801.1(a)(2)

M[redacted]

From: [redacted]
Sent: [redacted]
To: Michael Verne
Subject: FW: HSR QUESTION

Mike, I would appreciate your help in answering two HSR questions with regard to the following fact pattern:

FACTS:

Under the current structure, a development authority (formed by two counties pursuant to state legislation) entered into two agreements with Company A: a service agreement and an installment sales agreement. The service agreement provides for Company A to operate a garbage burning plant, and provide waste disposal services to 2 counties that have disposal contracts with the authority. The resulting energy power is sold to the local electric utility and the revenues benefit the counties and the development authority by lowering their disposal fees. The installment sales agreement allows Company A to occupy the plant in return for the repayment, over the life of the agreement, of the bonds (of greater than $50 million) used to develop the plant. As such, under the installment sales agreement the plant title is retained by the development authority, but the beneficial ownership is held by Company A, which has a purchase option at a nominal price once the bonds are repaid.

Under the purchase agreement contemplated, my client ("CLIENT") will purchase the service agreement and the power sales agreement, as well as some personal property and inventory needed to operate the plant from Company A it will also fund the authority's acquisition of the plant title. The installment sales agreement would be assigned by Company A so beneficial title to the plant would revert back to the development authority. The total consideration for the assignments of the plant title to the authority and of the contracts and property to the CLIENT is $6.6 million, all of which is funded by the CLIENT. Under the assigned service agreement, CLIENT would operate the plant for 12 years in return for annual fees and provide waste disposal services to the authority and its two county sponsors. The resulting energy power would continue to be sold to the utility with the benefit described above to the counties and to the development authority. Under the option to purchase between the CLIENT and the authority, at the conclusion of the 12-year term, CLIENT has the option to purchase the plant for $2.5 million or lease the plant of $600,000 per year. At the end of the term, the development authority also has a put option, whereby it can force CLIENT to purchase the plant for one dollar, if the CLIENT elects not to purchase the plant for $2.5 million or if the CLIENT opts to lease the plant. The development authority could also keep the plant unless the CLIENT opts to buy or lease the plant.

Questions:

1. Is the development authority considered a "person" for the purposes of the HSR Act? My understanding is that the development authority is not a corporation and should be considered a state agency or political subdivision. Thus, it is not considered a person and would not be subject to the HSR Act. Would you agree? YES

2. Under the terms of the purchase agreement contemplated, CLIENT will receive an "option to purchase." Does the "option to purchase," as set out above, create a reportable event by CLIENT? NO

It is not clear, from what I read, that an "option to purchase" assets would be considered a reportable event.

I would appreciate it if you could call me to discuss.

Thanks very much.

[redacted]

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SEE ABOVE
N. OVUKA CONCURS.

B. Michael Verne
11/7/02