HENRY MCMASTER
ATTORNEY GENERAL

March 16, 2010

The Honorable James H. Harrison
Member, House of Representatives
Post Office Box 11867
Columbia, South Carolina 29211

Dear Representative Harrison:

We understand you desire an opinion of this Office as to

> whether the South Carolina Public Service Authority ("Santee Cooper") has statutory authority to provide a proposed guarantee to the United States Department of Agriculture's Rural Utilities Service ("RUS") on behalf of Orangeburg County Biomass, LLC, and whether the proposed loan guarantee would violate Art. 10 § 11 of the South Carolina Constitution's prohibition against pledging or loaning of the credit of a *political subdivision* of the State for the benefit of any individual, company, or corporation. Subsumed in the second issue is whether the proposed guarantee would promote a primarily public, as opposed to a primarily private, interest.

In addition, you provided the following background information:

> Orangeburg County Biomass's proposed biomass power plant to be built in Orangeburg County is of the utmost importance to our State because it will provide a source of green renewable energy to the citizens of South Carolina at a cost below what would otherwise be attainable. The guarantee is necessary in order to secure funding through the RUS. The guarantee mandated by RUS requires that Santee Cooper guarantee Orangeburg County Biomass's debt repayment to RUS. With the RUS's low interest rate funding, Orangeburg County Biomass will be able to produce electric energy from renewable forest resources and sell that energy to Santee Cooper at a rate of 7.7 cents per kilowatt hour, a full 1.3 cents cheaper than will be possible without the RUS interest rate. The power, in turn, will be sold to rural South Carolina customers, who will receive the benefit of the low-priced energy.

Law/Analysis

First, you ask us to address whether Santee Cooper has the authority to guarantee Biomass's debt to RUS. The Legislature created the South Carolina Public Service Authority ("Santee Cooper") pursuant to chapter 31 of title 58 of the South Carolina Code (1976 & Supp. 2009). Because Santee Cooper is a creature of statute, it holds "only those powers expressly conferred or necessarily implied for it to effectively fulfill duties with which it is charged." Captain's Quarters Motor Inn, Inc. v. South Carolina Coastal Council, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991). Thus, we look to Santee Cooper's enabling legislation to determine whether or not the Legislature gave it the authority to guarantee Biomass's debt. Section 58-31-30 of the South Carolina Code (Supp. 2009) provides a list of powers given to Santee Cooper by the Legislature. These powers include provisions allowing Santee Cooper to incur debt. In addition, subsection (A)(15) gives Santee Cooper the power to "endorse or otherwise guarantee the obligations of a corporation all of the voting stock of which the Public Service Authority may own or acquire . . . ." S.C. Code Ann. § 58-31-30(A)(15). We understand Santee Cooper does not own any of the voting stock in Biomass. Thus, we do not believe this provision would allow Santee Cooper to guarantee Biomass's obligations. Moreover, we did not find any other provision in section 58-31-30 that would allow Santee Cooper to guarantee Biomass's debt. As such we believe Santee Cooper lacks specific authority to provide RUS with a guarantee on behalf of Biomass.

In your letter, you argue that the proposed guarantee is authorized "as incidental to Santee Cooper's granted power to sell electricity and to make contracts to carry on its business." You cite to the portion of section 58-31-30 giving Santee Cooper the general authority to "produce, distribute, and sell electric power . . . ." S.C. Code Ann. § 58-31-30(A). In addition, you cite to subsections (A)(17) and (A)(20), which give Santee Cooper the authority to:

> (17) to make contracts of every name and nature and to sue and be sued thereon; to enter into agreements providing for binding arbitration between the parties thereto; and to execute all instruments necessary or convenient for the carrying on of its business;
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> . . .
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> (20) to do all acts and things necessary or convenient to carry out the powers granted to it by this chapter or any other law;

S.C. Code Ann. § 58-31-30(A). You argue that Santee Cooper's authority to guarantee Biomass's debt is incidental to these express powers.

In your letter, you acknowledge that our Supreme Court in Creech v. South Carolina Public Service Authority, 200 S.C. 127, 20 S.E.2d 645 (1942)(superseded by statute), stated that the powers given to Santee Cooper are to be strictly construed. In that case, the Court addressed whether Santee Cooper had the authority to acquire South Carolina Electric and Gas Company and Lexington Water Power Company. Id. The Court stated as follows:

> In our opinion, the South Carolina Public Service Authority is a public corporation in the nature of a quasi municipal corporation, exercising certain governmental functions as an agency of the State. Floyd v. Parker Water & Sewer Sub-District, S.C., 17 S.E.2d 223. As such, the powers conferred are to be strictly construed, and any fair, substantial and reasonable doubt concerning the existence of any power or any ambiguity under the statute upon which the assertion of such power rests, is to be resolved against the corporation, and the power denied. Luther v. Wheeler, 73 S.C. 83, 52 S.E. 874, 4 L.R.A., N.S., 746, 6 Ann.Cas. 754.
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> Generally, a municipal corporation can exercise only those powers granted in express words or those necessarily or fairly implied in or incident to the powers expressly granted, or those essential to the declared objects and purposes of the corporation, which powers are not simply convenient, but indispensable. Southern Fruit Co. v. Porter, 188 S.C. 422, 199 S.E. 537.

Id. at 137-38, 20 S.E.2d 648-49. Based on this construction of Santee Cooper's powers, the Court found nothing in the powers granted to Santee Cooper that would support a finding that it had the power to purchase the public utilities. Id. at 139, 20 S.E.2d at 649. The Court further explained:

> Only such powers as are reasonably necessary to enable corporations to carry out the express powers granted and the purposes of their creation are to be implied or are to be deemed to be incidental. Accordingly, an incidental power may be defined to be one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has merely some slight or remote relation to it. Powers merely convenient or useful are not implied if they are not essential, having in view the nature and object of the incorporation. 13 Am.Jur., § 740, page 773.

Id. at 146, 215 S.E.2d at 652.

Nonetheless, you argue the Court modified its strict constructionist rule announced in Creech in Cooper v. South Carolina Public Service Authority, 264 S.C. 332, 215 S.E.2d 197 (1975). In this

case, the South Carolina Supreme Court addressed whether Santee Cooper had the authority to harvest pulpwood and timber on its lands. Id. The Court looked to the specific powers given to Santee Cooper by the Legislature, particularly Santee Cooper's authority to reclaim flooded lands and reforest watersheds. Id. at 336-37, 215 S.E.2d at 199. However, the Court noted that the Legislature did not "elaborate on the method it should employ in achieving the desired result." Id. at 337, 215 S.E.2d at 199. The Court stated generally with regard to Santee Cooper's authority:

> While the powers of the Authority are to be strictly construed, it is expressly granted the power 'to do all acts and things necessary or convenient to carry out the powers granted to it by (the legislature) . . .' This is somewhat of an exception to the general law which holds 'that powers merely convenient or useful are not implied if they are not essential having in view the nature and object of the incorporation.'

Id. (quoting Creech v. South Carolina Pub. Serv. Auth., 200 S.C. 127, 20 S.E.2d 645, 652 (1942)). Based on this reasoning, the Court concluded:

> [T]he power of periodically harvesting pulpwood and timber is both necessary and convenient to the implementation of the duty and power of the Respondent to reclaim and reforest its lands and is certainly implied, if not expressed, under its legislative power to be exercised in the discretion of the Respondent.

Id. at 338, 215 S.E.2d at 200.

Indeed, we believe that the Court's opinion in Cooper somewhat modified the Court's analysis in Creech. As we mentioned in a 1980 opinion of this Office, Cooper "appears to lessen the strict rule of construction heretofore laid down [by Creech]." Op. S.C. Atty. Gen., January 23, 1980. However, the Court's holding in Cooper did not negate the fact that any implied power must be at least necessary and convenient to the implementation of a stated power.

In our review of Santee Cooper's enabling legislation, we do not believe that the authority to guarantee a private entity's obligations are necessary and convenient to its authority to make contracts. We believe this construction of Santee Cooper's authority would be overly broad and not justified with the specific authority given to it by the Legislature. Moreover, as we mentioned above, the Legislature specifically gave Santee Cooper the authority to guarantee the obligations of other corporations if Santee Cooper owns or acquires all the voting stock of such a corporation. Our courts generally recognize the cannon of construction of *expressio unius est exclusio alterius* or *inclusio unius est exclusio alterius*, which means "to express or include one thing implies the exclusion of another, or of the alternative." Riverwoods, LLC v. County of Charleston, 349 S.C. 378, 384, 563 S.E.2d 651, 655 (2002) (quotations omitted). Thus, because the Legislature specified

the circumstances in which Santee Cooper can guarantee the obligations of another entity, we believe it intended to exclude from Santee Cooper's authority the ability to guarantee such obligations outside of meeting the specified conditions. Accordingly, we are of the opinion that Santee Cooper lacks the authority to guarantee Biomass's obligations to RUS.

In addition to your inquiry as to Santee Cooper's authority to guarantee Biomass's debt, you also asked whether the proposed loan guarantee would violate article X, section 11 of the South Carolina Constitution's prohibition on pledging or loaning of the credit of a political subdivision. We addressed this question in our January 11, 2010 opinion to you. However, you now ask us to comment on whether Santee Cooper is considered a political subdivision of the state for purposes of article X, section 11 of the South Carolina Constitution. Article X, section 11 of the South Carolina Constitution (2009) provides, in pertinent part:

> The credit of neither the State nor of any of its political subdivisions shall be pledged or loaned for the benefit of any individual, company, association, corporation, or any religious or other private education institution except as permitted by Section 3, Article XI of this Constitution. Neither the State nor any of its political subdivisions shall become a joint owner of or stockholder in any company, association, or corporation. The General Assembly may, however, authorize the South Carolina Public Service Authority to become a joint owner with privately owned electric utilities, including electric cooperatives, of electric generation or transmission facilities, or both, and to enter into and carry out agreements with respect to such jointly owned facilities.

Neither this portion of article X, section 11, nor any other portion of this provision, specifically define the term "political subdivision." Thus, we must employ the rules of statutory interpretation in order to determine what is meant by this term. "When construing the constitution, the Court applies rules similar to those relating to the construction of statutes." The Court's primary function in construing a constitutional provision is to "ascertain and give effect to the intention of the Legislature." Sheppard v. City of Orangeburg, 314 S.C. 240, 243, 442 S.E.2d 601, 603(1994). As our Supreme Court stated in Richardson v. Town of Mount Pleasant, 350 S.C. 291, 294, 566 S.E.2d 523, 525 (2002):

> When this Court is called upon to interpret our Constitution, we are guided by the "ordinary and popular meaning of the words used . . . ." Abbeville County School Dist. v. State, 335 S.C. 58, 67, 515 S.E.2d 535, 539-40 (1999)(internal citation omitted). A word used in the Constitution should be given its "plain and ordinary" meaning. Johnson v. Collins Entertainment, 333 S.C. 96, 508 S.E.2d 575 (1998).

In several previous opinions, this Office considered the meaning of the term "political subdivision" when this term is not specifically defined. In a 1969 opinion, we discussed whether the Lancaster County Natural Gas Authority was a political subdivision for purposes of the State's governmental license plate statute. Op. S.C. Atty. Gen., November 19, 1968. We considered the fact that its board is appointed by the Governor, its stated purpose, and the fact that it has authority to borrow money and issue bonds in determining that the Lancaster County Natural Gas Authority was a political subdivision. Id.

In a 1985 opinion, this Office stated: "Attributes of a political subdivision generally include existence to discharge a governmental purpose; prescribed area; authority for subordinate self-government; existence for the benefit of residents of the area; and organized for public, rather than private advantage." Op. S.C. Atty. Gen., May 9, 1985. In addition, we have looked to the definitions political subdivisions as provided in other provisions of the law and the Constitution to determine what constitutes a political subdivision. In a 1989 opinion, we looked to article X, section 14 of the South Carolina Constitution, which defines the term political subdivision for purposes of bonded indebtedness. Op. S.C. Atty. Gen., August 14, 1989. This provision states that political subdivisions include

> the counties of the State, the incorporated municipalities of the State, and special purpose districts, including special purpose districts which are located in more than one county or which are comprised of one or more counties. The term does not include regional planning agencies which are expressly forbidden to incur general obligation debt.

S.C. Const. art. X § 14(1) (2009).

In prior opinions, we also looked to other jurisdictions' interpretations of what is meant by a political subdivision. In a 1986 opinion, we cited to various courts in other states to determine the meaning of a political subdivision.

> As stated in Arkansas State Highway Commission v. Clayton, 266 Ark. 712, 292 S.W.2d 77 (1956), political subdivisions
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> > embrace a certain territory and its inhabitants, organized for the public advantage and not in the interest of particular or classes; that their chief design is the exercise of governmental functions; and that to the electors residing within each is to some extent committed the power of local government, to be wielded either mediately or immediately within their territory for the peculiar benefit of the people there residing.

> 292 S.W.2d at 79. Other attributes include the power to levy taxes and make appropriations, Dugas v. Beauregard, 155 Conn. 256, 236 A.2d 87 (1967); and the powers to sue and be sued, enter into contracts, exercise eminent domain, incur indebtedness, and issue bonds, among others. Hauth v. Southeastern Tidewater Opportunity Project, Inc., 420 F.Supp. 171 (E. D. Va. 1976). See also State ex rel. Maisano v. Mitchell, 155 Conn. 256, 231 A.2d 539 (1967); Commander v. Board of Commissioners of Buras Levee District, 202 La. 325, 11 So.2d 605 (1942); McClanahan v. Cochise College, 25 Ariz. App. 13, 540 P.2d 744 (1975).

Op. S.C. Atty. Gen., January 8, 1986.

In section 58-31-80 of the South Carolina Code (Supp. 2009), the Legislature defined the primary purpose of Santee Cooper as

> developing the Cooper River, the Santee River, the Congaree River, and their tributaries upstream to the confluence of the Broad and Saluda Rivers and upstream on the Wateree River to a point at or near Camden and other similar projects as instrumentalities of intrastate, interstate, and foreign commerce and navigation; of reclaiming wastelands by the elimination or control of flood waters, reforesting the watersheds of the rivers and improving public health conditions in those areas.

We believe this purpose constitutes a governmental function. By section 58-31-330 of the South Carolina Code (Supp. 2009), the Legislature defined Santee Cooper's service area to include "the counties of Berkeley, Georgetown, and Horry," except for those specific areas carved out by the Legislature. Thus, Santee Cooper embraces a defined area.

Santee Cooper's board of directors is appointed by the Governor with the advice and consent of the Senate. S.C. Code Ann. § 58-31-20 (Supp. 2009). Furthermore, the Legislature vested Santee Cooper with the authority to sued and be sued, enter into contracts, exercise the power of eminent domain, incur indebtedness, and issue bonds. S.C. Code Ann. § 58-31-30. Although Santee Cooper does not have authority to levy taxes, as we noted in prior opinions, this attribute does is not critical in determining that an entity is a political subdivision. Ops. S.C. Atty. Gen., May 23, 2008; November 19, 1968. Therefore, based on the authority cited above, we believe a court could find that Santee Cooper is a political subdivision.

In addition to our determination that Santee Cooper could generally be viewed as a political subdivision, we also find evidence in article X, section 11 indicating the intent that Santee Cooper

be considered a political subdivision for purposes of this provision. As quoted above, article X, section 11, after stating that the credit of the State and its political subdivisions cannot be pledged for the benefit of a private entity or individual and the State and its political subdivisions are prohibited from becoming a joint owner of an entity, continues on to provide: "The General Assembly may, however, authorize the South Carolina Public Service Authority to become a joint owner with privately owned electric utilities, including electric cooperatives, of electric generation or transmission facilities, or both, and to enter into and carry out agreements with respect to such jointly owned facilities." By specifically addressing Santee Cooper, we assume that the Legislature understood that Santee Cooper is a political subdivision for purposes of this provision. As such, we believe that not only could Santee Cooper generally be seen as a political subdivision, but a court would likely find that Santee Cooper is a political subdivision for purposes of article X, section 11.

Lastly, you asked that we address whether the proposed guarantee would promote a primarily public, as opposed to a private, interest. According to State ex rel. McLeod v. Riley, 276 S.C. 323, 329, 278 S.E.2d 612, 615 (1981), the South Carolina Supreme Court interprets article X, section 11 as prohibiting the expenditure of public funds for the primary benefit of private parties. From court decisions, we understand that what constitutes a public purpose is a "fluid concept which changes with time, place, population, economy and countless other circumstances." Bauer v. South Carolina State Housing Auth., 271 S.C. 219, 227, 246 S.E.2d 869, 873 (1978). As our Supreme Court explained in Anderson v. Baehr, 265 S.C. 153, 162, 217 S.E.2d 43, 47 (1975):

> The courts have, as a rule, been reluctant to attempt to define public purpose as contrasted with a private purpose, but have generally left each case to be determined on its own peculiar circumstances. As a general rule a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents, or at least a substantial part thereof. Legislation does not have to benefit all of the people in order to serve a public purpose. At the same time legislation is not for a private purpose as contrasted with a public purpose merely because some individual makes a profit as a result of the enactment.

Through case law, our courts developed a four-prong test to determine whether an act by a legislative body promotes a public purpose. This test is set forth as follows: "'The Court should first determine the ultimate goal or benefit to the public intended by the project. Second, the Court should analyze whether public or private parties will be the primary beneficiaries. Third, the speculative nature of the project must be considered. Fourth, the Court must analyze and balance the probability that the public interest will be ultimately served and to what degree.'" Nichols v. South Carolina Research Auth., 290 S.C. 415, 429, 351 S.E.2d 155, 163 (1986) (quoting Byrd v. Florence County, 281 S.C. 402, 407, 315 S.E.2d 804, 806 (1984)).

In your letter, you argue that the proposed guarantee serves a direct public purpose. You state that Biomass intends to use the funds received from RUS to provide "a source of low-cost, renewable energy." You also state that "this ecologically friendly project will create 27 direct jobs at a median income of $50,000, more than 200 timber industry jobs in the area surrounding the facility, and hundreds of construction jobs in the building phase, in an area with 18.7% unemployment." The South Carolina Supreme Court has determined that the production of electric power fulfils a public purpose. Taylor v. Davenport, 281 S.C. 497, 500, 316 S.E.2d 389, 391 (1984). Additionally, our courts recognize economic development as a valid public purpose. See Nichols v. South Carolina Research Auth., 290 S.C. 415, 351 S.E.2d 155 (1986); Carll v. South Carolina Jobs-Econ. Dev. Auth., 284 S.C. 438, 327 S.E.2d 331(1985). However, whether or not Santee Cooper's guarantee of Biomass's obligations constitutes a public purpose involves a question of fact. "As we stated in numerous opinions, this Office does not have the jurisdiction of a court to investigate and determine facts." Op. S.C. Atty. Gen., March 20, 2007. Thus, we must leave the determination as to whether the proposed guarantee satisfies the constitutional public purpose require up to a court.

Conclusion

Based on our analysis above, we do not believe that Santee Cooper has the authority to guarantee Biomass's obligations as required by RUS. In addition, we are of the opinion that a court would likely find that Santee Cooper is a political subdivision for purposes of article X, section 11 of the South Carolina Constitution. However, because the determination of whether a guarantee by Santee Cooper of Biomass's obligations to RUS satisfies a public purpose involves a question of fact, only a court can make this determination.

Very truly yours,

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