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WASHINGTON, D.C.

December 11, 2002

Via Telecopy - 202-326-2624

Federal Trade Commission
Premerger Notification Office
Bureau of Competition
(Attn: Mr. Michael Verne)
6th & Pennsylvania Avenue, N.W., Room 303
Washington, D.C. 20580

Re: Determination of the Value of the Assets Being Acquired in a
"Partnership Roll-Up"

Dear Mr. Verne:

On behalf of a client of my law firm that would comprise the "acquiring person" in a proposed transaction involving a "partnership roll-up," we are writing to confirm that the staff of the Federal Trade Commission's Premerger Notification Office concurs with our analysis regarding the appropriate approach that should be taken in the determination of the value of the assets being acquired in the below-described transaction.

This letter pertains to the transaction that you, [REDACTED] of the law firm of [REDACTED], and I discussed in our telephone call on December 9, 2002. The facts, as generally described during our telephone call but with some additional details (such as regarding size-of-person), are as follows:

Description of the Factual Circumstances

A. The Parties: The following parties are participating in the transaction:

"Companies A and B," are unrelated corporations, with Company A's ultimate parent corporation having assets in excess of \$100 million and Company B's ultimate parent corporation having assets in excess of \$10 million. Companies A and B each holds a 50% partnership interest in the Partnership.

The "Partnership" is a general partnership with its only material asset being a long-term contract (the "Contract") with a single customer (the "Customer"). To fund the performance of its obligations under the Contract, the Partnership arranged \$60 million of project financing from a bank (the "Bank"), with arrangements being put in place under the Contract whereby instead of

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making payments under the Contract to the Partnership, the Customer makes payments to a trustee (the "Trustee"), and the Trustee makes payments of (i) a specified amount to the Bank in accordance with an agreed-to repayment schedule, and (ii) any remainder to the Partnership. In essence, the Bank purchased a portion of the stream of contract payments. The Partnership, and Companies A and B pursuant to guaranties as its partners, are each liable for the repayment of the financing, with Companies A and B having agreed between themselves to share equally any liability to the Bank that is not satisfied by the Partnership.

The Partnership has completed in all material respects the construction/installation work to be performed during the initial phase of the Contract. The Customer is making payments to the Trustee under the Contract, and the Trustee is making payments of the specified amount to the Bank. The Contract specifies procedures under which the Customer "accepts" the initial-phase work under the Contract. Prior to such acceptance by the Customer, which has not yet occurred, the Bank retains full enforcement rights against the Partnership and Companies A and B (as guarantors), including the right to accelerate and demand full payment upon a material default.

B. The Pending Transaction:

Company A has agreed, for a purchase price of \$250,000, to purchase Company B's interest in the Partnership, whereby Company A will hold 100% of the Partnership's partnership interests. Company A also agrees to be solely liable for any financial guarantee responsibility with respect to the Partnership.

Application of the HSR Act

During our telephone conversation, we discussed the above transaction and how to determine the value of the assets to be acquired for purposes of the application of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act"). Based upon our discussion, the value of the assets to be acquired would be determined in accordance with the following analysis:

Acquisition Price. § 801.10(b) of the Commission's rules provides that the "value of the assets to be acquired shall be the fair market value of the assets, or, if determined and greater than the fair market value, the acquisition price." In the proposed transaction, Company A already holds a 50% partnership interest in the Partnership and is purchasing a 50% partnership interest from Company B. Under the Commission's policies, a "partnership roll-up" occurs upon Company A's acquisition of all of the interests in the Partnership with Company A being considered as having acquired all of the assets of the Partnership. The amount being paid by Company A to Company B for its partnership interest does not represent the acquisition price for the Partnership's assets; instead, the acquisition price is considered by the Commission not to have been determined in accordance with the meaning of § 801.10(b). (See Interpretation #132

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of the *Premerger Notification Practice Manual* (2nd ed., 1991), published by the ABA Section of Antitrust Law.)

Fair Market Value. As applied to the proposed transaction, § 801.10(c)(3) of the Commission's rules requires that the fair market value of the assets of the Partnership be determined in good faith by the board of directors of the ultimate parent corporation of Company A, or by another entity delegated that function by such board. In determining the fair market value of the Contract (which is the only material asset of the Partnership¹), the determining entity is to consider all relevant factors that bear upon its value at the time of the transaction. (See Interpretation #116 of the *Premerger Notification Practice Manual*.)

The fair market value of the Contract would reflect the present, discounted amount of the payments that Company A would anticipate receiving from the Trustee during the remaining term of the Contract, and would not include the payments to be made by the Trustee to the Bank under the Contract and the current financing arrangement in place among the Partnership, the Customer and the Bank. In determining the fair market value of the Contract, the determining entity could also ignore that portion of the payments to be received under the Contract that will reimburse Company A for expenses to be incurred after closing to perform its obligations under the Contract.

* * * * *

If this letter in any way misstates the substance of our conversation or the views of the Premerger Notification Office, please let me know at your earliest convenience. Unless I hear from you to the contrary, we, as counsel to Company A, will continue to advise our client that they may rely on the conclusions set forth herein. Thank you for your assistance in this matter.

Very truly yours,

[Redacted signature block]

cc: [Redacted]

AGREE.
Bluebird
12/16/02

¹ Any other assets being acquired by Company A in the transaction will be valued in accordance with the Commission's rules.