

802.2(b)

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FEDERAL TRADE COMMISSION
PREMERGER NOTIFICATION OFFICE

June 10, 2004

VIA ELECTRONIC MAIL AND POSTAL SERVICE

Mr. B. Michael Verne
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, D.C. 20580

Re: Confirmation of Advice Regarding Applicability of 16 C.F.R. 802.2(b)

Dear Mr. Verne:

In our conversation of June 8, I described for you a transaction in which Buyer will acquire from its Lessor an undivided interest for 50% of a power plant that Buyer operates. I write to confirm the analysis and your informal advice.

Description

Buyer is an electric cooperative. It is owned by its members, with whom it also has all-requirements contracts, but for HSR purposes Buyer is its own ultimate parent. Buyer operates a number of electric generation facilities, including Plant. Plant consists of realty, generation equipment, and related assets. Plant was originally operated by First Operator, which was another member-owned electric cooperative. First Operator caused the original construction of Plant and then entered into several sale-leaseback transactions, which are described below. Approximately 15 years ago, First Operator filed for Chapter 11 and eventually was dissolved. As part of the bankruptcy proceedings, Buyer agreed to "assume and become obligated to pay, perform, and discharge the obligations and liabilities" of First Operator under a number of agreements, including the Plant leases (with certain modifications and technical amendments). In addition, 10 of First Operator's 13 members became members of Buyer. (The other 3 members were released from their all-requirements contracts with First Operator and entered into similar contracts with the buyers of other assets of First Operator.) Buyer and the trustee for First Operator filed HSR Notifications with respect to Buyer's acquisition (and several related transactions), and the transaction proceeded after the waiting period expired.

Plant first went into service in the mid-1980s. Lessor acquired its interest shortly before the in-service date and has held the interest since that time. (Technically the interest is held by a single-purpose grantor trust controlled, for HSR purposes, by an ultimate parent entity that we will refer to as Lessor. An entity included within Lessor is the grantor and beneficiary of the

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trust.) Lessor is in the business of providing financing, and it has held this interest continuously since its acquisition. The lease agreement cedes all operational control to the lessee (which is now Buyer). Buyer is responsible for all operation, maintenance, and insurance of Plant, and Buyer controls the disposition of all power generated by Plant.

Lessor holds a 50% undivided interest in Plant. Until recently, the remaining 50% was owned by four other, similar grantor trusts established in the 1980s, which had entered into similar leases with First Operator, to which Buyer succeeded. In the last two years, Buyer has acquired the beneficial interests in two of the trusts (representing 28% of Plant), but these transactions were nonreportable because they did not meet applicable size tests.

Discussion

Buyer now proposes to acquire the 50% interest held by Lessor. An undivided interest is considered an asset, so its acquisition is treated as the acquisition of an asset. See, e.g., Informal Interpretation File No. 9208001 (available at <http://www.ftc.gov/bc/hsr/informal/opinions/9208001.htm>). Nonetheless, this acquisition appears to be exempted under 16 C.F.R. § 802.2(b). That section exempts from any reporting obligation the acquisition of a "used facility" if

- "the facility is acquired from a lessor that has held title to the facility for financing purposes in the ordinary course of the lessor's business,"
- "by a lessee that has had sole and continuous possession and use of the facility since it was first built as a new facility."

The first condition is plainly satisfied here, because Lessor holds and has at all material times held its undivided interest in the ordinary course of its business. We understand that the fact that the interest is the beneficial ownership of an undivided partial interest in the "title to the facility" (rather than a direct ownership of 100% of the title) makes no difference.

The second condition requires more analysis. First Operator caused Plant to be built, was the lessee in the original sale-leaseback transaction with Lessor, and had sole and continuous possession and use of Plant until its sale in bankruptcy. Buyer in essence succeeded to First Operator's rights under that original lease, and assumed virtually all the obligations of First Operator relating to the Plant. Buyer's membership now includes the First Operator members for whom Plant was primarily built. (Moreover, Buyer's acquisition of First Operator's interest was reported under the HSR Act without incident.) Buyer has had sole and continuous possession and use of Plant since the date that it succeeded to First Operator's rights. Under these circumstances, you agreed that Buyer would be deemed to have stepped into the shoes of First Operator, that First Operator's and Buyer's combined use and possession of Plant would be deemed "sole and continuous," and that the exemption therefore applied on the stated facts.

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Conclusion

Based on the foregoing analysis, we have concluded that Buyer's acquisition from Lessor of the beneficial interest in the trust controlled by Lessor is not reportable.

Thank you again for your assistance. I would appreciate a telephone call confirming that I have correctly stated your advice.

Very truly yours,

AGREE -
B. Michael Verne
6/16/04