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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER  
ATTORNEY GENERAL

March 12, 2003

Lieutenant Governor Andre Bauer  
Office of the Lieutenant Governor  
Post Office Box 142  
Columbia, South Carolina 29202

**Re: Your Letter of February 14, 2003**

Dear Lieutenant Governor Bauer:

In your above-referenced letter on the behalf of your constituent, Louis Neiger, you ask for this Office's opinion on the following questions:

1. Is the Clinton Newberry Natural Gas Authority (authority) an agency of South Carolina?
2. Does serving on the board of the authority violate the dual office holding prohibition when the board is composed of the following members: Clinton Mayor, Newberry Mayor, two Clinton City Council members, and two Newberry City Council members?
3. Can the authority divide its net revenues between the cities of Clinton and Newberry?

**Law / Analysis**

As to your first question, this Office opined on March 11, 1982 that the Clinton Newberry Natural Gas Authority was created as a special purpose district and a body corporate and politic by Act No. 789 of 1952. Special purpose districts perform a governmental function. Ops. Atty. Gen., March 11, 1982. They, like counties, municipalities and school districts, are considered political subdivisions of the state. Ops. Atty. Gen., March 18, 1996. In an opinion, dated February 15, 1995, we noted that "[w]hile South Carolina case law does not contain a complete and concise definition of the term 'political subdivision,' characteristics 'which are generally regarded as distinctive of a political subdivision are that it exists for the discharging of some function of local government, that it has a prescribed area and that it possesses authority for subordinate self-government by officers selected by it.'" Quoting, McClanahan v. Cochise College, 540 P.2d 744 (1975). Therefore, the Authority is not a state agency, but a political subdivision of the State.

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Your second question concerns dual office holding. Section 3 of the Authority's Enabling Act provides for the composition of the board. Act No. 789 of 1952. The legislation states that the board shall consist of seven members as follows:

“(1), the Mayor of Clinton, ex officio, shall serve as a member of the authority ...; (2), the Mayor of Newberry, ex-officio, shall serve as a member of the authority ...; (3), the Municipal Council of each of Clinton and Newberry shall elect two members of their respective councils who shall serve, ex officio, as members of the authority ... The six members so designated shall, at their first meeting, elect a seventh member, who shall reside in the service area of the authority.”

Article XVII, Section 1A of the South Carolina Constitution provides that “no person may hold two offices of honor or profit at the same time ...,” with exceptions specified for an officer in the militia, member of a lawfully and regularly organized fire department, constable, or notary public. For this provision to be contravened, a person concurrently must hold two public offices which have duties involving an exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907). Other relevant considerations are whether statutes, or other such authority, establish the position, prescribe its duties or salaries, or require qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980).

While the South Carolina Constitution prohibits dual office holding, such prohibition does not generally apply when one of the offices is held ex officio. The phrase ex officio is defined as “[f]rom office; by virtue of the office” or “[f]rom office; by virtue of office; officially. A term applied to an authority derived from official character merely, not expressly conferred upon the individual, but rather annexed to the official position.” Lobrano v. Police Jury of Parish of Plaquemines, 150 La. 14, 90 So. 423 (1921). In Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 44 S.E. 2d 88 (1947), the South Carolina Supreme Court commented extensively on ex officio memberships:

“The rule here enforced with respect to double or dual office holding in violation of the constitution is not applicable to those officers upon whom other duties relating to their respective offices are placed by law. A common example is ex officio membership upon a board or commission of the unit of government which the officer serves in his official capacity, and the functions of the board or commission are related to the duties of the office. Ex officio means ‘by virtue of his office.’ ... Similar observation may be made with respect to ex officio membership upon a governing board, commission or the like of an agency or institution in which the unit of government of the office has only a part or joint ownership or management. In mind as an example

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is an airport operated by two or more units of government. A governing board of it might be properly created by appointment ex officio of officers of the separate governmental units whose duties of their respective officers have reasonable relation to their functions ex officio. ...

Here, the Authority's Enabling Act provides that the mayors and the city council members hold their position on the Authority's governing board in an ex officio capacity. Therefore, the dual office holding prohibitions of the State Constitution are not violated by the composition of the board.

Finally, you ask whether it is proper for the Authority to divide its net revenue between the cities of Clinton and Newberry. Your constituent is particularly concerned about the Authority's disposition of overage or surplus revenue. In section 5 of the Enabling Act, the Legislature designated the manner in which the Authority's funds are to be appropriated. The Act provides that "[a]ll net revenues derived from the system whose disposition the authority shall not have covenanted to otherwise dispose of shall be disposed of as follows:" Subsection (a) states that the "sum which reflects the proportion of revenue derived from the sale of firm gas shall be divided between Clinton and Newberry on the basis of firm gas sold within their respective municipal service areas." Subsection (b) adds that the "sum which reflects the proportion of the revenue derived from the sale of interruptible gas shall be divided equally between Clinton and Newberry, irrespective of where such interruptible gas shall be sold." Finally, subsection (c) states that a portion of the revenue to which Newberry is entitled shall be used to reimburse the authority for the cost of the construction of the transmission line located "between the northwestern municipal limits of Newberry and the line dividing the Counties of Newberry and Laurens." Of course, this Office cannot resolve factual questions in an opinion, Op. S.C. Atty. Gen., December 5, 1983 and it would be a factual issue as to whether these provisions are being followed by the Authority in a particular instance.

Nevertheless, it is well recognized that where the General Assembly has appropriated funds in a particular manner, such funds must be spent in the manner designated by the General Assembly. See Condon v. Hodges, 349 S.C. 232, 562 S.E.2d 623 (2002). Accordingly, for the Authority to transfer to the cities of Clinton and Newberry net revenues "whose disposition the authority shall not have covenanted to otherwise dispose of" would, on its face, seem to be in keeping with the Authority's enabling legislation.

Sincerely,



Robert D. Cook  
Assistant Deputy Attorney General