

[REDACTED]

July 22, 1991

John M. Sipple, Jr.  
Chief, Premerger Notification Office  
Bureau of Competition  
Federal Trade Commission  
Room 306  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Jul 23 8 50 AM '91  
FEDERAL TRADE COMMISSION  
BUREAU OF COMPETITION

Dear Mr. Sipple:

In pursuance of our telephone conversation of this morning, I am writing to set forth the circumstances pursuant to which the [REDACTED] seeks a determination of whether it is obligated to file a disclosure statement under the Hart-Scott-Rodino notification provisions when it acquires an interest giving [REDACTED] the right to gas production from certain wells to serve [REDACTED] municipalities -- and specifically, whether [REDACTED] is required to do so with respect to its prospective acquisition of a royalty override interest in gas from [REDACTED]. We are aware that 15 U.S.C. § 18a(c)(4) exempts "transfers to or from . . . a State or political subdivision thereof"; that 15 U.S.C. § 18a(c)(1) exempts transactions "in the ordinary course of business"; and that the Commission has issued regulations in connection with these exemptions.

[REDACTED] was created by the State of [REDACTED] as "an institution of purely public charity performing an essential governmental function" -- specifically that of obtaining gas supplies for and

associated financing for [redacted] municipalities that operate gas distribution systems. (A copy of [redacted] chartering legislation is enclosed.) While [redacted] is not itself technically a "political subdivision" of [redacted], it is declared to be an "instrumentality" of the state, [redacted] and each of the participants whose representatives govern [redacted] is a political subdivision of [redacted] authorizing legislation provides that, "the General Assembly finds that certain political subdivisions of the state now own and operate gas distribution systems . . . and if such political subdivisions are to furnish, and if the members of the public in the areas they serve are to receive adequate service, such political subdivisions must have adequate, dependable and economic sources of gas supply." The legislation goes on to authorize the creation of [redacted] as a "public body, corporate and politic." [redacted] The municipalities that are participants in [redacted] each nominate a representative to [redacted] "election committee" which, in turn, chooses [redacted] nine "members" (i.e., representatives of municipalities), as well as a chairman and associated officers. [redacted] thus operates for the interests of an aggregate of [redacted] political subdivisions for the purpose of providing their gas supplies, and the gas it acquires is sold only to such municipalities.<sup>1/</sup>

Notably, there is an electrical counterpart of [redacted], the [redacted], which, in a recent antitrust case, was held exempt from the antitrust laws with respect to carrying out its functions, and

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1/ As indicated throughout its chartering legislation, [redacted] has the attributes of a state subdivision and agency and serves only state political subdivisions. However, the reason it is declared to be an instrumentality rather than a subdivision is that, prior to the creation of [redacted] had in [redacted] created an electrical counterpart, the [redacted] ([redacted]). The first [redacted] chartering bill described [redacted] as a state political subdivision; but a concern was raised that [redacted] would, by reason of a then-existing state constitutional provision [redacted] as codified), have to hold a referendum for each of its bond issues, even though it lacked a geographical constituency in which to do so. The bill was then changed to recharacterize [redacted] as a state instrumentality, not a subdivision. The format was followed for the later legislation creating [redacted]

"doubly vested in implementing what is in the public interest: it is a state instrumentality with defined purposes and accreditation, and it acts on behalf of the Participants [municipalities], which are themselves political entities within the state."

[REDACTED] statutes are virtually identical, except that one concerns gas and the other electricity.

It is also worth noting that the gas supplies that [REDACTED] acquires are not productive capital assets. Rather, the gas is sold to, and consumed by, the customers of municipalities throughout the State of [REDACTED]

Although there are a number of forms by which [REDACTED] can secure gas supplies, i.e., through various sizeable contracts specifying quantities or minimum quantities, including "take or pay" provisions and so forth, [REDACTED] has, on the advice of bond counsel, made its purchases in the form of a "royalty override interest" -- i.e., a purchase of an interest giving [REDACTED] the right to the gas from particular wells. [REDACTED] is expressly authorized by [REDACTED] statute to issue revenue bonds. See [REDACTED]

We believe that if [REDACTED] were required regularly to file premerger notification statements under the Hart-Scott-Rodino Act each time it makes a large gas purchase, it would serve no purpose of federal antitrust enforcement activities and would result in substantial cost and burden to [REDACTED] and the municipalities that are served by and participate in [REDACTED]


There is some urgency to this as [REDACTED] was quite unaware that its gas purchases would create any need to report under HSR, and [REDACTED] is on the verge of approving and completing a [REDACTED] acquisition of gas, which it believes to be advantageous to it and its municipal participants, from [REDACTED] which is in the business of selling gas at wholesale. It had been

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- 2/ The contemplated transaction is structured as an asset purchase in the form of an 'in kind' overriding royalty in specific producing gas properties. The asset purchase is the form of transaction recommended by Bond Counsel under the Internal Revenue Code of 1986 for transactions financed with municipal bonds.

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anticipated that the contract would be submitted to the governing board on July 25, 1991 for approval and that the transaction would be set to close on or about August 28, 1991.



We would be pleased to supply you promptly with any further information you may need. Please feel free to call if you have any questions. Thank you for your consideration.

Sincerely yours,  


Enclosure

Called on 7/24/91 -

A/C

I informed the inquirer that we would treat  as the state or agency of the state of  since it is an instrumentality of the state, formed by the state for the purpose of carrying out the state policy established by the state of purchasing gas among other things, for ~~local~~ political subdivisions of the state. For purposes of 11 S.R. only, the municipal authority would be treated as a state agency and therefore, its ~~acquisitions~~ <sup>are</sup> ~~will be~~ exempt under § 7A(c)(4) of the Act. (The Act ~~covering~~ the municipal authority was reviewed in connection with the matter).