802.70

[redacted]

[redacted]

[redacted]

[redacted]

CONFIDENTIAL

2000 JAN 13 P 3:29

January 13, 2000

VIA FACSIMILE

Mr. Michael Verne
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
6th Street and Pennsylvania Avenue, NW
Room 301
Washington, DC 20580

Re: [redacted] Joint Venture And Related Acquisition — Not Reportable Under Hart-Scott-Rodino

Dear Mr. Verne:

On behalf of our client, [redacted], I write to confirm the substance of our conversations on December 17 and 20, 1999 and our joint conference call with [redacted] counsel for [redacted]) on December 17, 1999, in which you advised us that no aspect of the proposed joint venture between [redacted] described below, is subject to the reporting requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR").

Specifically, this letter confirms your analysis as to why three distinct aspects of the transaction are not reportable under HSR: (1) the initial creation of the [redacted] int venture; (2) the parties' respective contributions of their interests in several Texas partnerships to the joint venture (the "Texas Transaction") which will result in the joint venture holding 100% of the outstanding interests in each of the partnerships; and (3) the subsequent transfer of additional assets by the parties to the joint venture and the related transfer of control of the partnership from [redacted]

Although we had previously confirmed with Dick Smith of your office that the first and third aspects of the transaction noted above were not themselves reportable, we were unaware of the Texas Transaction at the time of our communication with Mr. Smith. Therefore,

[redacted]

[redacted]

Mr. Michael Verne
January 11, 2000
Page 2

CONFIDENTIAL

we sought to contact Mr. Smith to reconfirm that the Texas Transaction is not independently reportable and would not alter the PNO's previously expressed view that neither the first nor third aspects of the transaction were reportable. Given Mr. Smith's recent retirement, you have confirmed the PNO's position that none of the acquisitions made in conjunction with this transaction are reportable.

Material Facts

On September 21, 1999 [redacted] executed a U.S. Wireless Alliance Agreement ("Agreement" or "proposed transaction"), pursuant to which they will form a joint venture designed to enhance the parties' ability to provide national wireless service and other benefits to consumers. The vehicle for creating the joint venture is a preexisting Delaware general partnership known as the [redacted] d/b/a [redacted] Mobil[redacted] Prior to the creation of the joint venture [redacted] wholly-owned by [redacted]

Pursuant to the Agreement, [redacted] nd [redacted] ill contribute assets to [redacted] exchange for which [redacted] ould receive and [redacted] would retain certain interests in [redacted] an to consummate the proposed transaction in two stages as more fully explained below.

The Stage I Closing

At the Stage I closing, [redacted] will transfer to the partnership: 1) certain assets and regulatory licenses related to cellular telephone and other wireless businesses; and 2) the net proceeds from the disposition of [redacted] ystems which, if retained, would result in the

---

[1] Three entities controlled by [redacted] own the following portions of [redacted] .%); 2) [redacted] , [redacted] 344%); and [redacted] CS, Inc. [redacted] (37.646%).

[redacted] an indirect, wholly-owned subsidiary o[redacted] owns 60% o[redacted] nd PCS owns the remaining 40%.

[redacted] is a limited partnership which is an indirect, wholly-owned subsidiary of [redacted] is owned by four entities: 1) [redacted]; 2) [redacted] Mobile Systems of Northern New Jersey, Inc.; 3) [redacted] ., directly or indirectly, [redacted] y, Inc. is a subsidiary of [redacted] entities are wholly-owned direct subsidiaries of [redacted], a Delaware corporation, which in turn are wholly-owned direct subsidiar[redacted], a Delaware corporation, which is a wholly-owned direct subsidiary of [redacted]

[redacted] is a wholly-owned subsidiary of [redacted] which is a wholly-owned subsidiary of [redacted] n is a wholly-owned subsidiary of [redacted]

[redacted]

Since [redacted] is 50% held by [redacted] prior to this closing, this step constitutes the non-reportable formation of a partnership.

[redacted]

CONFIDENTIAL

ownership of competing or overlapping wireless assets and FCC licenses. In return [redacted] will issue a new partnership interest to [redacted] entitling it to approximately 65.1% of [redacted] revenues and approximately 65.1% of [redacted] assets upon dissolution. [redacted] would own the remaining 34.9% of [redacted]. As presently structured, therefore, [redacted] temporarily will become [redacted] ultimate parent entity at the Stage I closing.

The Texas Transaction

After the execution of the Agreement, [redacted] and [redacted] reached agreement on the [redacted] Transaction. The [redacted] Transaction is composed of two agreements: 1) a U.S. Wireless Alliance Agreement; and, 2) through two wholly-owned subsidiaries together with [redacted] a Purchase Agreement to acquire certain outstanding partnership interests in several [redacted] partnerships held by [redacted]. Prior to consummating the [redacted] Transaction, [redacted] and [redacted] through their respective 50% partnership interests in a partnership known as [redacted] -- have an indirect interest in each of three limited partnerships, Dallas MTA, LP, Houston MTA LP, and San Antonio MTA LP. [redacted] holds 80% of the outstanding partnership interests in each partnership; [redacted] holds the other 20% interest in each of the three partnerships.

Pursuant to the Purchase Agreement, [redacted] and [redacted] through other controlled entities, will each acquire 55% and 45% respectively of the outstanding interest in each partnership held by [redacted]. In other words, [redacted] will acquire an 11% limited partnership interest from [redacted] in each partnership and [redacted] will acquire a 9% limited partnership interest from [redacted] in each partnership. In the Alliance Agreement, [redacted] and [redacted] have agreed that the [redacted] partnership interests acquired by each of their affiliates "shall be considered [redacted] Stage I Conveyed Assets and [redacted] Stage I Conveyed Assets respectively, for the purposes of the Alliance Agreement." The net effect of the agreements is that both the 80% interest in each partnership presently held by [redacted] as well as the additional 20% interests presently held separately by [redacted] and [redacted] will be contributed to and held by the [redacted] partnership as part of Stage I of the joint venture.

The Stage II closing is set to occur on the earlier of: 1) the first anniversary of the Stage I closing; or 2) 10 days after: a) [redacted] consummates its merger with [redacted] [redacted] and [redacted] abandon their proposed merger. The Stage II closing will take one of two forms, depending upon whether or not [redacted] and [redacted] consummate their merger.

The Stage II Closing

If [redacted] and [redacted] consummate their merger, [redacted] will contribute certain [redacted] wireless assets, liabilities and accompanying FCC and other regulatory licenses and approvals to [redacted] will contribute additional wireless assets, liabilities and

[redacted]

[redacted]

Mr. Michael Verne
January 13, 2000
Page 4

CONFIDENTIAL

accompanying FCC and other regulatory licenses and approvals [redacted] will issue additional partnership interests to [redacted] and [redacted] adjusting their relative partnership interests to reflect their contributions to the partnership. After the Stage II closing [redacted] will control 55% and [redacted] will control 45% of the [redacted] partnership interests.

If, however, [redacted] and [redacted] do not consummate their merger before the Stage II closing, [redacted] will contribute the remainder of its domestic wireless operations to [redacted] in return for additional partnership interests. [redacted] also will contribute certain additional wireless assets, liabilities and accompanying FCC and other regulatory licenses and approvals to [redacted]. [redacted] will issue additional partnership interests to [redacted] and [redacted] such that [redacted] will control 67% of [redacted] and [redacted] will own the remaining 33%.

The Consent Decree

On December 6, 1999 the Antitrust Division announced that [redacted] and [redacted] had entered into a proposed consent decree to address any concerns the Antitrust Division may have regarding the [redacted] joint venture. The proposed decree is in the form of an amendment to the Bell Atlantic/GTE Corporation proposed consent decree entered into with the Antitrust Division in May, 1999. The proposed decree adds [redacted] as a party to the earlier [redacted] decree.

The amended proposed consent decree addresses competitive issues arising from overlaps in the wireless businesses among [redacted] created by both the proposed [redacted] merger and the [redacted] joint venture. The proposed decree would require the [redacted] and/or [redacted] to divest certain assets and licenses in areas where the parties would hold overlapping wireless assets or FCC licenses.

Discussion

You have confirmed that no HSR filing would be required for the Stage I closing, the Texas Transaction, or the Stage II closing for the reasons described below.

The Stage I Closing is Not Reportable

You have confirmed that the Stage I closing is not reportable under HSR because it would be deemed to be the formation of a new partnership. Even though [redacted] already exists -- and state law would treat the issuance of partnership interests in [redacted] as an amendment and restatement of an existing partnership -- we understand that it is the PNO's position that [redacted] is not an entity for HSR purposes while all of its outstanding partnership interests are held, directly or indirectly, by [redacted]

[redacted]

[redacted]

CONFIDENTIAL

Therefore, [redacted]s contribution of assets to [redacted] in exchange for a 67% interest in the [redacted] partnership will be deemed, for HSR purposes, to be the formation of a new partnership. Pursuant to the PNO's long-standing interpretation that the formation of a partnership does not give rise to a filing obligation under the HSR Act, [redacted] and [redacted] need not file HSR forms for the "formation" of the [redacted] partnership at Stage I. This principle further exempts from a reporting obligation both [redacted] acquisition of its 67% stake interest in [redacted] Partnership (and [redacted] concomitant reduction in its stake from 100% to approximately 33%) as well as the parties' respective contributions of assets to [redacted] as part of the formation transaction.

Accordingly, Stage I of the transaction is not reportable under the HSR Act.

The Texas Utilities Acquisition Is Not Reportable Under HSR

The [redacted] Transaction can itself be thought of as a two step transaction. In step one, subsidiaries of [redacted] and [redacted] will each purchase for cash or cash equivalents 11% and 9% respectively of the outstanding partnership interests in each of the three [redacted] partnerships. Since neither [redacted] nor [redacted] will hold 100% of the interests in any of the partnerships as a result of this acquisition, the PNO would not treat the acquisition of the partnership interests as either an acquisition of assets or of voting securities and therefore such acquisitions would not trigger an HSR filing obligation.

In the second step of the [redacted] Transaction, [redacted] and [redacted] will each contribute their newly acquired partnership interests to their [redacted] joint venture as part of the Stage I Closing.[2] The effect of contributing their respective independently held interests in [redacted] along with [redacted] contribution of its 80% interest in each of the three partnerships, results in the [redacted] partnership holding 100% of the outstanding interests in each of the three partnerships involved in the [redacted] Transaction at the close of Stage I of the [redacted] the joint venture. Although [redacted] will control more than 50% of the outstanding partnership interests in [redacted] at the completion of Stage I, and [redacted] will hold more than 50% of the interests in [redacted] at the close of Stage II, you have advised us that it is the PNO's position that neither [redacted] will be deemed to hold 100% of the interests in the [redacted] partnerships held directly by [redacted] for the purpose of triggering a filing obligation for 100% of the underlying assets of those partnerships.

You have explained that where there are several partnerships in the chain of control, it is the PNO's position that a single, non-partnership person must control 100% of the interests in the partnership that is at the highest tier within the chain for the non-partnership

---

2 [redacted] and [redacted] shall effect their contributions to [redacted] in either of two ways: (1) by directly contributing the partnership interests each firm has acquired from [redacted]; or (2) by contributing the wholly-owned entities each firm created to acquire and which presently hold their respective interests in the [redacted] partnerships.

[redacted]

person to be deemed to have made a reportable acquisition. In this case, since [redacted] and [redacted] will both hold interests in [redacted] at the close of Stage I and the close of Stage II, neither will be deemed to have acquired 100% of the underlying assets of the partnerships that are acquired by [redacted] Thus, the [redacted] Transaction will not be reportable.

Stage II is Not Reportable Under the HSR Act

During our conversations, you confirmed that Stage II of the proposed transaction will not be reportable pursuant to 16 C.F.R. §802.70.

Section 802.70 exempts transactions from the requirements of the HSR Act if, inter alia, "assets are to be acquired from an entity pursuant to *or in accordance with* . . . [a] proposal for a consent judgment that has been submitted to a Federal court by the Federal Trade Commission or the Department of Justice and that is subject to public comment." 16 C.F.R. 802.70(c) [emphasis added]. The proposed consent decree -- as well as the complaint and competitive impact statement -- address the alleged competitive effects arising from the [redacted] joint venture, the [redacted] merger, and the combined effect of those two transactions. Indeed, the decree specifically references both the [redacted] Agreement and Plan of Merger dated July 28, 1998 and the U.S. Wireless Alliance Agreement among [redacted] AirTouch Plc dated September 21, 1999; and provides for divestitures of defined "Wireless System Assets" in specified "Overlapping Wireless Markets."

Given these facts, you have confirmed that the transfer of additional assets to the [redacted] partnership pursuant to Stage II of the [redacted] Agreement and/or the [redacted] merger would be transfers of assets from entities "pursuant to or in accordance with" the proposed consent decree, and therefore would be exempt from HSR reporting requirements pursuant to 16 C.F.R. § 802.70. Thus, [redacted] and [redacted] would be relieved of any HSR filing obligation that might otherwise arise for Stage II of their transaction.

Although § 802.70 is itself sufficient to relieve the parties from any filing obligation for Stage II of their transaction, we also discussed whether the PNO's interpretation of the non-reportability of partnership formation also may exempt this transaction. The Agreement obligates both [redacted] and [redacted] complete both stages of their proposed transaction. Both stages are interrelated parts of a single transaction, even though they will be temporally separated. Accordingly, Stage II arguably is not reportable for the same reasons that Stage I is not reportable. We understand, however, that you disagree that a filing would not be required on this basis for a variety of reasons including: (1) that the timing of the Stage II closing is uncertain; (2) the form and amount of the contributions to made at Stage II depends on events outside of the parties control (state and FCC approvals for the [redacted] deal); and (3) control of [redacted] will change at the uncertain time of the Stage II closing.

[redacted]

CONFIDENTIAL

Accordingly, you have advised us that were it not for the § 802.70 exception, the reportability of Stage II would depend upon whether state partnership law treats the change in respective interests of the partners in [redacted]s a reformation or a continuation of the then-existing [redacted]artnership. If viewed as a reformation, then both the shift in control and the associated contributions of assets to the partnership would not be reportable. On the other hand, if viewed as a continuation of an existing partnership, the transfers of assets from the parties to the joint venture may be viewed as a reportable asset acquisition if the other jurisdictional thresholds were met. It is unnecessary to further evaluate these issues, however, given your confirmation that § 802.70 exempts Stage II of the transaction.

Conclusion

For the foregoing reasons, it is our understanding that you have agreed that each of the following acquisitions is exempt from the reporting requirements of HSR: (1) the acquisitions to occur at the Stage I closing of th[redacted] joint venture; (2) the [redacted]ransaction described above; and (3) the acquisitions to occur at the Stage II closing of the [redacted]oint venture.

If you believe that this letter is in any way inconsistent with the advice that you have rendered in this matter, I would appreciate your calling me as soon as possible. As always, we appreciate your assistance and that of the entire Premerger Notification Office.

Sincerely,

[redacted]

cc[redacted]

AGREE THIS IS NON-REPORTABLE
B. Michael Verne
1/13/00

[redacted]