801.2(a)

[redacted]

May 31, 2000

CONFIDENTIAL

VIA FACSIMILE

Mr. Michael Verne
Federal Trade Commission
Room 323
6th Street & Pennsylvania Avenue, NW
Washington, DC 20580

2000 MAY 31 P 12:54

FEDERAL TRADE COMMISSION PREMERGER NOTIFICATION OFFICE

Re: Hart-Scott-Rodino Matters

Dear Mr. Verne:

This will confirm our telephone conversation concerning the application of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act") to a proposed transaction. In addition to myself [redacted] participated in the telephone call.

In the proposed transaction, Company A intends to acquire voting securities of a corporation, Company B. Company A has easements on the land of certain landowners. The newly formed Company B will negotiate with these landowners to either amend Company A's easements or gain new easements that confer additional property rights ("enhanced easements"). At Company A's option, Company B will attempt to acquire the enhanced easements in either Company A's or Company B's name.

The agreement between Company A and Company B (the "Agreement") contains a provision that states that neither party will have the right to assume, create, or incur any liability in the name of or on behalf of the other party. Notwithstanding, the Agreement also requires Company B to use best commercial practices to maintain good relations with landowners. For example, Company B must notify landowners of certain activities that Company B will conduct within the enhanced easements. Company B will determine the fee for enhanced easements to be acquired and will be responsible for all costs and expenses relating to the acquisition of the enhanced easements. Company A, however, will have the option to submit

a competitive bid to Company B to perform all or part of the work necessary to acquire enhanced easements. Moreover, the Agreement provides that Company A will have the right to require Company B to relocate all or part of its activities within the enhanced easements for any reason. The Agreement also requires Company B to maintain certain insurance policies for its activities conducted within the enhanced easements.

The Agreement requires Company B to use one of two standard agreements when contracting for enhanced easements from landowners. Company B has limited authority to modify such agreements within predetermined limits when negotiating with landowners. Company B must provide the landowners with a "fact sheet" that explains the landowners' relationship with Company A and Company B. Such fact sheet states that the landowner will continue to have a direct contractual relationship with Company A, who will in turn have a contractual relationship with Company B. If Company B acquires a particular enhanced easement in its own name using one of the standard agreements, Company B will, at Company A's option, immediately assign it (or a portion thereof) to Company A. Regardless of whether Company A acquires the enhanced easement in the first instance or through assignment, Company A would subsequently grant to Company B on a long-term basis (an initial term of 50 years with an option to renew for an additional 25 years) and at no additional charge a nonexclusive right to use a portion of the enhanced easements.

If, however, after negotiating with a landowner Company B reasonably concludes that the landowner will not agree to either standard agreement or that condemnation is necessary, Company B will notify Company A of such fact. Company B may then attempt to acquire the enhanced easement in its own name using another agreement or by condemnation. Company A then has the option of having Company B assign such enhanced easements obtained by agreement (in whole or in part) to Company A. As in the first two instances, if Company A accepts the assignment, Company A would subsequently grant to Company B on a long-term basis and at no additional charge a nonexclusive right to use a portion of the enhanced easements.

You confirmed the following application of the Act and 16 C.F.R. § 801.2(a) (2000) to the proposed transaction. In the first instance (in which Company B acquires the enhanced easements in Company A's name), Company B would, for HSR purposes, be acting as an agent for Company A. In this transaction, Company A would be the "acquiring person" and the landowner would be the "acquired person." The Agreement clearly establishes the limitations on Company B's actions and authority in obtaining the enhanced easements for Company A. Accordingly, Company A would be acquiring the enhanced easements from the landowners, with Company B acting as Company A's agent. Both the language of § 801.2(a)

and the Statement of Basis and Purpose indicate that agents or other entities acquiring assets on behalf of another person do not "hold" those assets and that the person on whose behalf such assets are acquired would be the acquiring person. See ABA, Premerger Notification Practice Manual, Interpretation 107 (1991). Under § 801.2(a), an acquiring person is any person "which, as a result of an acquisition, will hold ... assets ... through agents or other entities acting on behalf of such person." 16 C.F.R. § 801.2(a) (2000).

This was illustrated by the FTC staff's advice reported in Interpretation 107, which analyzed a situation where corporation "X" purchased a subsidiary of "Y" on behalf of another corporation "Z." X directed Y to immediately register the shares in Z's name. Beneficial ownership of the shares was at all times in either Y or Z. Interpretation 107 states that Z was the acquiring person and not X, since X was acting as an agent for Z.

Similarly, in the second instance (in which Company B acquires the enhanced easements in its own name and then immediately assigns them to Company A), you stated that Company B would, for HSR purposes, be acting as the agent of Company A. As in the first instance, Company B's authority to negotiate the terms (other than price) of the easements is closely circumscribed. Company B would acquire the enhanced easements and, at Company A's option, immediately assign them to Company A. Accordingly, Company A would be the acquiring person and the landowners would be the acquired persons. Interpretation 107 states that even if X directed Y to register the shares in X's name, and then X immediately sold the shares to Z, Z would still be the acquiring person (and Y would be the acquired person).

Finally, you stated that in the third instance, in which Company B is unable to acquire the enhanced easements using a standard agreement and thus acquires them in its own name, Company B would be the acquiring person and the landowner would be the acquired person. The agency relationship between Company A and Company B would terminate upon Company B's notice to Company A that the standard agreements will not be sufficient. Thereafter, Company B would be acquiring any enhanced easements on its own account. If Company A subsequently chooses to have Company B assign such enhanced easements to Company A, then Company A would be acquiring the enhanced easements from Company B.

You also confirmed that in each instance, Company A's subsequent grant to Company B of a portion of the enhanced easements would not be the acquisition of an asset by Company B, and therefore not reportable under the HSR Act. Company A would be either (1) leasing the rights to Company B on a long-term basis, or (2) granting a non-exclusive license to Company B. In either case, the grant would not, for HSR purposes, be the acquisition of an asset.

First, entering into a lease generally does not constitute an asset acquisition, unless the lease is an obvious disguise for the transfer of the underlying asset. See ABA, Premerger Notification Practice Manual, Interpretation 48 (1991). Here, the lease would not be a disguise for transferring the property rights. The term would be for 50 years (with an option for a 25-year extension) and would not include a purchase option. A 50- or even 75-year term would not exhaust the useful life of the property nor the property rights conveyed to Company B.

Second, the grant of a nonexclusive license is not the transfer of an asset, since the grantor retains the right to use the licensed asset and/or grant additional nonexclusive licenses. See ABA, Premerger Notification Practice Manual, Interpretation 49 (1991) (patent licenses). Here, Company A would be granting to Company B a nonexclusive right to use, occupy, or enjoy a portion of the enhanced easements. Company A would retain the right to use the enhanced easements for its own purposes and to grant to other companies the nonexclusive right to use, occupy, or enjoy the enhanced easements. Accordingly, the subsequent grant to Company B would not be reportable a transaction.

Please call me promptly at[redacted] you believe that any part of our conversation was misunderstood. Thank you for your assistance.

Sincerely,

[redacted]

AGREE WITH THE WRITER'S CONCLUSIONS.

B. Michael Verne

5/31/00