

TESTIMONY FOR IRS PUBLIC HEARING ON THE DEFINITION OF A POLITICAL SUBDIVISION

I appreciate this opportunity to make this statement before you today on the Internal Revenue Service proposed rulemaking addressing the definition of a political subdivision for purposes of determining eligibility to issue tax-exempt bonds under Section 103 of the Internal Revenue Code.

My name is Dave Schryver and I am the Executive Vice President for the American Public Gas Association. APGA is the national association for publicly-owned natural gas distribution systems. There are approximately 1,000 public gas systems in 37 states and over 720 of these systems are APGA members. Publicly-owned gas systems are not-for-profit, retail distribution entities owned by, and accountable to, the citizens they serve. They include municipal gas distribution systems, public utility districts, and other public agencies that have natural gas distribution facilities—mostly in rural areas but also in Philadelphia, San Antonio, Omaha, Long Beach, Colorado Springs, Memphis, Richmond, and Pensacola.

All APGA gas distribution members are political subdivisions either created directly by state or local law or organized under state or local enabling legislation. None exists or operates for the benefit of private parties. Their retail customers are served as members of the general public under generally available tariffs and rate schedules.

Natural gas is a lifeblood of our economy and more than 5 million Americans depend on our members to provide safe, reliable, and affordable natural gas service to the homes and businesses in their community. APGA members represent the homeowners and small businesses which rely on affordable natural gas to heat their homes, heat their water, cook their meals, and service their restaurants, manufacturing operations, and businesses.

In addition to having public gas systems as members, APGA's membership also includes, as agency members, a number of governmental entities that do not own retail distribution systems but rather have been formed by municipalities under state law as joint action gas supply agencies, for the purpose of acquiring long-term gas supplies for municipal gas distribution systems and managing those systems' transportation and storage

contracts with the federally regulated interstate pipelines to which they are connected.

Our message is that the proposed regulations “throw the baby out with the bath water.” The proposed new definition of “political subdivision” would eliminate the ability of local communities all over the U.S. to build their utility infrastructure and purchase natural gas with tax-exempt financing, which they have been doing appropriately for decades for the benefit of their inhabitants.

APGA’s members utilize tax-exempt financing for critical investments in natural gas infrastructure to ensure their ability to continue to provide safe and reliable natural gas service in their communities. For many, access to tax-exempt financing was the reason they were able to bring natural gas service to rural parts of the country in the first place, beginning over 60 years ago. These investments in infrastructure are now more important than ever given the new pipeline safety regulations being issued by the Pipeline and Hazardous Materials Safety Administration.

Access to tax-exempt financing to acquire long-term gas supplies is also crucial for public gas systems. Following the deregulation of the commodity portion of the gas industry that began over 30 years ago, many local governments use tax-exempt financing to meet the obligations thrust upon them by changes in federal law, which required them to purchase their own gas supplies and ship them through the interstate pipelines, rather than buying a bundled product from the pipelines. Access to tax exempt financing is an important tool in their tool box for acquiring that gas supply on a long-term basis at a reasonable and competitive price, despite their small size and lack of market power.

The governmental structures under which public gas systems and their joint action gas supply agencies have been organized and established under state law are numerous and nuanced. Some meet all three of the sovereign powers (taxation, eminent domain, and police) and therefore meet the “governmental control” test within the proposed rule, but many others do not.

The proposed rule as written would eliminate future tax exempt financing for any entity that is not controlled by a single city, town or county’s elected governing body. APGA has members that are Gas Districts, which are formed under a state law authorizing two or more municipalities to organize

a new public corporation to provide natural gas distribution service to consumers living in cities and towns and unincorporated areas in a rural part of a state, with powers that include eminent domain but not tax or police powers. The gas district is not an instrumentality of its members or an “on behalf of” entity. It is the “entity.” And, once organized, it is the state or local governmental unit. But the proposed rule suggests that a distinction exists, or must exist, and that some other state or local governmental unit must exercise control over the gas district.

For the same reason, Joint action gas supply agencies could also be adversely impacted by the proposed rule. Joint action gas supply agencies are governmental entities that have been created by or organized pursuant to a law enacted by the legislature in a state. Similar to the gas district member I just mentioned, joint action gas supply agencies have been granted authority to provide natural gas services as a public function but not governmental functions of all types.

The joint action agency is governed by a board of directors or commissioners made up of representatives of the member governmental entities. The board is not controlled by any individual member entity. The directors may be government officials. They may also be citizens who are neither elected nor appointed municipal officials. But once they are elected or appointed to the board they are officials of a governmental entity – the joint action agency. Given these issues, the critical role that joint action agencies play in providing natural gas supply and other services to public gas systems would be jeopardized by the proposed rule.

APGA has also strong concerns regarding the impact of the Incidental Private Benefit Provision. All of APGA’s members serve a public purpose and a governmental purpose. Their purpose is to provide, safe, reliable and reasonably priced natural gas supply, transmission and distribution services to the public within the areas they serve, on a not-for-profit basis. No member of the governing body of a public gas system participates in the “profits” of a public gas system. There are no “profits” paid to shareholders. Net margins are used for capital or other infrastructure improvements to enhance the safety, reliability and breadth of the services offered, or are used to reduce rates to the gas consuming public, if they do not just remain with the municipality. This provision creates significant regulatory uncertainty by adding the requirement that a governmental entity operate in a manner that provides “no more than incidental private benefit”. It is APGA’s position that the private use rules currently in place provide an

appropriate amount of restrictions on the private use of the proceeds of tax-exempt bonds.

In closing, the proposed rule either would or could terminate the status of scores of public natural gas distribution systems and their joint action gas supply agencies as “political subdivisions” for purposes of issuing tax-exempt bonds. For these reasons, APGA opposes the proposed rule and urges the IRS to withdraw it.