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December 17, 2019

The Honorable Luke Rankin
Chairman
South Carolina Senate Judiciary Committee
101 Gressette Building
Columbia, South Carolina

Dear Chairman Rankin:

The attached article from the STATE newspaper of August 6, 2019 regarding the retention of the Gibson Dunn law firm by the Department of Administration caught my attention. (Attachment 1) The Department of Administration has retained Gibson Dunn in connection with the Department's responsibilities under the provisions of Act 95 of the 2019 Session of the General Assembly (the Joint Resolution) regarding the future of Santee Cooper.

In addition to outlining the six million dollar fee that Gibson Dunn is to be paid, the article includes the following sentence:

"As an act of good faith, the contract states, the firm will defer 10% of its total fees until the General Assembly decides what to do with Santee Cooper."

After obtaining and reviewing the actual retention letter between the Gibson Dunn law firm and the Department of Administration (Attachment 2), it is clear that the 10% of the fee referred to in the STATE article is not an expression of "good faith." The Gibson Dunn fee agreement says nothing about "good faith." Not only is it not an act of good faith, the fee agreement violates the law as it directly contravenes Section 1. (A)(2)(b) of Act 95. This subsection, discussed below, specifically prohibits the kind of agreement that the Department of Administration has entered with Gibson Dunn.

The 10% portion of the fee agreement, which could amount to as much as six hundred thousand dollars, is, in fact, a contingency fee agreement. This 10%, under the terms of the paragraphs set forth below, is to be paid to Gibson Dunn upon the contingency of Santee Cooper being sold. As such, the Gibson Dunn agreement is a contingency fee agreement and provides for Gibson Dunn to have a financial interest in the outcome of the process. As set forth below, Section 1. (A)(2)(b) of Act 95 prohibits the Department from entering into a contingency fee agreement or any other agreement that provides a financial interest for a professional services firm in the outcome of the Act 95 process.

The entire Gibson Dunn retention letter is attached as Attachment 2 and the relevant two paragraphs are as follows:

In light of the uncertainty arising from not knowing what the General Assembly may ultimately determine after it receives the Department's recommendations, we propose to defer ten percent (10%) of total amount of our fees incurred in working with the Department until the General Assembly makes a decision in response to the Department's recommendations.

If the General Assembly elects to proceed with a sale transaction, these deferred fees would become payable upon the closing of the applicable transaction. However, if the General Assembly elects to proceed with a third-party management transaction or to permit Santee Cooper to continue under its own management, the Firm would write off the deferred fees in their entirety due to the State not reaping the benefit of any additional sales proceeds, having to continue to service the Summer debt and having to pay a third-party manager.

As the language of the retention letter makes clear, Gibson Dunn will receive up to an additional six hundred thousand dollars if, but only if, Santee Cooper is sold. The existence of this contingent arrangement raises a number of important legal issues and other concerns. First, there is the question of whether the work of Gibson Dunn can ever be accepted as objective or fair. The second paragraph of the letter of retention provides as follows:

You are retaining us to provide legal services to the Department in connection with the Department's legislatively mandated obligation pursuant to that Public Service Authority Joint Resolution (R113, 1-1R.4287) (the "Joint Resolution") to deliver to the South Carolina General Assembly three recommendations, one for each of the following categories: (1) a potential acquirer of Santee Cooper, in whole or in part; (2) a company to potentially manage Santee Cooper as a continuing state-owned utility; and (3) a plan to be proposed by Santee Cooper for reforming and restructuring Santee Cooper as a continuing state-owned utility (collectively, the "Santee Cooper Matter").

The Joint Resolution (R 113, H. 4287) is of course now Act 95 of 2010. (Attachment 3)

As can readily be seen, under this fee agreement, Gibson Dunn is to render legal analysis and opinions on three options called for under the Act 95 concerning:

1- The Sale of Santee Cooper
2- The management of Santee Cooper by a third party
3- The reform of Santee Cooper

Gibson Dun stands to receive an additional six hundred thousand dollars if Santee Cooper is sold. This contingency fee agreement calls into substantial question any analysis and opinion by the firm regarding the management or reform proposals. It is shocking to the conscience that the Department would enter into an agreement that, on its face, renders questionable the work to be performed by Gibson Dunn and for which it is to be paid six million dollars.

In addition to the overall question of fundamental fairness, the agreement is in clear violation of Section 1. (A)(2)(b) of Act 95. In pertinent part, this subsection reads:

In addition, the department must not utilize the professional services of an individual or entity that would have a financial interest in the outcome of this process, nor may the Department contract or otherwise employ an individual or entity based upon a contingency fee due to the outcome of this process.

The agreement that the Department has entered into with the Gibson Dunn law firm stunningly violates both of these specific legal prohibitions. The agreement is a contingency fee that provides for Gibson Dunn to have a direct financial interest in the outcome of the process.

Perhaps even more alarming than the absence of any objectivity of the Gibson Dunn work product, and the clear violation of Section 1, (A)(2)(b) of Act 95, is the obvious misapprehension by Gibson Dunn - and the Department of Administration - of fundamental provisions of statutory law regarding Santee Cooper. When Santee Cooper was created in 1934, the General Assembly wisely protected the State of South Carolina from ever being or becoming liable for any of Santee Cooper's debt. The General Assembly made this clear in several of the provisions of the enabling legislation. The following provision of Santee Cooper's enabling legislation states this fundamental principal in very clear and concise terms:

Section 58-31-130. Credit and taxing power of the State and its subdivisions shall not be involved; liability for payment of securities.

Nothing contained in the provisions of this chapter shall, at any time or in any manner, involve the credit and taxing power of the State, or of any of its political subdivisions; nor shall any of the securities or other evidences of indebtedness authorized to be issued in and by this chapter ever be or constitute obligations of the State or of any of its political subdivisions; nor shall the State or any of its political subdivisions ever be liable or responsible, in any way, for the payment of the principal or interest of or on such security or other evidences of indebtedness.

Gibson Dunn and the Department of Administration are apparently unaware of this very basic and clearly worded statute. In the above referenced paragraphs, the fee agreement states - as a part of the rationale for the six hundred thousand dollar contingency payment - that the sale of Santee Cooper will keep the State from *"having to continue to service the Summer debt."* In other words, Gibson Dunn is to be paid the six hundred dollars, contingent on the sale, because - it is asserted - the sale will prevent the State from *"having to service the Summer debt."* Had Gibson Dunn and the Department of Administration ever read the above referenced Code section, they would know that the State has never paid - nor will it ever have to pay - the Summer debt nor any other debt of Santee Cooper. To base a portion of its fee on a savings of money that can never occur raises questions of both competence and propriety. If Gibson Dunn is not aware that this simple, but fundamentally important statute protecting the State from ever being liable for any Santee Cooper debt, one must question the competence of the firm to render analysis and legal opinions on the complex questions that are certain to arise in carrying out the responsibilities under Act 95.

It is stunning that Gibson Dunn is not aware of this simple straight forward and controlling provision of Santee Cooper's enabling statute. Perhaps even more shocking is the fact the Department of Administration is not aware of this same simple provision of the South Carolina Code. This failure, in turn raises question about all the work that Gibson Dunn and the Department of Administration have performed under Act 95 (the Joint Resolution).

The Gibson Dunn letter also sets out two other purported reasons for the contingency fee arrangement. These are that the State would be "reaping the benefit of any additional sales proceeds" if Santee Cooper

is sold, or, for the State not "having to pay a party a third-party manager" if Santee Cooper is turned over to a third party manager.

While these two purported reasons are not directly in contravention of the Santee Cooper enabling law as is the provision regarding the State not "having to service the Summer debt" discussed above, they are equally illusory. First, there is by no means any assurance that the sale of Santee Cooper will actually result in the State "reaping the benefit of any additional sales proceeds." The Gibson Dunn agreement does not require that the sale of Santee Cooper would result in "additional proceeds" in order for the firm to receive the additional six hundred thousand dollars in legal fees. The only contingency for this additional fee is that Santee Cooper be sold. It was entirely foreseeable at the time the Gibson Dunn agreement was signed that a sales price would not result in any "additional sales proceeds" to the State. Yet no such "additional sales proceeds" are required for Gibson Dunn to receive the additional six hundred thousand dollars.

As to the second purported reason, that is that the State would not be "having to pay a third party manager," this also appears to be completely illusory. It is well understood, that if the option of a third party managing Santee Cooper is selected, the management fee for such an arrangement would be derived from Santee Cooper operations, not the taxpayers of South Carolina. The General Assembly has never appropriated any money for Santee Cooper and there is certainly no intent to begin to do so now.

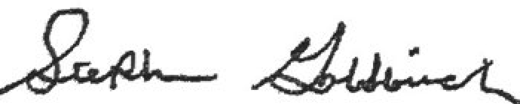
In sum, all three reasons for the contingency portion of the fee are non-existent and a total illusion - and one of them contravenes two provisions of the statutory law of South Carolina.

The troubling questions of objectivity and competence outlined above must be addressed and they need to be addressed quickly. The Joint Resolution (Act 95) calls for the three alternate proposals to be submitted to the General Assembly by January 15, 2020. We have little time to address these very substantial issues.

For these reasons, I am asking you as Chairman of the Senate Judiciary Committee to immediately appoint a subcommittee to address these issues. I have many questions for the Department of Administration and Gibson Dunn and am sure other members of the Judiciary Committee may have as well. Since the questions relate directly to questions of law, it is appropriate for the Judiciary Committee to inquire into these matters as early as possible.

I would welcome the opportunity to discuss this request at your convenience.

Sincerely yours,



Stephen L. Goldfinch
SC Senate - District 29

Attachments