

1979 WL 43616 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

September 24, 1979

*1 Honorable C. Moody Staley
Mayor of Woodford
Route 1
Box 276 Woodford
North, South Carolina 29112

Dear Mayor Staley:

You have requested the advice of this Office as to whether or not the agreement entered into in 1959 by the Town of Woodford and the South Carolina Electric and Gas Company (S.C.E. & G.) is invalid for failure to comply with the requirements of [Section 58-27-410, CODE OF LAWS OF SOUTH CAROLINA](#), 1976 (formerly section 24-21 of the 1962 Code). In my opinion, that agreement may be invalid insofar as it purports to grant an exclusive franchise to the utility.

[Sections 58-27-410 et seq.](#) of the 1976 Code provide the sole means by which a municipality may grant to a utility company an exclusive franchise for providing electrical service. Inasmuch as the statutory requirements (specifically, the referendum requirement) were apparently not followed in granting the contract in question to S.C.E. & G., it would seem clear that the utility does not have an exclusive right to operate in Woodford. Thus, Woodford may be free to negotiate with other power companies to operate concurrently with S.C.E. & G. within its corporate limits.

This does not mean, however, that the contract is void in its entirety. A municipality may grant an electric utility the right to operate within its boundaries on a non-exclusive basis without complying with the requirements imposed by statute. [Town of Brookland v. Broad River Power Co.](#), 172 S.C. 115, 173 S.E. 71 (1934). Such an agreement is valid and binding by its terms between the parties, notwithstanding the fact that the contract purports to illegally grant an exclusive franchise along with its other provisions. In such a case, only the illegal provision is severed from the contract, and the separable features are enforced between the parties as previously agreed. [La Follette v. La Follette Water Co.](#), 252 F. 762.

It may be that the agreement can be contested on purely contractual grounds, *i.e.*, the failure of S.C.E. & G. to make the payments called for in paragraph 7 of the contract. An argument might be made that S.C.E. & G.'s non-performance as to that requirement relieved the Town of Woodford of the duty to give a two-year notice of its intent to terminate the agreement.

With kind regards,

Karen LeCraft Henderson
Senior Assistant Attorney General

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