

801.1 (a)

Attorneys and Counselors at Law

November 7, 2007

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Mr. Michael B. Verne
Federal Trade Commission
Premerger Notification Office
Bureau of Competition
600 Pennsylvania Avenue, N.W.
Room 303
Washington, DC 20580

**RE: [REDACTED]
Hart-Scott-Rodino Premerger Notification**

Dear Mr. Verne:

This letter confirms our telephone call of earlier today and our understanding regarding application of the Hart-Scott-Rodino Act's exemption involving an acquisition of a half-built power plant by our client. As you know, the client we represent (the "Client") is a privately formed nonprofit corporation organized by specific legislative act of its members, all political subdivisions, under the laws of the State of Ohio for the sole purpose of benefiting its members (the "Members"). For the reasons set forth below and as you confirmed in our telephone call, Client should be treated as a political subdivision for HSR purposes and, therefore, is exempt from the requirements to file a premerger notification with the Federal Trade Commission and the Department of Justice and to comply with the applicable waiting period. Similar to the client in FTC File # 9904004, Client is an "agency" and is not an "entity" and, therefore, Client is not a "person" nor an "acquiring person" under CFR § 801.1.

Description of Transaction

The transaction at issue involves Client's possible acquisition, on behalf of its Members, of a half-built power plant from a major U.S. power company that currently owns the facility. The power plant will provide a portion of the future power supply needs of the Members. If the power plant has output capacity greater than that needed by the Members, Client may enter into long-term contracts to sell the excess output to non-Member public and private entities. Any resulting income from any such contracts with private entities will inure to the benefit of the Members.

Description of Client

The Members of Client must be either (1) political subdivisions of the State of Ohio or another state that own or are in the process of initiating electric, natural gas, or communication utility systems, or (2) political subdivisions that consume electric power to distribute it to other political subdivisions that qualify under (1) but are so geographically remote from Client's general area of operations that Client cannot economically provide services to such Member. Client's powers specifically include the right to borrow on behalf of its Members.

Client was organized to assist in procuring the most economic and reliable wholesale electric power supplies and transmission services for its Members both on an individual basis and on a "pool" basis for groups of Members. Client generates and buys, or otherwise arranges for, electric power for its Members for use in their individual municipal electric utility systems. It also arranges for the transmission of power to the Members. Some of the Members obtain all of their power supply through Client, while others purchase only a portion of their needs through Client. In every situation, however, Client's activities are vitally important to the operations of the Members. Both its Articles of Incorporation and its Code of Regulations provide that it will be operated for the benefit of its Members.

1. Authorizing Statutes

As stated above, Client was organized by specific legislative act of its members, all political subdivisions. Any political subdivision interested in becoming a Member must take legislative action to do so. That is, acceptance of membership in Client is formally approved and typically memorialized by such Member's adoption of an ordinance or resolution or other administrative action.

2. Applicability of Laws

Client is not subject to any Ohio or local income tax. Interest on bonds issued by Client is exempt from Ohio and local income tax. Ohio recently enacted a commercial activity tax on all receipts of Ohio businesses. Client is exempt from such tax. Client is subject to Ohio property taxes and is subject to sales tax on purchases of its non-utility related property.

Client is a Municipal Power Agency under the laws of the State of Ohio. This designation is important for various purposes, including, for example, appropriation of property by public agency. Because Client is a Municipal Power Agency, a public body can appropriate property and transfer it to Client and such use would be considered a public use.

Client is also afforded the treatment of political subdivisions by the Internal Revenue Service (the "Service"). In addition to its tax exempt status under section 501(c)(12) of the Internal Revenue Code of 1986, as amended (the "Code"), Client has received several rulings that essentially treat it as a political subdivision.

On May 9, 1996, the Service issued a private letter ruling concluding that Client is empowered to issue, on behalf of its Members, tax exempt bonds under Code section 103(a). That ruling finds the following facts crucial to the analysis:

Here [Client] was organized under state law as a non-profit corporation by specific legislative act of its members, all political subdivisions of State, as authorized by State law. Each [Member] will specifically approve any debt issued by [Client], and each will be responsible for part of the debt service. [Client's] public purpose is to help its members by providing economical electrical power, transmission of electrical power, technical services, and mutual aid. The members control [Client] through their power to elect and remove representatives on the governing Board of Trustees. [Client] is a non-profit corporation and none of [Client's] income can be paid to any person or entity other than a member. Upon dissolution any assets remaining after payment of debt must be divided among the members, including past members, according to their contributions, dues, and patronage. (emphasis added.)

The Service issued another private letter ruling on October 24, 2002 under Code section 141 which addresses the taxation of private activity bonds (i.e., bonds issued by non-governmental persons for private purposes). In concluding that Client came within the meaning of "governmental person" under Treas. Reg. §1.141-1(b), the ruling considered the following facts relevant to the analysis:

[Client] was formed by the Members to obtain economic, reliable supplies of electric power and transmission services on behalf of its Members (political subdivisions of certain states) and to provide related technical services to its Members. By obtaining electric power and transmission services and providing related technical services, [Client] performs the same or similar functions that each Member would be required to perform individually if [Client] did not exist. Hence, [Client] is used for the governmental purpose of its Member utility systems and performs the governmental function on behalf of the Members.

The Members have the powers and interests of an owner. All annual revenues in excess of expenses accrue to the benefit of the Members in that they are either applied to reduce costs of services to Members or are treated as increases to Members' patronage capital. In the event of [Client's] dissolution or liquidation, Members receive the assets of [Client], to the extent that any remain after payment of [Client's] debts, based on initial capital

contributions, refunds of membership fees, and their patronage capital.

Control and supervision of [Client] are vested in public authorities and not private interests because the Members, each of which is a political subdivision, control all aspects of [Client's] operations through the Board. The Board is composed exclusively of representatives of the Members, each of whom must be elected by the Members. In the event of an unscheduled vacancy, any replacement Board trustee would also be selected from among the Members.

The financial affairs of [Client] are controlled by the Members. The Members, through the Board, establish the amount of all fees and energy charges and develop [Client's] annual budget. Both the Board and the Members approve [Client's] annual budget.

Finally, on May 28, 2004, the Service issued a private letter ruling that Client's gross income is excluded from taxation under Code section 115 because Client performs an essential governmental function and all of its income accrues to the benefit of one or more political subdivisions. With regard to Client's status, the ruling states the following:

[Client] was formed to benefit its member political subdivisions by allowing them to use their pooled resources to purchase and sell electric power at favorable rates. Such activities are similar to those undertaken by the political subdivisions in Rev. Rul. 90-74 to obtain insurance coverage at the lowest possible rate. Thus, [Client] derives its income from an essential governmental function that accrues to the benefit of political subdivisions of State. Private interests will benefit no more than incidentally from the business operations of [Client]. Accordingly, based on the information presented, the income of [Client] will be excludable from gross income under section 115(1) of the Code.

3. Board Appointments

Client is governed by a board of trustees consisting of sixteen of its Members. No individuals, non-Member municipalities, or other entities or organizations are eligible to serve as trustees. Members elected as trustees appoint an individual to represent them on the Board. The president and general counsel serve as non-voting, *ex officio* trustees. One hundred percent of the control of Client is held by political subdivisions. Although the definition of control in CFR § 801.1(b) refers to the ability to designate 50 percent or more of the directors, the Members are entitled to designate all of the directors.

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In light of these facts and consistent with our discussion, Client is exempt from the Act. Client is a political subdivision and is not an "entity" under section 801.1(a)(2) of the regulations. If your understanding of today's telephone call differs from what has been stated herein, please let me know.

Sincerely,

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cc:

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AGREE
B
11/8/07