

INTERPRETIVE LETTER 93-022 (OCTOBER 28, 1993)

Non-rated bonds issued by a public agency are a permitted investment; definition of "public agency."

Your letter to * concerning bonds issued by the Bi-State Development Agency of the Missouri-Illinois Metropolitan District ("Bi-State") has been referred to me for response. With your letter, you enclosed copies of opinions from the accountant and the law firm for * ("Bank"), addressing the tax status of Bi-State's bonds as well as the authority of Bank to invest in the bonds.

We understand that Bank purchased \$550,000 worth of Industrial Development Revenue Refunding Bonds Series 1992 that were issued by Bi-State. That amount is less than 20% of Bank's unimpaired capital and unimpaired surplus. Therefore, Bank's investment in the Bi-State bonds does not violate the quantitative criterion of Section 33 of the Illinois Banking Act, 205 ILCS 5/33 (1992) [formerly Ill. Rev. Stat. ch. 17, par. 341 (1991)] ("Banking Act"). The issue concerns whether the bonds had to meet the qualitative rating criterion of Section 33 to be eligible for purchase by Bank. It is the Commissioner's position that the rating restrictions of Section 33 do not apply to marketable investment securities issued by Bi-State as a public agency.

Last year, Public Act 87-940 significantly affected the qualitative criterion of Section 33 of the Banking Act. Public Act 87-940 provided that a marketable investment security issued by a "public agency" does not have to be rated in one of the top four rating categories by a national rating service in order for a state bank to be authorized to purchase the security. Section 33 of the Banking Act uses the definition of "public agency" found in Section 1 of the Public Funds Investment Act, 30 ILCS 235/1 (1992) [formerly Ill. Rev. Stat. ch. 85, par. 901 (1991)] ("Investment Act").

The definition of "public agency" in Section 1 of the Investment Act identifies specific categories of entities that are to be treated as public agencies. While Bi-State is not an entity that is included in any of these specific categories, the definition also includes two general categories of public agencies. If Bi-State constitutes a "political corporation" or a "subdivision" of the State of Illinois, it would qualify as a public agency for purposes of Section 1 of the Investment Act and Section 33 of the Banking Act.

Bi-State has been construed to be a "local public entity" under the Illinois Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101 et seq. (1992) [formerly Ill. Rev. Stat. ch. 85, pars. 1-101 et seq. (1991)] ("Tort Immunity Act"). See Grady v. Bi-State Development Agency, 502 N.E.2d 1087 (Ill. App. Ct. 1986). In Grady, Bi-State appealed a judgment in which the court denied Bi-State's motion to dismiss a personal injury suit for failure of the plaintiff to substantially comply with the notice requirements of the Tort Immunity Act. Bi-State claimed that, as a local public entity, it was entitled to receive a notice of plaintiff's injuries containing all of the specific

information listed in Section 8-102 of the Tort Immunity Act. The court determined that Bi-State was a local public entity for purposes of the Tort Immunity Act, based on Bi-State's statutory duties and powers. The court additionally justified its determination with the definition of "Interstate transportation authority" in the Local Mass Transit District Act, 70 ILCS 3610/2(h) (1992) [formerly Ill. Rev. Stat. ch. 111 2/3, par. 352(h) (1991)], which stated:

"Interstate transportation authority" shall mean any political subdivision created by compact between this State and another state, which is a body corporate and politic and a political subdivision of both contracting states.... Id. at 1089. (emphasis added)

The court held that the plaintiff did not substantially comply with the requirements for notifying a local public entity under the Tort Immunity Act, reversed the lower court's denial of Bi-State's motion, and dismissed plaintiff's complaint with prejudice. Id. at 1090. See also Cooper v. Bi-State Development Agency, 510 N.E.2d 1288 (Ill. App. Ct. 1987) (court recognized determination in Grady of "local public entity" status of Bi-State and dismissed plaintiff's complaint with prejudice for similar reasons as in Grady).

The United States Court of Appeals for the Eighth Circuit, which includes the State of Missouri, considered whether Bi-State was immune from action under 42 U.S.C. Section 1983 due to the protection of the Eleventh Amendment of the United States Constitution as an arm of the States of Missouri and Illinois. See Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corporation et al., 948 F.2d 1084 (8th Cir. 1991). The court used six different factors in analyzing Missouri and Illinois state law to determine whether Bi-State was an arm of Missouri and Illinois or more in the nature of a local public body. In its decision that Missouri and Illinois state law treated Bi-State as though it was a county or municipality, the court referred to the determination in Grady that Bi-State was a local public entity. Id. at 1087. The court concluded that Bi-State was more in the nature of a local public body, according to Missouri and Illinois state law, rather than an arm of the States of Missouri and Illinois and therefore it was not entitled to the protection of the Eleventh Amendment against action under 42 U.S.C. Section 1983. Id. at 1088. But see State ex rel. Trimble v. Ryan, 745 S.W.2d 672, 674-675 (Mo. 1988) (en banc) (persuaded by Grady that Bi-State was a public entity, the Missouri Supreme Court construed Bi-State to be a political subdivision of the State of Missouri).

The Commissioner is persuaded that Bi-State is a "public agency" as defined in Section 1 of the Investment Act. Bi-State is encompassed within the language "all other political corporations or subdivisions of the State of Illinois..." in the "public agency" definition.

The rating restrictions of Section 33 of the Banking Act do not apply to marketable investment securities issued by Bi-State.