

ALAN WILSON
ATTORNEY GENERAL



August 29, 2013

The Honorable Dennis Moss
Member, South Carolina House of Representatives
306 Silver Circle
Gaffney, South Carolina 29340

Dear Representative Moss:

Attorney General Alan Wilson has referred your letter of February 11, 2013 to the Opinions section for a response. The following is our understanding of your question presented and the opinion of this Office concerning the issue based on that understanding.

Issue: May a nonprofit water company provide a month of free water to its residential customers but not to its business customers?

Short Answer: The test used by South Carolina courts in the past concerning water rates has been the reasonableness test. Therefore, the answer to your question will likely depend on whether a court interprets the water rate as reasonable or not.

Law/Analysis:

As this Office has mentioned before, if an administrative agency's interpretation of a statutory provision is reasonable, this Office generally defers to an agency's construction. Op. S.C. Atty. Gen., 2006 WL 269609 (January 20, 2006). However, it is this Office's understanding that according to your correspondence with the Office of Regulatory Staff, there is no administrative agency concerning nonprofit water companies such as the one you are dealing with. Included in your correspondence was a letter from the Office of Regulatory Staff that stated the Public Service Commission and the Office of Regulatory Staff do not have the authority to regulate the rates of a nonprofit water company. One statute cited in your correspondence was South Carolina Code § 33-36-280 (1976 Code, as amended), which says:

The rates charged for services furnished by a nonprofit corporation created for the purpose of providing water supply or sewage disposal, or a combination of those services, are not subject to supervision or regulation by a state board, commission, or agency or department or division of it.

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Therefore, since the water company is a nonprofit corporation, if there is no state board, commission or agency to supervise the rates, the rates would, at minimum, be regulated by the contract with the customers and would also be regulated, at minimum, by the courts. While this Office has written numerous opinions concerning rates, those were written for special purpose districts, municipalities and commissions concerning their statutes and limitations, not for a nonprofit corporation furnishing water pursuant to South Carolina Code § 33-36-280. See, e.g. Ops. S.C. Atty. Gen., 2006 WL 1207272 (April 21, 2006); 2002 WL 31341808 (September 26, 2002); 1963 WL 11115 (March 12, 1963). Nevertheless, as this Office has stated before, “[a] nonresident purchaser of water from a municipality has only those rights set forth or necessarily implied from the contract to sell and furnish water and the nonresident has no rights beyond the contract.” Ops. S.C. Atty. Gen., 2006 WL 1877124 (June 30, 2006) (citing Childs v. City of Columbia, 87 S.C. 566, 70 S.E. 296 (1911)). Thus, reasonableness would be the standard for the water rates. Water meter rates in ordinances are presumed to be reasonable. Poole v. Paris Mountain Water Co., 81 S.C. 438, 62 S.E. 874 (1908). Moreover, our South Carolina Supreme Court said:

As we have heretofore pointed out, the Constitution, while investing municipalities with the right to operate waterworks systems, has limited their power to charge, by directing that “reasonable” rates must be maintained. But even in the absence of this constitutional restriction, **the court would hold that the rates charged must be reasonable. A waterworks is a public utility, and it makes no difference whether such utility be operated by a municipality or by a private corporation. Both are bound by the rule of reasonableness.** ... “Water rates are imposed and collected merely as compensation or equivalent to be paid, by those who choose to receive and use the water.” 27 R.C.L. 1436. A municipality may charge a rate that will yield a fair profit, just the same as a private corporation. The fact that it makes a profit does not show that the rate is unreasonable. The service received is the test. 67 C.J. 1243.

Simons v. City Council of Charleston, 181 S.C. 353, 187 S.E. 545 (1936). As you are likely aware, this Office does not make factual determinations. This Office only issues legal opinions. Op. S.C. Atty. Gen., 1996 WL 599391 (September 6, 1996) (citing Op. S.C. Atty. Gen., 1983 WL 182076 (December 12, 1983)). Therefore, this Office will leave it up to the courts to determine whether the rates are reasonable.

However, please note Tennessee’s Attorney General’s Office issued an opinion in 2012 opining that utility providers could give discounted water and sewer rates to senior citizens. Op. Tenn. Atty. Gen., 2012 WL 719468 (February 29, 2012). That same opinion also notes that discounted water rates are not authorized for charitable institutions pursuant to a Tennessee statute that requires “reasonable rates” and based on their common law principle that rates may not be “unjustly discriminatory.” Id. (citing 99-026; 97-129 and referencing City of Parsons v. Perryville Utility District, 594 S.W.2d 401, 406-407 (Tenn. Ct. App. 1979)).

Conclusion: The test used by South Carolina courts in the past concerning water rates has been the reasonableness test. Therefore, the answer to your question will likely depend on whether a court interprets the water rate as reasonable or not. However, this Office is only issuing a legal opinion. Until a court or the legislature specifically addresses the issues presented in your letter, this is only an opinion

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on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,



Anita Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Robert D. Cook
Solicitor General