

7A(c)(4)
801.1

November 24, 2010



Via Electronic Mail, Original by U.S. Mail

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

2010 DEC -2 AM 11:34

Re: Application of Hart Scott Rodino Act to Texas Local Government Corporation

Dear Mr. Verne:

I am writing to confirm my interpretation regarding the application of the Hart Scott Rodino Antitrust Improvements Act (the "HSR Act") to a local government corporation. For the reasons set forth in this letter, I believe the local government corporation should be considered a political subdivision under Section 7A(c)(4) of the HSR Act which exempts transactions involving "transfers to or from a Federal agency or a State or political subdivision thereof" as well as Section 801.1(a)(2) of the regulations promulgated under the HSR Act.

Description of Transaction

My client, a Texas local government corporation (the "LGC") is proposing to purchase the assets of an electrical power generating plant located in West Texas. Assuming the size of parties tests are met, based on the proposed purchase price, the transaction would exceed the size of transaction test under the HSR Act and could therefore potentially be subject to its filing requirements.

The LGC was formed by a municipal power agency (the "MPA") which was formed under the Texas Utilities Code. As a municipal power agency, the MPA is to provide for the supply of electric power to its member cities. The MPA currently satisfies these obligations through a wholesale power sales contract with a third party, which contract expires without the possibility of renewal in 2019. Because of this expiring contract, the MPA must ensure it has facilities built and capable of generating electricity to replace that currently provided under the wholesale contract by 2019.

The Local Government Corporation

The LGC was formed in 2008 by the MPA. The MPA itself is a separate municipal corporation and political subdivision of the State of Texas formed by four cities in west Texas (the "Member Cities"). As a municipal power agency and municipally-owned utility under the Texas Utilities Code, the MPA is obligated to provide for the reliable and adequate supply of electric energy for the service of the municipalities included in its geographic coverage. To aid in the performance of its duties, the MPA formed the LGC as a "local government corporation"

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under the Texas Transportation Corporation Act, pursuant to Chapter 431, Subchapter D of the Texas Transportation Act.

Purpose and Powers. Pursuant to the LGC's Articles of Incorporation (the "Articles"), the LGC is "organized exclusively for the purposes of benefitting and accomplishing [the] public purposes of, and to act on behalf of [the MPA]." Specifically, the LGC is authorized to issue bonds, notes and other forms of debt and acquire, maintain, lease and sell property and interests therein, on behalf of the MPA, to "promote and develop public generation and transmission systems within the [MPA] service area and the state of Texas in order to generate and transport electric energy for the benefit of the member cities of [the MPA]."

The LGC, pursuant to the Articles, has and may exercise "the same powers of sovereignty of [the MPA], including . . . the power of eminent domain." In addition, the LGC is considered a "governmental unit" and its actions are "governmental functions" for purposes of the Texas Tort Claims Act.

Taxation. The Articles further provide that, "The [LGC] is a constituted authority and a public instrumentality within the meaning of the regulations and rulings prescribed and promulgated pursuant to Sections 103 and 141 of the Internal Revenue Code of 1986, as amended . . ." (which provisions generally relate to interest on state and local bonds).

Governance. The affairs of the LGC are managed by a seven person board of directors. Four of the directors are directly appointed by each of the member cities and three directors are appointed by the MPA. A majority of the directors must reside within the member cities and they serve without compensation.

Meetings of the board are subject to the Texas Open Meetings Act and the LGC is generally subject to the Texas Public Information Act.

Authorizing Statute

In looking at whether a governmental corporation qualifies as a political subdivision of a government entity, one of the most important factors is the enabling legislation. As stated above, the LGC was formed pursuant to the Texas Transportation Corporation Act (the "TTCA") under Chapter 431 of the Texas Transportation Code.

Purpose. Section 101 of the TTCA provides that a "local government corporation may be created to aid and act on behalf of one or more local governments to accomplish any governmental purpose of those local governments."

In addition to the governmental purpose describe in Section 101, Section 108(a) of the TTCA specifically provides that a local government corporation is a "governmental unit" for purposes of the Texas Civil Practice and Remedies Code. Chapter 101 of the Texas Civil Practice and Remedies Code defines a governmental unit as "(A) [the State of Texas] and all the several agencies of government that collectively constitute the government of this state, including other agencies bearing different designations, and all departments, bureaus, boards,

commissions, offices, agencies, councils, and courts; (B) a political subdivision of [the State of Texas], including any city, county, school district, junior college district, levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, and river authority; (C) an emergency service organization; and (D) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution."

Section 108(b) of the TTCA goes on the state, "The operations of a local government corporation are governmental, not proprietary functions."

Taxation. The TTCA further provides, in Section 22, that a local government corporation is considered a "public charity" under Article VIII, Section 2 of the Texas Constitution, which generally exempts from taxation "public property used for public purposes." In addition, Section 102 of the TTCA provides that the property of a local government corporation (as well as a transaction to acquire property) is generally exempt from taxation.

Income. Section 107 of the TTCA provides that a local government which creates a local government corporation is entitled at any time to receive any income earned by the local government corporation that is not needed for the local government corporation's obligation. In addition, Section 107 specifically prohibits the earnings of a local government corporation from benefitting a private interest.

Declaratory Judgment

In connection with a previous potential transaction, the LGC and the MPA, in January 2009, sought and obtained a judgment from a Texas District Court with respect to its rights and authority. Specifically, the District Court found, among other things:

1. The MPA is a municipal power agency, a municipal corporation and a municipally-owned utility.
2. The MPA is a municipality for purposes of the TTCA and has the authority to create a local government corporation.
3. The LGC is a local government corporation with the authority of a non-profit corporation.
4. The LGC is a municipally-owned utility within the meaning of the Texas Public Utility Regulatory Act.
5. The LGC was properly formed and has the authority to issue bonds without seeking a further declaratory judgment under the Texas Government Code.

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Conclusion

Based on the intent of the governing statute, the provisions of the LGC's organizational documents and the declaratory judgment issued by the District Court in Texas, I believe it is clear that the LGC constitutes a political subdivision of the State of Texas and therefore would not be considered an "entity" for purposes of the HSR Act. I believe the facts and analysis are very similar to those in a November 7, 2007 informal interpretation (#0711008) regarding the acquisition of a power plant in Ohio, in which you concurred that a privately formed non-profit corporation organized by specific legislative act of its members, all political subdivisions, for the sole purpose of benefiting its members, was not an equity under Section 801.1(a)(2), but rather a political subdivision for purposes of Section 7A(c)(4).

If, based on these facts, you believe a different conclusion is warranted, I would appreciate the opportunity to discuss the matter at your earliest convenience. If you are in agreement with my conclusion, I would appreciate it if you could acknowledge such by phone or email.

Should you have any questions or need additional information, please contact me at [REDACTED]

Respectfully submitted,

[REDACTED]

AGREE
11/26/10
[Signature]