

802-2(c)

November 11, 2004

Via Facsimile

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

Re: Unproductive Real Property Exemption

Dear Mike:

I am writing to confirm our understanding of the appropriate Hart-Scott-Rodino analysis of a transaction we discussed during a November 3, 2004, telephone call and [REDACTED] discussed with you again during a November 9, 2004, telephone call.

Specifically, we discussed the following transaction. X intends to build a power plant. X has the necessary permits and has entered into contracts with fuel suppliers and a power purchaser. X is leasing the land upon which to build the facility from a city and has an option to acquire such land. X has also acquired the necessary intellectual property rights to build and run the facility. X has entered into a construction contract with a third party under which the third party would construct the facility. Preliminary construction activities have commenced. Collectively, these assets, plans, contracts and rights related to the planned power plant are termed the "Project."

Y would like to purchase the Project from X and lease it back to X for construction and operation of the power plant. Y will pay X approximately \$169 million, of which approximately \$165 million will be attributable to the development

Mr. B. Michael Verne
November 11, 2004
Page 2

and construction costs of the facility. The lease back rights are not for the useful life of the facility, but X will have an option to extend the lease back rights on terms offered by Y in its sole discretion.

We understand that Y's acquisition of the Project (including the contracts, permits and other assets related to the Project currently held by X) would be exempt under 16 C.F.R. § 802.2(c), which applies to acquisitions of unproductive real property, so long as the real property at issue has not generated total revenues in excess of \$5 million during the 36 months preceding the acquisition. We also understand that X's exercise of its option to acquire the land from the city would not be reportable regardless of whether construction of the facility had begun on the land when such option is exercised.

Finally, because the term of the lease back agreement is not for the useful life of the power plant, and because it is uncertain whether the parties will be able to agree on the terms of a second lease term, we understand that no filing obligation currently exists with respect to the lease back arrangement between Y and X.

Mike, please advise if our understanding of our discussions and the proper Hart-Scott-Rodino analysis of this transaction is incorrect in any way. As always, thank you for your help.

Best regards,

cc: [REDACTED]

AGREE -
Brubaker
11/15/04