



# The Critical Responsibility of Municipal Utilities

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The information provided here is for informational and educational purposes and current as of the date of publication. The information is not a substitute for legal advice. Consult your attorney for advice concerning specific situations.

# “Going into the Business”

- Pre-Home-Rule authority (prior to 1973).
- After Home Rule, S.C. Const. Article VIII, sec. 16:  
“Any incorporated municipality may, upon a majority vote of the electors of such political subdivision who shall vote on the question, acquire by initial construction or purchase and may operate gas, water, sewer, electric, transportation or other public utility systems or plants.”



# Retained State Control

- S.C. Const. Article IX, sec. 1: “The General Assembly shall provide for appropriate regulation of common carriers, publicly owned utilities, and privately owned utilities serving the public as and to the extent required by the public interest.”

# General Statutory Authorization

## Title 5, Chapter 31: “Electricity, Water, Natural Gas and Sewerage Systems.”

- Article 7 (S.C. Code §§ 5-31-610 *et seq.*): “Any city or town may: (1) Construct, purchase, operate and maintain waterworks and electric light works ... (2) Purchase, own, operate and maintain [equipment] for generating either electricity or gas ... (4) Contract for the erection of plants for waterworks, sewerage or lighting purposes ....”
- Article 9 (S.C. Code §§ 5-31-810 *et seq.*): “Any city or town in this State may incur bonded indebtedness and own and possess property ... for the purposes of purchase, establishment and maintenance of sewerage systems ....”

# What About *Selling* a System?

- Must have an election for water and electricity (S.C. Code §§ 5-31-1310 to -1370).
- *Probably* must have an election for natural gas (S.C. Code § 5-31-680).
- The statutes say you have to have an election for sewer (S.C. Code § 5-31-620), but the courts have said that this requirement is unconstitutional as being based on a freeholder petition. So you can sell a sewer system by ordinance.

# Joint Systems

- Title 6, Chapter 25 (S.C. Code §§ 6-25-5 *et seq.*) allows creation of joint water and sewer systems (Anderson Regional Joint Water System, Lake Marion Regional Water System).
- Title 6, Chapter 23 (S.C. Code §§ 6-23-10 *et seq.*) allows creation of joint electrical systems (Piedmont Municipal Power Agency).
- Title 6, Chapter 24 (S.C. Code §§ 6-24-10 *et seq.*) allows creation of joint natural gas systems (Patriots Energy Group).

# Commissions of Public Works

- Creation of Commission of Public Works triggered by election for bond approval for initial construction or purchase of water system; see S.C. Code § 5-31-210.
- Over 100 municipalities are specifically excluded; see S.C. Code § 5-31-230.
- Legal status of the CPW in relation to the municipality. The municipal council retains some financial oversight and approvals; see S.C. Code § 5-31-260 (debt must be approved) and 5-31-270 (monthly financial reports required).
- The powers of CPWs are in S.C. Code § 5-31-250.
- CPWs may be abolished under S.C. Code § 5-31-235.

# Service Area

- Generally a municipal utility has exclusive rights to serve within the municipality's territorial limits; possible exceptions are for assigned service areas (PSC), annexed lands, and unserved areas.
- Service outside the municipality is by contract and is generally permitted on a first-come, first-served basis.
- Possible service area competitors include counties, special purpose districts, rural water companies, private companies, and possibly other municipalities.

# Annexation

- Clearly established that municipalities can condition utility service on annexation or (if non-contiguous) signing an annexation agreement.
- Annexation of an area served by a special purpose district, a special tax district, or an assessment district triggers the protections of S.C. Code §§ 5-3-310 *et seq.*
- Annexation of an area assigned by the PSC raises a host of complicated questions, addressed by a long line of cases.

# Restrictions on Service Area

- S.C. Code § 5-7-60 provides that municipalities may not serve in “an area in which the particular service is being provided or is budgeted or funds have been applied for as certified by the governing body thereof.”
- See Commissioners of Pub. Works of the City of Laurens v. City of Fountain Inn, 428 S.C. 209, 833 S.E.2d 834 (2019), reh'g denied (Oct. 31, 2019).
- Territorial boundaries of special purpose districts will also be protected.
- The service area of rural, non-profit utility companies with federal debt is protected by 7 U.S.C. § 1926(b).

# Decision to provide service

- No obligation to provide utility service within a municipality. See Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 593 S.E.2d 462 (S.C. 2004).
  - The decision whether to grant a sewer extension request generally must be left to the sound discretion of municipal leaders, ... including financial ... feasibility ... and the effect of an extension on ... planning.
- The decision of whom to serve is a clearly governmental decision that may not be delegated. City of Beaufort v. Beaufort-Jasper County Water and Sewer Authority, 325 S.C. 174, 480 S.E.2d 728 (1997).
- Municipalities can require residents to utilize sewer service. S.C. Code § 5-31-2010.

# Rates

- Municipal utility rates are not subject to State-level regulation, by the Public Service Commission or otherwise. S.C. Code § 58-5-30 provides that the PSC does not have any power “to regulate or interfere with public utilities owned or operated by or on behalf of any municipality.”

# Rates: In-City Customers

- Rates must be “reasonable.” See S.C. Code § 5-31-670.
- Cannot be discriminatory (due process and equal protection).
- POSSIBLY subject to the fee requirements of S.C. Code §§ 6-1-300(6) and -330; in the *Azar* case the City of Columbia conceded the issue.
- Rate study is recommended but not mandatory.

# Rates: Out-of-City Customers

- Clearly established that out-of-city rates can be higher than in-city rates; many municipalities use 2x rates for out-of-city.
- There are regular threats to change this rule, in the courts and in the legislature. But the service is delivered by contract and the precedent is clear.
- Remember the theory: A municipal utility system is an asset of the municipal citizens. Council can and should use the system to benefit citizens.

# Utilities and Economic Development

- Frequently site selection is heavily dependent upon availability of public utilities and rates.
- In most situations municipalities are able to create a special rate classification to incentivize economic develop through reduced rates.
- No free service if bonded
- Economic development benefits may justify rate decisions even if direct utility revenues are reduced

# Revenues of the Utility System

- For accounting purposes, the utility is considered a business and constitutes an “enterprise fund.”
- Bonds for the utility system are generally secured by revenues of the system (Revenue Bonds) rather than by taxes (General Obligation Bonds).
- Transfers from the enterprise fund to the general fund are limited by financial considerations (rating agencies) and, recently, by caselaw (*Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015)).