STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 14-65

City's Ability to Contract with Out-of-State Water Commission

QUESTIONS

1. Is a Tennessee city authorized to contract for the provision of water services with a water commission created under the laws of another state?

2. Is a Tennessee city authorized to serve as a member of a water commission created under the laws of another state?

OPINIONS

1. Under Tenn. Code Ann. § 12-9-108, a Tennessee city is authorized to contract with a political subdivision of another state for the provision of water services. A water commission organized by local governments of another state would likely meet the definition of "political subdivision" as used in this statutory scheme.

2. Assuming the other state's laws so permit, a Tennessee city may become a member of an out-of-state water commission pursuant to the Interlocal Cooperation Act, Tenn. Code Ann. §§ 12-9-101 to -112, under an agreement that satisfies the requirements of § 12-9-104.

ANALYSIS

1. Tennessee cities are generally authorized to own and operate water systems and to contract for the provision of water. *See, e.g.,* Tenn. Code Ann. §§ 7-34-104; 7-35-416; 9-21-107. In addition, the Interlocal Cooperation Act, Tenn. Code Ann. §§ 12-9-101 to -112, authorizes cooperative action between and among governmental entities. Tenn. Code Ann. § 12-9-108 provides:

> Any one (1) or more public agencies may contract with any one (1) or more public agencies to perform any governmental service, activity or undertaking which each public agency entering into the contract is authorized by law to perform; provided, that such contract shall be authorized by the governing body of each party to the contract. Such contract shall set forth fully the purposes, powers, rights, objectives, and responsibilities of the contracting parties. Contracts entered into

> pursuant to this section need not conform to the requirements set forth in this chapter for contracts for joint undertakings.

The term "public agency" includes "[a]ny political subdivision of this state" and "[a]ny political subdivision of another state." Tenn. Code Ann. § 12-9-103(3)(A), (E). A city is clearly a political subdivision within the meaning of the statute, so a Tennessee city is authorized to contract with a political subdivision of another state for the provision of water services. A water commission created under the laws of another state and organized by local governments of that state would likely also be a political subdivision under this statutory scheme. *See* Tenn. Code Ann. § 12-9-103(1) (defining "[l]ocal government entity" to include a "utility district . . . or other political subdivision of this state"); Tenn. Att'y Gen. Op. 03-17, at 3 (Feb. 19, 2003) ("A utility district, once incorporated, is a municipality or public corporation."). *See also, e.g.*, *Davis v. Powell's Valley Water Dist.*, 920 S.W.2d 75, 78 (Ky. Ct. App. 1995) ("a water district is a type of special district which constitutes a political subdivision of the [C]ommonwealth [of Kentucky]").

2. No general Tennessee law explicitly confers upon a city authority to become a member of an out-of-state water commission, and the general rule is that municipalities may exercise only those express or necessarily implied powers delegated to them by the legislature in their charters or under statutes. *See, e.g., Allmand v. Pavletic*, 292 S.W.3d 618, 625 (Tenn. 2009). If there is any fair doubt whether a local governmental entity possesses a particular authority, courts should resolve that doubt against the existence of that authority. *Southern Constructors, Inc. v. Loudon County Board of Education*, 58 S.W.3d 706, 710 (Tenn. 2001). Nevertheless, the General Assembly can supply direct evidence of its intent to grant broad local governmental powers when it chooses to do so. *Id.* at 712-13. In *Southern Constructors*, for example, the Tennessee Supreme Court found that the power of county school boards to arbitrate disputes arising out of construction contracts could be fairly implied by their express authority to contract. *Id.* at 714-18.

The power to become a member of a political subdivision of another state (by becoming a member of an out-of-state water commission) is fairly implied by the Interlocal Cooperation Act. This act confers broad authority on cities, as well as other Tennessee political subdivisions, to enter into joint projects with other political subdivisions both in and outside Tennessee. Tenn. Code Ann. § 12-9-102 provides:

> It is the purpose of this chapter to *permit local governmental units the most efficient use of their powers* by enabling them to cooperate with other localities on a basis of mutual advantage and thereby provide services and facilities *in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population, and other factors* influencing the needs and development of local communities.

(Emphases added.) And Tenn. Code Ann. § 12-9-104(a)(1) provides:

> Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state, . . . may be exercised and enjoyed jointly with any other public agency of this state having the power or powers, privilege or authority, and jointly with any public agency of *any other state* or the United States *to the extent that laws of such other state or of the United States permit such joint exercise* or enjoyment. . . .

(Emphasis added.)

In contrast to a city's contracting with another public agency for water services pursuant to § 12-9-108, a city's becoming a voting member of another public agency pursuant to § 12-9-104 would be subject to requirements for joint undertakings under § 12-9-104. Consequently, while a city would have authority to become a member of an out-of-state water commission, such an undertaking could not affect the "powers, privileges or authority" of individual public officers or of an agency of the city with a separate governing body. Tenn. Code Ann. § 12-9-104(a)(1). Furthermore, appropriate action of the governing bodies of the participating public agencies must be secured before any agreement for joint or cooperative action may enter into force. Tenn. Code Ann. § 12-9-104(b).[1] And such an agreement would be subject to all of the restrictions and limitations set out in Tenn. Code Ann. § 12-9-104(c)-(f). Subdivision (e)(1), for instance, provides that "[n]o agreement made pursuant to this chapter shall relieve any public agency of any obligation or responsibility imposed upon it by law." Therefore, a city may not become a member of a water commission if such commission exercises any powers that the city itself does not possess. *See* Tenn. Att'y Gen. Op. 06-81 (May 1, 2006).

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[1] Tenn. Code Ann. § 12-9-108, discussed above, also requires that a contract between or among public agencies "be authorized by the governing body of each party to the contract."

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