

1981 WL 158147 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

February 13, 1981

*1 Honorable Heyward McDonald
Chairman
Municipal Annexation Study Committee
604 Gressette Senate Office Building
Columbia, South Carolina 29202

Dear Senator McDonald:

You have asked the opinion of this Office on the following questions:

(1) Does the draft of the proposed legislation designated as Section 5-3-180 [copy attached] contravene [Article VIII, § 15 of the South Carolina Constitution](#)?

(2) Does the consent of a municipality required by the aforementioned constitutional provision apply after an annexation to the continued operation by an electric supplier of electric facilities existing within an area prior to its annexation?

At your request, three opinions previously have been issued concerning questions similar or related to those recited hereinabove. These opinions were issued on August 21, October 3 and October 17, 1980. For convenience, the authority and discussion contained in those opinions will not be repeated herein.

The proposed legislation designated as Section 5-3-180 requires that prior to a reassignment of electric service in a newly annexed area, the Public Service Commission shall study the reassignment matter and make a recommendation to the council of the annexing municipality as to which electrical supplier should be awarded the franchise. It further requires the municipal council to call for a public hearing on the matter within a specified time period and thereafter to 'take such action on the question of reassignment of electrical suppliers as it deems necessary.' The purpose of the proposed legislation appears to be intended to provide a procedural framework, in the specific circumstances identified in the proposed legislation, for a municipal council exercising the consent reserved to it by [Article VIII, § 15](#). The procedures which comprise this framework do not restrict the exercise of that consent in a manner that conflicts with [Article VIII, § 15](#). See the previous opinions above-noted. Moreover, the proposed legislation reaffirms such consent by providing that the municipal council can 'take such action on the . . . reassignment as it deems necessary.'

Question (2) was discussed on pages 2 to 3 of the opinion dated October 17, 1980. Although recognizing therein that case decisions in other states had held that similar provisions were not applicable to electric suppliers operating after annexation facilities which existed in areas prior to their annexation, the opinion, citing several reasons, concluded that the consent required by [Article VIII, § 15](#) was applicable to such suppliers and facilities. Pursuant to your recent request, this question has again been considered.

The majority of case decisions researched, which considered constitutional or statutory language similar to that in [Article VIII, § 15](#), concluded that the provisions involved did not apply to electric suppliers operating facilities which existed prior to annexation. E.g., [Town of Culpepper v. Virginia Electric and Power Co.](#), 215 Va. 189, 207 S.E.2d 864 (1974); [McQuillan, Municipal Corporations](#), Section 7.46. However, case decisions reaching the opposite conclusion also were found. E.g., [Franklin Power and Light Co. v. Middle Tennessee Electric Membership Corp.](#), 434 S.W.2d 829 (Supreme Court of Tenn., 1968).¹

Based on the latter authority and the reasons set forth on pages 2 to 3 of the October 17, 1980 opinion, this Office cannot conclude that the consent required by [Article VIII, § 15](#) does not apply to and was not intended to be required for the continued use, operation and maintenance after annexation of electric facilities existing in areas prior to their annexation. As noted in the October 17, 1980 opinion, the case decisions reaching a conclusion to the contrary do render the conclusion restated herein less than certain.

*2 To summarize the conclusions stated herein, it is the opinion of this Office that the proposed legislation designated as Section 5-3-180 does not contravene [Article VIII, § 15 of the South Carolina Constitution](#). It is further the opinion of this Office that the consent of a municipality required by the aforementioned constitutional provision does apply after an annexation to the continued operation by an electric supplier of electric facilities existing in an area prior to its annexation.

Sincerely,

James M. Holly
Assistant Attorney General

Footnotes

- 1 With regard to any property rights an electric supplier may have in existing facilities, the court in the cited case concluded that the forced sale of the facilities therein did not constitute an unconstitutional taking of property. It should be noted that South Carolina has similar procedures for the sale of such facilities. [Section 58-27-1360, Code of Laws](#), 1976.

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