 S.E.2d 631 where Charleston County was permitted to issue bonds to buy the site for the present State Medical College Hospital; or in the case of Cothran v. Mallory, 211 S.C. 387, 45 S.E.2d 599 where Spartanburg County and the City of Spartanburg jointly built a public auditorium; or in Shelor v. Pace, 151 S.C. 99, 148

> S.E. 726, where Oconee County was permitted to issue bonds for school district purposes. As stated in the Smith case, '[W]e have nothing in our Constitution which prohibits cooperation between two governmental entities, created under it, in doing what each of them might do alone.'

Pursuant to this same reasoning, we concluded in Op. Atty. Gen., Op. No. 85-5 (January 21, 1985) that Richland County could assist in the construction of a performing arts center owned by the University of South Carolina even though the Court owned no interest in the building. We noted that, in our opinion, such an expenditure would further both a public purpose as well as a corporate purpose. We also referenced Art. X, § 13 of the State Constitution which provides that

> [a]ny county, incorporated municipality, or other political subdivision may agree with the State or with any other political subdivision for the joint administration of any function and exercise of powers and the sharing of costs thereof.

I have found no case which applies these same principles to a "quasi-municipal corporation" or special purpose district such as Lancaster County Natural Gas Authority. In fact, in an Opinion, dated May 25, 1970, we concluded that the Clinton Newberry Natural Gas Authority had no power to make donations or contributions from its funds to charitable or educational groups or corporations. There, we stated, that the Authority

> ... can have no powers which are not specifically granted to it, or which are by inference reasonably necessary to carry out its function. Williams v. Wylie, 217 S.C. 247, 60 S.E.2d 586. We find no such grant in 1952 (47) 1958, and can conceive of no reason why the power would be inferred. The power to make donations is not necessary to the Natural Gas Authority's legitimate function.

Thus, while it is true that Lancaster Natural Gas Authority's enabling legislation specifically authorizes it to " ... transfer and dispose of any property, real, personal or mixed or any interest therein ...", it is necessary that in making any expenditure of funds by the Authority, the Board must carefully determine whether such expenditure not only promotes a public purpose, but is in furtherance of the Authority's corporate purpose, described by our Supreme Court as "a governmental function" designed by the General Assembly for "securing a supply of natural gas for the benefit of the incorporated and unincorporated municipalities and other populated areas within its service area ... ."

I am advised by you and others that any such contribution or donation, if made at all, would be made upon the express stipulation that a room or a portion of the new building would be named for the Lancaster County Natural Gas Authority and that such contribution or donation would thus receive permanent recognition in one form or another. I am also advised that the amount of such contribution, if made, has not yet been determined. Thus, it is contemplated that any contribution, if given, would be for the purpose of advertising the Authority. The expectation is that the good will and promotion created by such advertising, as well as customer support for the Authority resulting therefrom, would inure to the benefit of the Authority, and would result in the realization of financial returns thereto.

By analogy, it has been stated with respect to a public utility that

> ... reasonable advertising or promotional costs may be allowed a public utility for rate-making purposes, at least where the advertising or promotional activity primarily benefits the utility's consumers. Accordingly, advertising or promotional activity that is primarily image-building or advertising or promotional costs resulting primarily from competition with another company may not be allowed if possible benefit to the consumer is too indirect.

McQuillin, supra, §34-167.05. And in West Ohio Gas Co. v. Public Utilities Com., 294 U.S. 63, 55 S.Ct. 316, 79 L.Ed. 761 (1935), the United States Supreme Court reversed a decree of a state Supreme Court affirming a rate order of the state public utilities commission. The Commission has severely reduced the expenses claimed by the gas company for procuring new business or endeavoring to procure it. There, the Court stated:

> [a] public utility will not be permitted to include negligent or wasteful losses among its operating charges. The waste or negligence, however, must be established by evidence of one kind or another, either direct or circumstantial ... . The company made claim to expenses incurred in procuring new business or in the endeavor to procure it, such expenses amounting on the average to 12,000 a year. The commission did not question the fact of payment, but cut down the allowance to $5,000 a year on the ground that anything more was unnecessary and wasteful. The criticism has no basis in evidence, either direct or circumstantial. Good faith is to be presumed on the managers of a business ... . In the absence

> of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay.

Finally, in Pacific Tel. and Telegraph Co. v. Pub. Util. Comm., 44 Cal. Reptr. 1, 401 P.2d 353 (1965), the California Supreme Court held that contributions and donations to charities and colleges and universities could not be charged to ratepayers but only to stockholders. The Court stated that

> ... Pacific's present attempt to charge all of its own contributions as an operating expense to be borne by ratepayers is plainly unwarranted. The Commission in its decision observes that "Dues, donations and contributions, if included as an expense for ratemaking purposes, became an involuntary levy on ratepayers who, because of the monopolistic nature of utility service, are unable to obtain service from another source and thereby avoid such a levy. Ratepayers should be encouraged to contribute directly to worthy causes and not involuntarily through an allowance in utility rates. [Pacific] should not be permitted to be generous with ratepayers' money but may use its own funds in any lawful manner.

401 P.2d at 374.

In addition, there is also the case of South Carolina Public Service Authority v. Citizens and Southern Bank, 300 S.C. 142, 386 S.E.2d 775 (1989). Therein, our Supreme Court examined the question of the validity of the judgment by Santee-Cooper to change fiscal year to calendar year. Noting that Santee-Cooper is a quasi-municipal corporation (as is Lancaster Natural Gas Authority), the Court strongly suggested that the "business judgment" rule was applicable to business decisions made by the governing board of such corporations. The Court referenced with approval the case of Dockside Assoc., Inc. v. Detyens, 294 S.C. 86, 362 S.E.2d 874 (1987) where the Court had explained the "business judgment" standard this way:

> [w]e now uphold the Court of Appeals' determination that the business judgement rule precludes judicial review of actions taken by a corporate governing board absent a showing of lack of good faith, fraud, self-dealing or unconscionable conduct ... . We also affirm the Court of Appeals' holding that the burden of proving good faith is not on the governing

> board; the burden of proving a lack of good faith is borne, by those challenging the board's actions.

294 S.C. at 97.

CONCLUSION

Based upon the foregoing case law, it is my opinion that the Authority may expend reasonable amounts for the costs of advertising its services to Lancaster County. I understand that the Board presently budgets advertising costs yearly. Such would be within the corporate purpose of the Board -- to provide natural gas to the citizens of the area. The Board's power to advertise its services to Lancaster could lawfully include advertising at USCL, depending upon the circumstances.

Of course, I express no opinion upon whether any particular expenditure to USCL would constitute "advertising" by Lancaster County Natural Gas Authority. Instead, I would suggest that the Board in making its determination as to whether or not to expend money with respect to the referenced project should consider the following:

1. Any advertising expenditure must be reasonably related to the Board's corporate purpose of providing natural gas to its service area.

2. The Board should, in fulfilling its corporate purpose, determine whether any expenditure would constitute a direct benefit to its service area and its ratepayers. In short, would such an expenditure assist in providing customers with useful, factual information about the Authority and its services?

3. The Board should determine that there is a reasonable correlation between the amount of the expenditure and the return on its investment which the Authority and the public is getting. The question here is whether the Authority is getting its "money's worth."

4. As with any intra vires act, the Board must abide by the "business judgment" rule described above. This would entail a determination based upon sound and prudent business judgment, as with any expenditure.

In short, the question, in a nutshell, which the Board must determine is whether the expenditure, if made, is an advertising cost. Any such questions are necessarily factual in nature and thus we express no opinion as to any particular proposal or

expenditure made by the Board. As always, I am sure the Board will use common sense and sound business judgment in this and all other matters.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph

cc: The Honorable James H. Hodges
Member, House of Representatives