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TM#

Jay Holmquist, General Manager
Nebraska Rural Electric Association
800 South 13th Street
P.O. Box 82048
Lincoln, NE 68501

Re: Rural Economic Development Grant

Dear Jay:

QUESTION

You have asked whether public power districts are authorized to participate in the grant portion of the Federal Rural Economic Development Loan and Grant program sponsored by the United States Department of Agriculture (REDLG). REDLG is a part of the federal "cushion of credit payments program" described in 7 U.S.C. § 940c and 7 CFR, Subpart B, §§ 1703.10 through 1703.68.

FACTS

As I understand the grant portion of the program, federal grants are made available to rural utilities to establish a revolving loan fund to provide no interest loans to local businesses, governmental units, and not-for-profit entities for economic development. Rural Utilities are required as part of the grant program to provide 20% of the loans from their own funds.

ANALYSIS

The Attorney General for the State of Nebraska has given an opinion regarding the pass through loan program of REDLG (Opinion No. 00042 dated December 1, 2000). Although the opinion only includes the pass through loan program of REDLG and not the grant portion, the analysis of the question presented and the conclusions reached by the opinion are applicable as well to the grant portion of REDLG. The request for the opinion describes REDLG as follows:

"The substance of the federal statutory and regulatory provisions are that 'cushion of credit' funds may be used for rural economic development and job creation projects; that the funds are to be made available to Rural Utilities Service (RUS) borrowers as

defined, and that in regard to zero interest loans, reasonable repayment terms should be established. Under this Rural Economic Development Loan and Grant (REDLG) program, federal funds could be loaned to an eligible RUS borrower like a public power district which would make a "pass-through" loan to another entity that will own or undertake a private development project using the proceeds of the loan. One of the requirements of the REDLG program is that the RUS borrower is required to obtain a letter of credit from a financial institution satisfactory to RUS to honor a draft drawn on the RUS borrower, should such borrower fail to pay on the loan obtained from RUS."

The Attorney General in his opinion divides the pass through loan portion of the REDLG program in two parts, as follows:

(1) Involves the loan from a public power district to another entity that would ultimately own or undertake a private development project using the proceeds of that loan. In this situation, the power district stands as a creditor since it would loan funds to the other entity.

(2) Involves the borrowing of funds from RUS for the purpose of making loans to the private entity. The loan from RUS to the power district would necessitate a letter of agreement and any additional legal documentation from the power district which RUS deemed appropriate including loan agreements, promissory notes, security instruments, certifications or legal opinions, and a letter of credit. The power district would have to pay back its zero interest loan to RUS if the other entity defaulted on its loan from the power district.

Article XIII, § 3 of the Nebraska Constitution prohibits lending the credit of the state and the use of public funds for private purposes. In this regard, the Attorney General states in his opinion:

"Article XIII, § 3 of the Nebraska Constitution provides that '[t]he credit of the state shall never be given or loaned in aid of any individual, association, or corporation...' The purpose of that section is to prevent the state or any of its political subdivisions from expending the state's credit to private enterprise. (Citations omitted). It is designed to prohibit the state from acting as a surety or guarantor of the debt of another."

(Citations omitted). Page 3 of the Opinion.

The Nebraska Supreme Court in *Haman v. Marsh*, 237 Neb. 699, 722, 467 N.W.2d 836, 852 (1991) stated that "the key focus of Article XIII, § 3 is whether the state stands as a creditor through the expenditure of its funds, or as a debtor by the extension of credit in the interest of private parties. (Citations omitted).

The Attorney General found that part (1) of the pass through loan does not violate the constitutional prohibition. He states in his opinion that "[t]he power district would stand as a creditor in that transaction, since it would loan funds to the private entity. As a result, that portion of the program does not appear to involve lending the credit of the state." Page 4. However, the Attorney General found that part (2) of the pass through loan "implicates the credit of the state. In that latter situation, the power district stands as a debtor through the extension of

its credit, rather than as a creditor through the loan of public funds. Consequently, the pass-through loan portion of the REDLG program meets the first element of an unconstitutional extension of credit under arty. XIII, § 3.” Page 5 of the Opinion.

A. Loans from Power Districts to Private Entities under grant portion of REDLG

The Attorney General’s opinion does not specifically opine on the grant portion of REDLG. Nevertheless, a part of the grant program is similar to part (1) of the pass through loan program. In that regard, the grant portion of the REDLG program involves a grant from RUS to the power district which in turn makes loans to private entities. The power district has no obligation to pay back the grant to RUS, but only to follow RUS requirements in making the loans. One of the requirements is for a power district to contribute 20% of the loan made to private entities. In this situation, the power district is not extending its credit on behalf of a private entity, but is making a direct loan. The power district then is a creditor and not a debtor. Thus, it would appear that the grant portion of REDLEG would not violate Article XIII, § 3 of the Nebraska Constitution since it does implicate the credit of the power district.

B. Contribution of 20% of the Loans by Power Districts under the grant portion of REDLG

Another issue to be decided is whether a power district has the authority to contribute 20% of the loan from its own funds to qualified entities. Public power districts, as creatures of statute, must operate within the limits of the powers expressly or impliedly conferred on them by the Nebraska statutes, particularly Chapter 70, Article 6. In addition, a district’s operations are subject to the limitations expressed in its charter. *Schroll v. City of Beatrice*, 169 Neb. 162, 98 N.W.2d 790 (1959). Furthermore, a public power district may not go into areas for which the laws of the state give them no authority. *United Community Services v. Omaha Nat. Bank*, 162 Neb. 786, 77 N.W.2d 576 (1956); *Chase v. County of Douglas*, 195 Neb. 838, 241 N.W.2d 334 (1976).

Neb. Rev. Stat. § 70-625(3) authorizes the board of directors of a public power district to apply for and use funds available from federal agencies for grants or loans to promote economic development and job creation projects in rural areas under the rules and regulations of the federal agency from which the funds are received. A limitation on this authority is that any loan made must be made with the participation of a bank pursuant to a contract. Subsection (3) of the statute also authorizes the board of directors, in rural areas of the district, to provide technical or management assistance to businesses, provide assistance to a local or regional industrial or economic development corporation or foundation and provide youth and adult community leadership training.

Neb. Rev. Stat. § 70-625.01 contains a number of findings by the Legislature including: (1) rural areas in the state are experiencing declines in economic activity and out-migration of residents; (2) rural economic development efforts can increase the productivity of economic resources and quality of life of rural residents; (3) funds may be available from federal agencies for economic development and job creation projects; (4) public power districts operating in rural areas are uniquely situated to know and understand the need to promote economic development and job creation projects in their service areas, and (5) it is the public policy of this state to allow

public power districts to promote economic development and job creation projects in rural areas through programs administered by federal agencies such as the Rural Economic Development Loan and Grant program.

The Attorney General in his opinion found that “[s]ections 70-625 and 70-625.01 clearly authorize public power districts in Nebraska to participate in the cushion of credit and Rural Economic Development Loan and Grant programs.” Page 2. In addition, section 70-625(3) specifically authorizes public power districts to use “grants or loans to promote economic development and job creation projects in rural areas as permitted under the rules and regulations of the federal agency from which the funds are received.” One of the requirements of the rules and regulations under the grant program of REDLG is that public power district contribute 20% of its own funds to the revolving loan program.

Although section 70-625 does not expressly authorize a power district to use its own funds in order to participate in economic development programs sponsored and funded by the United States Department of Agriculture or other federal agencies, it does expressly authorize power districts to participate in such programs “as permitted under the rules and regulations of the federal agency from which the funds are received.” In *United Community Services v. Omaha Nat. Bank*, 162 Neb. at 794, the Supreme Court stated with respect to the powers of companies chartered for the purpose of supplying the public with electricity:

* * * have such lawful rights and powers as are clearly and expressly granted, together with such implied * * * powers as are reasonably * * * necessary to enable them to exercise those expressly conferred, and to enable them to accomplish the objects of their creation. All rights and powers not thus granted are withheld.”

A reasonable argument can be made that the contribution of power district funds is implied because it is necessary to enable power districts to exercise the powers that are expressly conferred on a power district under Section 70-625. A power district is expressly authorized to participate in the federal programs under rules and regulations of the federal agencies. The rules and regulations with respect to the grant program of REDLG require a power district to contribute 20% of the funds. A power district cannot participate in the grant program unless it contributes 20% of the funds. Therefore, the power to contribute 20% is implied otherwise a power district could not carry out the expressed authority to participate in the program under the rules and regulations of the federal agency.

Considering the authority that has been granted to public power districts under section 70-625 to participate in federal programs which would include REDLG, the intent of the Legislature and the expression of public policy in section 70-625.01 for public power districts to promote and assist in economic developments in rural areas, and the case law referred to above, it would appear that public power districts have the implied authority to contribute 20% of their own funds to the grant and revolving loan program of REDLG.

CONCLUSION

In conclusion, there appears to be no constitutional prohibition against a public power district participating in the grant program of REDLG so long as it does not lend its credit to the transaction. In addition, the Legislature has specifically authorized public power districts to participate in this program under the rules established by the program. The rules and regulations require a public power district to contribute 20% of the funding for the revolving loan program. If a public power district could not participate in the program, the phrase "as permitted by the rules and regulations of the federal agency from which the funds are received" would in this instance be meaningless. Moreover, a power district would not be able to participate in this program when the legislature has expressly authorized power districts to participate in federal programs that promote economic development in rural area. Thus, a reasonable argument can be made that public power districts have the implied authority to contribute 20% of the funds in order to participate in the grant portion of REDLG and make loans for economic development pursuant to the rules and regulations of the REDLG program. However, the authority to participate in this program is conditioned by section 70-625(3) on the public power district's participation with a bank under a contract on any loan made by the power district.

Very truly yours,

CROSBY GUENZEL LLP

By


Steven G. Seglin

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