

802.50

[REDACTED]

[REDACTED]

[REDACTED]

March 19, 2003

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FEDERAL TRADE
COMMISSION
PREMERGER NOTIFICATION
OFFICE

VIA MESSENGER

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

Re: Assignment of Contracts Involving Foreign Assets and Services

Dear Mr. Verne *in file*

We wanted to provide you, in writing, the facts of the proposed transaction we discussed on the phone last week and confirm our HSR conclusion.

The contemplated transaction involves the assignment of several contracts, some involving goods produced and sold outside the United States. The payment by Company A (the company that will be assigned the contracts) to Company B (the company assigning the contracts) for the assignment of all of these contracts will exceed \$50 million.

The proposed transaction involves the assignment to Company A of Company B's interest in the following contracts: (1) three contracts for the firm purchase of [REDACTED] by Company B, (2) one contract that allows an [REDACTED] seller to "put" [REDACTED] to Company B, (3) an agreement for the provision of [REDACTED] import terminalling services to Company B, and (4) one agreement for the sale of gas by Company B at the tailgate of the [REDACTED] import terminal.

The contract for the terminalling services (number 3 above) and the gas sales contract (number 4 above) will be performed in the United States. However, the three [REDACTED] contracts (number 1 above) and the [REDACTED] "put" (number 2 above) relate to goods that are produced and sold to Company B outside the United States. The [REDACTED] that is being purchased under the three [REDACTED] sales agreements, as well as the [REDACTED] that may be acquired under the put agreement, is destined for the United States, but itself is produced outside the United States (and in the case of number 1 above, is being sold by non-U.S. entities). Furthermore, title to the [REDACTED] passes from the [REDACTED] seller to the buyer under the [REDACTED] contracts while the [REDACTED] is on the tanker at a point

outside of U.S. waters (although custody and risk of loss remains with the seller until the [REDACTED] is offloaded in the U.S. at the import terminal).¹

We understand that under Premerger Notification Office interpretations of the HSR statute and rules that the assignment of a contract constitutes the transfer of an asset for HSR purposes. We also understand that the value of the assignment of a contract for HSR purposes is the premium paid for the assignment, not, for example, the total value of the periodic payments made under the terms of the contract.

As we discussed, we believe that the assignment of the [REDACTED] contracts and the [REDACTED] "put" are exempt acquisitions pursuant to 802.50 because these assignments would be considered to be acquisitions of foreign assets.

Rule 802.50(a) provides:

"The acquisition of assets located outside the United States shall be exempt from the requirements of the act unless the foreign assets the acquiring person would hold as a result of the acquisition generated sales in or into the U.S. exceeding \$50 million during the acquired person's most recent fiscal year."

We believe that it is the PNO's position that if the underlying assets, services and other transactions that are covered by a contract qualify for the 802.50(a) exemption (that is, the assets are located and the services are performed outside the U.S., and the assets and services covered by the contracts did not generate sales into the U.S. exceeding \$50 million during the last fiscal year), that the assignment of that contract itself would qualify for the 802.50(a) exemption. If that is true, since the assets and services covered by the [REDACTED] Contracts and the [REDACTED] "put" in this transaction qualify for the 802.50(a) exemption, the assignment of the contracts covering those assets and services should also qualify for the exemption.

If the [REDACTED] contracts and the [REDACTED] "put" are exempt, the amount being paid for the assignment of those contracts can be excluded from the value of the transaction (rule 801.15(b)) in determining whether the proposed transaction exceeds the HSR size-of-transaction threshold. Based on a preliminary allocation by Company A (the acquiring person) of the value of the contracts being assigned,² if the value of the [REDACTED] contracts and [REDACTED] "put" qualify for the 802.50(a) exemption, the value of the transaction, counting only the premium being paid for the remaining contracts that will be assigned (the [REDACTED] import terminalling services agreement and the gas sales agreement), will be less than \$50 million, thus obviating the need for an HSR filing for this transaction.

¹ It should be noted that no [REDACTED] has yet been sold or delivered to the United State under these contracts. The first shipments will probably not occur for a few months, after the proposed transaction described in this letter (the assignment of the contracts) is closed.

² The preliminary valuation will be confirmed in good faith by the board of directors - or an entity delegated that function by the board - of Company A pursuant to the requirements 801.10(b) and (c).

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We would appreciate it if you would confirm our analysis of the proposed transaction and our conclusion that the [REDACTED] contracts will qualify for the 802.50 exemption. Please let me know if you have any questions.

Sincerely yours,

[REDACTED]

[REDACTED]

AGREE - THESE CONTRACTS ARE ASSETS LOCATED
OUTSIDE OF THE U.S. NIOVUKA CONCLUS.

B. Verne

3/24/03