

801-2
802-70

February 17, 2005

Mr. Michael Verne
Federal Trade Commission
Premerger Notification Office
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

BY HAND-DELIVERY

Re: Request For Informal Interpretation of HSR Rules

Dear Mr. Verne:

The subject matter of this request for informal interpretation of the Hart-Scott-Rodino ("HSR") Antitrust Improvements Act of 1976 and the regulations thereunder is the exchange of one wireless broadband license for another such license. The exchange is being structured so as to qualify for favorable tax treatment. As a general preview of this letter, it reflects our understanding that the Premerger Notification Office ("PNO") will look through to the economic substance of a series of related transactions in order to identify the substantive transaction of potential competitive significance, and thereby to minimize the number of HSR filings needed to provide adequate notice to the Federal Trade Commission ("FTC") and to the Department of Justice ("DOJ"). Please note that, in this case, the series of related transactions to accomplish the legitimate business objective of favorable tax treatment will occur virtually simultaneously, except for an initial acquisition (some time earlier) which is pursuant to DOJ approval of the buyer under a divestiture process required by DOJ and ordered by a federal district court.

I thank you in advance for your patience and attention in addressing this request.

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FEDERAL TRADE COMMISSION
PREMERGER NOTIFICATION OFFICE

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Transaction Description

Corporation A is a privately-held corporation engaged in the business of wireless telecommunications and is one in a chain of wholly owned subsidiaries of another privately-held corporation which is the ultimate parent entity of Corporation A (and also engaged in the business of wireless telecommunications). LLC B is a joint venture between two publicly-traded corporations unaffiliated with any of the foregoing entities, and is engaged in the business of wireless telecommunications. One of the two publicly-traded members of LLC B is the ultimate parent entity of LLC B. LLC B is subject to a divestiture requirement resulting from DOJ review of an HSR filing by LLC B.

Partnership C is a joint venture between two publicly-traded corporations unaffiliated with any of the foregoing entities and is engaged in the business of wireless telecommunications. One of the two publicly-traded partners of Partnership C is the ultimate parent entity of Partnership C.

Corporation A holds as part of its inventory a 30 MHz wireless license ("License") from the Federal Communications Commission ("FCC") for a given geographic market. Partnership C desires to acquire a 10 MHz portion of License ("sub-License") from Corporation A. Corporation A is amenable to selling sub-License to Partnership C so long as the transaction will qualify for like-kind exchange treatment under Federal income tax law. In order to effectuate the like-kind exchange, Corporation A will need to exchange sub-License for another wireless license ("Replacement License") rather than sell the sub-License outright. Partnership C does not have a Replacement License acceptable to Corporation A that Partnership C is willing to

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exchange. Corporation A has identified a Replacement License for the like-kind exchange which is being sold by LLC B pursuant to a court-ordered divestiture and approval by DOJ.

Federal income tax law permits Corporation A to effect the like-kind exchange (of sub-License for Replacement License) via a qualified intermediary ("QI") which brokers the exchange. A QI is typically a single purpose entity established solely to effectuate the like-kind exchange, and may not be affiliated with either the actual purchaser or seller. Under the tax laws, a QI generally is not required to take actual title to the exchanged properties (with an exception described below); it is sufficient that the QI merely obtain a contractual right to acquire the exchange properties. As described below, there are two QIs involved in this exchange – QI-1 and QI-2. The QIs are subsidiaries of a privately-held limited liability company engaged in the business of acting as a qualified intermediary for like-kind exchanges. Neither the privately-held limited liability company nor its QI subsidiaries are affiliated with any of the foregoing entities.

To effectuate a like-kind exchange where the acquisition of the replacement property (i.e., the Replacement License) occurs prior to the sale of the relinquished property (i.e., the sub-License), the tax laws require the involvement of two QIs. With respect to this proposed exchange, the acquisition of the Replacement License from LLC B will occur pursuant to a DOJ-approved divestiture by LLC B, and will have to be scheduled prior to the sale of the sub-License to Partnership C. Therefore, QI-1 must take actual title to the Replacement License from LLC B and hold it until closing of the sale of the sub-License to Partnership C.



Corporation A intends to accomplish the like-kind exchange in the following way. First, Corporation A will assign its rights in the Purchase Agreement between Corporation A and LLC B to QI-1, who will then acquire title to the Replacement License from LLC B. Corporation A and QI-1 will also enter into an Accommodation Agreement whereby Corporation A has the right to acquire the Replacement License. DOJ has approved the purchase of the Replacement License by Corporation A, and approved the intermediate step of the acquisition by QI-1.

To accomplish the second step, Corporation A will negotiate a Sale Agreement for the sale of the sub-License to Partnership C. Corporation A then will assign its sales obligation as to the sub-License to QI-2, and also assign its right to the Replacement License (under the Accommodation Agreement) to QI-2. Subsequently, at the closing of the like-kind exchange, QI-2 will use its right under the Accommodation Agreement to direct QI-1 to transfer title to the Replacement License to Corporation A. At that same closing, and in exchange for Corporation A receiving the Replacement License at the direction of QI-2, Corporation A will be directed by QI-2 to transfer title to the sub-License directly to Partnership C.

A schematic diagram of the transactions is as follows:

- | | | |
|---|--------|---|
| 1. Corporation A (right to Replacement License) | -----> | QI-1 |
| 2. Accommodation Agreement | | |
| 3. LLC B (title to Replacement License) | -----> | QI-1 |
| 4. Corporation A (Accommodation Agreement) | -----> | QI-2 |
| 5. QI-1 (title to Replacement License) | -----> | Corporation A |
| 5.1 QI-1 (title to Replacement License) | -----> | <i>deemed transfer</i> to QI-2
[via Accommodation Agreement] |
| 5.2 QI-2 (title to Replacement License) | -----> | <i>deemed transfer</i> to Corporation A |

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Sub-License:

- | | | |
|--|--------|---|
| 6. Corp. A (obligation under Sale Agreement) | -----> | QI-2 |
| 7. Corp. A (title to sub-License) | -----> | Partnership C |
| 7.1. Corp. A (title to sub-License) | -----> | <i>deemed</i> transfer to QI-2 |
| 7.2. QI-2 (title to sub-License) | -----> | <i>deemed</i> transfer to Partnership C |

Steps 5.1 and 5.2 are the deemed steps included in Step 5, and Steps 7.1 and 7.2 are the deemed steps included in Step 7. The deemed transfer by Corporation A of the sub-License to QI-2 (Step 7.1) in exchange for the Replacement License (Step 5.2) constitutes the like-kind exchange which provides the favorable tax treatment for Corporation A.

In the context of obtaining DOJ's approval of the divestiture by LLC B of the Replacement License to Corporation A, Corporation A has informed DOJ of the need for the QI-1 step in order to permit the like-kind exchange format for the transactions. Specifically, DOJ has been informed, among other things, that QI-1 will initially acquire title to the Replacement license, but that no party other than Corporation A will be the ultimate holder of the Replacement License. The transfer to QI-1 and subsequently to Corporation A of LLC B's Replacement License has been approved by DOJ and is therefore exempt from HSR reporting pursuant to HSR regulation at 16 C.F.R. Section 802.70(a), as you confirmed in a telephone call of February 9, 2005.

It is assumed that the value of the sub-License and the value of the Replacement License each is in excess of \$50 million, and in excess of \$53.1 million (when 2005 indexing becomes effective).



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Question

Is any filing required under the Act in connection with the transactions described above?

Our Understanding

Our understanding is that the only reportable transaction is the step in which Partnership C acquires the sub-License. We believe that the other transactions are not reportable because: (1) the QI-2 involvement in the transfer of the Replacement License is part of a DOJ-approved divestiture required of LLC B, is solely for the legitimate business purpose of obtaining like-kind exchange tax treatment, does not have competitive significance, and will be simultaneous with the reportable transaction; and (2) the QI-2 involvement in the transfer of the sub-License occurs because it is necessary to receiving favorable income tax treatment, is solely for the legitimate business purpose of obtaining like-kind exchange treatment, does not have competitive significance, and will be simultaneous with the reportable transaction. Moreover, and perhaps most importantly, the QI-2 steps should not be “acquisitions” because QI-2 does not take actual title to either license but only hold rights in the licenses – for a few moments on the day of closing the acquisitions by Corporation A and Partnership C.

The transactions involving QI-2 and the transfer rights to the sub-License and Replacement License are entered into for the legitimate purpose of obtaining favorable tax treatment. Specifically, these steps are necessary in order to align the parties such that like-kind exchanges can occur between the appropriate entities. Our view that these transactions are not reportable is based on the reasons set forth above and on our understanding that the PNO’s



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informal position is to look through to the economic substance of a string of related transactions in order to identify the substantive transaction and minimize the number of HSR filings needed to provide adequate notice to the FTC and to the DOJ. Applying this reasoning, the economic substance is (i) an acquisition of the sub-License by Partnership C, and (ii) an acquisition of the Replacement License by Corporation A. Because the acquisition of the Replacement License will be accomplished pursuant to a DOJ-approved divestiture, our understanding is that the only reportable transaction would occur when Partnership C obtains the sub-License from Corporation A. For HSR reporting purposes, Corporation A would be the acquired person and QI-2 involvement could be explained in the HSR filing.

Please confirm our understandings or otherwise convey your views of the HSR reporting requirements for the transactions described above. I can be reached at [REDACTED], and my colleague [REDACTED] can be reached at [REDACTED].

Thank you as always for your valuable assistance.

AGREE THAT THE ONLY
REPORTABLE STEP IS C'S
ACQUISITION OF THE SUB-LICENSE
FROM A. M. BAUNO CONCURS.

B. Michael
2/24/05

Sincerely,

[REDACTED]

[REDACTED]

[REDACTED]