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CONSTITUTIONAL LAW

I. SPECIAL REVENUE BONDS

In *Johnson v. Piedmont Municipal Power Agency*,¹ the South Carolina Supreme Court held that municipalities joining hands under provisions of the Joint Municipal Electric Power and Energy Act of 1978 (Act)² could issue special revenue bonds to purchase an interest in a large nuclear power generating facility. This decision indicates that the supreme court is willing to grant the state and its political subdivisions greater flexibility in the use of revenue bonds. *Johnson* follows within one year another revenue bond challenge in which the state was enjoined from issuing bonds to finance development of the "gasahol" industry in South Carolina.³ While this earlier case suggested that the court would require some showing of public purpose before granting a constitutional imprimatur to the legislature's aims,⁴ *Johnson* is a return to the court's oft-stated position that legislative determinations should be granted every presumption of constitutional propriety.⁵

In early 1978, Duke Power Company sold a part interest in its Catawba Nuclear Station to a joint agency composed of North Carolina municipalities organized under a North Carolina statute similar to the South Carolina Act.⁶ Shortly thereafter,

1. 277 S.C. 345, 287 S.E.2d 476 (1982).

2. S.C. CODE ANN. §§ 6-23-10 to -330 (Supp. 1981). The Act allows a municipality to join as tenant-in-common with one or more municipalities in South Carolina, or another state, or any political subdivision or agency of another state, to jointly provide electricity for its inhabitants. *Id.* at § 6-23-30. The purpose of the Act is to provide an economical and efficient source of energy, not attainable by a single municipality. 277 S.C. at 349, 287 S.E.2d at 478.

3. *State ex rel. McLeod v. Riley*, 276 S.C. 323, 278 S.E.2d 612 (1981). In *Riley*, the court also invalidated amendments to the Industrial Revenue Bond Act, S.C. CODE ANN. §§ 4-29-10 to -150 (Supp. 1981), which allowed the issuance of industrial revenue bonds to finance computer and office facilities and commercial shopping centers because a public purpose was not served. 276 S.C. at 330-32, 278 S.E.2d at 616-17.

4. 276 S.C. at 333, 278 S.E.2d at 617.

5. 277 S.C. at 351, 287 S.E.2d at 479.

6. *Id.* at 348, 287 S.E.2d at 477-78. North Carolina's Act is codified at N.C. GEN. STAT. § 159B (1976 & Supp. 1981). It was signed into law two years prior to South Carolina's Act.

South Carolina's Act was signed into law, and twelve municipalities in the upper part of the state joined together to form Piedmont Municipal Power Agency (PMPA),⁷ one of the defendants in *Johnson*. Two and one-half years later, in August 1980, PMPA and Duke Power negotiated the sale and service contracts relating to the facility. As part of these contracts, PMPA agreed to issue special revenue bonds which ratepayers in PMPA's service area would repay as part of the price charged for electricity sold.⁸ The value of these bonds was expected to total 675 to 767 million dollars over the thirty year term of the contract.⁹

The suit in *Johnson* was brought to enjoin issuance of the bonds and to declare the agreements between Duke Power and PMPA void as an unconstitutional exercise of legislative power. Plaintiffs were taxpayers, suing individually and on behalf of all others similarly situated, and the Town of Bamberg, South Carolina. Plaintiffs first asserted that the bonds could not issue without an election, since the rate-paying population and tax-paying population were substantially identical, thus making these bonds, in effect, general revenue bonds. Second, the plaintiffs argued that the agreements between PMPA and Duke Power established a "joint ownership" between public and private interests, prohibited under article X, section 11 of the South Carolina Constitution.¹⁰ The trial court upheld the Act and agreements, and the South Carolina Supreme Court affirmed.

The supreme court split three to two over the question of the Act's constitutionality, with Justice Harwell cautiously concurring but directing a caveat regarding unresolved legal questions toward ratepayers, bond purchasers, and others who may be involved in the matter.¹¹ The majority, after clearly reaffirm-

7. 277 S.C. at 348, 287 S.E.2d at 478. Currently, member municipalities include the following: Abbeville, Clinton, Easley, Gaffney, Greer, Laurens, Newberry, Rock Hill, Seneca, Union, and Winchester. Prosperity, while a member when the agreements in question here were executed, withdrew in 1980. *Id.* at n.3, 287 S.E.2d at 478 n.3.

8. *Id.* at 349, 287 S.E.2d at 478.

9. *Id.*, 287 S.E.2d at 478.

10. S.C. CONST. art. X, § 11 states in pertinent part that "[n]either the State nor any of its political subdivisions shall become a joint owner of or shareholder in any company, association or corporation."

11. 277 S.C. at 355, 287 S.E.2d at 482 (Harwell, J., concurring).

ing that deference will be given to legislative determinations of purpose,¹² based its decision on a line of cases approving special revenue bonds in general, and industrial revenue bonds in particular.¹³ Since the Act specifies that all bonds issued by PMPA are special obligations,¹⁴ and since the legislature, through passage of the Act, determined that the acquisition of power plants is a public purpose,¹⁵ any constitutional hurdles were cleared. Any benefits to Duke Power flowing from the contracts did not render the bond issue constitutionally defective.

Plaintiffs' argument that a referendum was required prior to purchase of the plant was also rejected. The referendum provision applies to constitutionally created political subdivisions, the majority reasoned; PMPA was a legislatively created body.¹⁶ On the issue of joint ownership, the majority refused to accept the plaintiffs' characterization of the purchase as by PMPA from Duke Power; rather, they viewed the agreement as essentially between PMPA and the North Carolina consortium of municipalities.¹⁷ This construction renders South Carolina Constitution article X, section 11, inapplicable, and in fact finds a specific constitutional warrant in article VIII, section 13.¹⁸

12. *Id.* at 351, 287 S.E.2d at 479.

13. *Id.* at 351-54, 287 S.E.2d at 479-81. General revenue bonds are those for whose redemption actual tax revenues have been pledged, and substantial restrictions attach to their issuance. Special obligations, on the other hand, are bonds repaid from revenues from a source other than taxes. The "full faith and credit" of the issuing body is not pledged for repayment of special obligations. S.C. CONST. art. X, §§ 13-14.

14. S.C. CODE ANN. § 6-23-210 (Supp. 1980).

15. In *Elliott v. McNair*, 250 S.C. 75, 87, 156 S.E.2d 421, 428 (1967), the "public purpose" as determined by the legislature was industrial development and concomitant employment in economically depressed areas of the state. Nothing in the record of *Johnson* indicates that jobs will be created, or that an industry had been attracted to the Piedmont region because of PMPA's bond issue. Rather, PMPA is purchasing an existing, partially completed power plant, and Duke Power is free to recruit technicians for the plant's operation from wherever it chooses.

A further distinction between the purchase/operation agreement entered into by PMPA and Duke Power and an industrial revenue bond issue is that in the latter the industry is able to take advantage of a county's or political subdivision's access to credit markets at a lower rate of interest by promising certain things in return, e.g., local recruitment of employees, while in the former Duke Power promises very little and receives relief from its unanticipated construction expenses, courtesy of PMPA's ratepayers.

16. 277 S.C. at 352, 287 S.E.2d at 480. The court analogized PMPA to a special purpose district.

17. *Id.* at 354, 287 S.E.2d at 481.

18. Article X, § 11 is quoted *supra* at note 10. Article VIII, § 13 states in pertinent

Justice Littlejohn, dissenting along with the Chief Justice, noted that the contracts require PMPA to pledge 675 to 767 million dollars, an amount which the agency's rate-paying customers would repay. He felt that such an obligation demanded closer scrutiny by the court.¹⁹

The dissent grounded its reasoning on *Robinson v. White*.²⁰ There, a bond issue, though ostensibly "special" or "revenue," nonetheless ran afoul of the constitution because of a provision in the challenged statute allowing business license taxes to make up any shortfall caused by the project's failure to generate sufficient revenue.²¹ In *Johnson*, Justice Littlejohn tried to extend this holding to find that when the weight of repayment falls on such a broad segment of the population, the effect of the bonds is the same as if general revenues had been pledged. Since PMPA's ratepayers are in a similar situation as the business license taxpayers in *Robinson*, the dissent concluded that the result in *Johnson* should be the same. Justice Littlejohn reasoned that in both cases, the taxpayers are "captive payors" because "[t]he taxpayer must pay the tax or have his property sold; the ratepayer must pay the rate charge or either (1) discontinue the use of electricity, or (2) move out of town."²² Under this analysis, the PMPA bonds would be treated as general, not special, "making all the rules, statutes, and constitutional provisions relating to general obligation bonds applicable here."²³

Although this argument may appeal to advocates of lower government spending, case law provides little support for this analysis. While every jurisdiction considers charges for business licenses to be a "tax," just as the *Robinson* court did,²⁴ rarely

part: "Nothing in this Constitution shall be construed to prohibit the State or any of its . . . political subdivisions from agreeing to share the lawful cost, responsibility, and administration of functions with any one or more governments, whether within or without this State." (emphasis added).

19. 277 S.C. at 356-59, 287 S.E.2d at 482-83 (Littlejohn, J., dissenting).

20. 256 S.C. 410, 182 S.E.2d 744 (1971). Justice Littlejohn wrote the majority opinion in *Robinson*, Chief Justice (then Justice) Lewis joined his opinion.

21. *Id.* at 418, 182 S.E.2d at 748; accord *Kaminski v. Higgins*, 257 S.C. 222, 185 S.E.2d 365 (1971).

22. 277 S.C. at 302, 287 S.E.2d at 485.

23. *Id.* at 363, 287 S.E.2d at 485.

24. See, e.g., *Richmond County v. Richmond County Business Ass'n*, 225 Ga. 568, 170 S.E.2d 246 (1969); *City of Columbia v. Niagara Fire Ins. Co.*, 249 S.C. 388, 154 S.E.2d 674 (1967); *Commonwealth v. Olan Mills, Inc.*, 196 Va. 898, 86 S.E.2d 27 (1955); *Christopher v. James*, 122 W. Va. 665, 12 S.E.2d 813 (1941).

will a fee for services provided be deemed a tax.²⁵ Since PMPA's ratepayers are indeed receiving a service in exchange for paying their electric bills, it is difficult, even under the foregoing analysis, to classify PMPA's financing arrangement as a general obligation bond. Even if the bonds were considered special obligations, the dissent would have held that a referendum was required by article VIII, section 16,²⁶ since a contrary ruling would allow PMPA's member cities to do, as a group created by statute, that which is constitutionally prohibited for them individually.²⁷

On the issue of joint ownership, the dissent sharply criticized the General Assembly, stating that there could be no doubt "that the act was designed to permit the sale by Duke of this particular property."²⁸ Noting that Duke Power retains all but legal title to the Catawba Plant and that it will continue to profit from the operation as if no sale had occurred,²⁹ Justice Littlejohn argued that the arrangement between Duke Power and PMPA is indeed joint ownership prohibited by article X, section 11. Observing further that North Carolina amended her constitution to change a similar provision prior to the purchase pursuant to the North Carolina Act,³⁰ he would have required a similar constitutional change to legitimize PMPA's dealings with Duke Power.³¹

25. See, e.g., *City of Charleston v. Board of Educ. of Kanawha County*, 209 S.E.2d 55, 57 (W. Va. 1974)(charge by municipality for services rendered or conveniences provided is not a "tax").

26. S.C. CONST. art. VIII, § 16 provides:

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 and plants.

Any county or consolidated political subdivision created under this Constitution may, upon a majority vote of the electors voting on the question in such county or consolidated political subdivision, acquire by initial construction or purchase and may operate water, sewer, transportation or other public utility systems and plans other than gas and electric; *provided* this provision shall not prohibit the continued operation of gas and electric, water, sewer or other such utility systems of a municipality which becomes a part of a consolidated political subdivision.

27. 277 S.C. at 359-60, 287 S.E.2d at 484.

28. *Id.* at 364, 287 S.E.2d at 486.

29. *Id.* at 364-65, 287 S.E.2d at 486, 487.

30. N.C. CONST. art. V, § 10.

31. 277 S.C. at 365, 287 S.E.2d at 487.

The impact of *Johnson* is not yet clear. The majority's refusal to extend the dictum in *Robinson* and find a general obligation where a debt "fall[s] upon such a large segment of the people"³² indicates that the court will allow greater flexibility in public finance. If, as *Johnson* explicitly affirms, only clearly prohibited legislative enactments will be struck down, then South Carolina's cities may be free to employ new, innovative financing techniques to attract needed industries and jobs. Given the extensive revision of article X in 1977,³³ as well as the 1980 and 1981 amendments to the Industrial Development Bond Act,³⁴ *Johnson*'s sweeping approval of an arguably unwise revenue project suggests that these imaginative revenue bond techniques, if authorized by the legislature, will weather a constitutional challenge.

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32. 256 S.C. at 418, 182 S.E.2d at 748.

33. S.C. CONST. art. X (1895, amended 1977). From the point of view of bond attorneys, the most significant change was a relaxation of the absolute ceiling on bonded indebtedness. Prior to the 1977 amendment, total bonded indebtedness could not exceed 8% of assessed value of taxable property; the new article X allows unlimited indebtedness upon approval of a majority of the voters in the political subdivision. *Id.* at § 14.

34. S.C. CODE ANN. §§ 4-29-10 to -150 (Supp. 1982). The 1980 amendment expanded the definition of "project" to include office facilities and shopping centers, subject to a minimum employee restriction. It was the subject of *State ex rel. McLeod v. Riley*, 276 S.C. 323, 278 S.E.2d 612 (1981), discussed *supra* at notes 3-4 and accompanying text. In response to this decision, the 1981 amendment emphasized most explicitly the legislature's findings of "public purpose" in a very lengthy preamble. Section 9, Act 179, 1981 S.C. Acts.