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March 2, 2005

VIA FEDEX

Private & Confidential

Mr. Michael Verne
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Corporate Reorganization and Hart-Scott-Rodino Act Compliance

Dear Mr. Verne:

Pursuant to my telephone conversation of Wednesday, February 23, 2005, with James Ferkingstad at the Federal Trade Commission's Premerger Notification Office (the "PNO"), I am writing to request an informal interpretation regarding whether the Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 U.S.C. § 18a (§ 7A of the Clayton Act or the "Act"), and the regulations promulgated thereunder by the Federal Trade Commission (the "FTC"), 16 C.F.R. §§ 801, *et seq.*, require the filing of a premerger report (the "HSR Premerger Report") prior to effecting a proposed corporate reorganization involving several clients represented by our law firm.

Based on perceived ambiguity in the Act and in the regulations found in 16 C.F.R. §§ 801.2(d), 801.11(e), 801.40 and 803.30, as well as the apparent lack of a definitive statement in the Formal Interpretations provided by the PNO in relation to the particular fact pattern at issue, I am respectfully requesting confirmation of the correctness of my analysis of the Premerger Notification Rules (the "Rules") as they relate to the proposed corporate reorganization discussed below.

The Rules

According to the Rules, the filing of the HSR Premerger Report is required when, alternatively, (1) the commerce test is met and both the size of person and size of

transaction tests are met; or (2) the commerce test is met and, as a result of the transaction, the "acquiring person" will hold an aggregate amount of stock and assets of the "acquired person" valued in excess of $200 million. Sections 7A(a)(1) and (2) of the Act.

The Facts

Four individual corporate persons represented by our law firm (collectively, the "Subsidiaries" and each individually a "Subsidiary"), each of which is a wholesale installer of digital satellite equipment, intend on effecting a corporate reorganization (the "Reorganization") whereby shares in the Subsidiaries will be exchanged for shares in a holding company (the "Holding Company"). Following the Reorganization, the Holding Company shares will be held by the pre-Reorganization shareholders of the Subsidiaries, based on (1) their pre-Reorganization ratable interest in the individual Subsidiary at issue in relation to (2) the post-Reorganization aggregate asset value of the Holding Company.

For purposes of analysis the following facts should be assumed:

- "Holding Company" is a newly-formed person, who has not yet prepared financial statements and has an asset value and market value of approximately $0;
- "Company A" has an asset value and market value of approximately $56 million;
- "Company B" has an asset value and market value of approximately $29 million;
- "Company C" has an asset value and market value of approximately $24 million;
- "Company D" has an asset value and market value of approximately $21 million; and
- The Reorganization will effect a *simultaneous* share exchange as described above. *See* n.1, *infra*.

My Analysis

As stated above, prior to the Reorganization, Holding Company has an asset value and

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market value of approximately $0. In addition, Holding Company has not prepared financial statements. It is my understanding, pursuant to my telephone call with Mr. Ferkingstad of February 23, 2005, that the PNO will treat the share exchange transactions effected pursuant to the Reorganization as *successive* rather than *simultaneous*; if this is the case, it appears as if ordering the "successive" acquisitions in a particular manner will obviate the requirement of the Rules to file the HSR Premerger Report – a requirement which would otherwise be imposed.[1] To wit, Holding Company (as the "acquiring person"), could acquire Company A, then Company B, then Company C and finally Company D, each an "acquired person", without being required to file the HSR Premerger Report.[2]

This scenario can be depicted as follows:

1. Holding Company acquires Company A, a $56 million company. Because Holding Company has a pre-transaction asset value of $0, no HSR Premerger Report would be required by the Rules as the size of person test is not met (i.e., no "$100 million person").

2. Subsequently, Holding Company (with Subsidiary Company A in tow) acquires Company B, a $29 million company. Because Holding Company has a pre-transaction asset value of $56 million (aggregate value of Holding Company and Subsidiary Company A), no HSR Premerger Report is required as the size of person test is not met (i.e., no "$100 million person").

3. Subsequently, Holding Company (with Subsidiary Company A and Subsidiary Company B in tow) acquires Company C, a $24 million company. Because Holding Company has a pre-transaction asset value of $85 million (aggregate value of Holding Company, Subsidiary Company A and Subsidiary Company B), no HSR Premerger Report is required as the size of person test is not met (i.e., no "$100 million person").

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[1] Alternatively, in the event that the PNO treats the Reorganization as simultaneous rather than successive share exchange transactions, we believe the HSR Premerger Report would not be required by the Rules because the size of person test is not met where Holding Company's pre-Reorganization asset value is approximately $0. Please note that, for both corporate and income tax purposes, the Reorganization will be structured as a tax-free reorganization pursuant to Section 368 of the Internal Revenue Code of 1986, as amended (the "Code"), and will be effected as a simultaneous acquisition of the Subsidiaries, irregardless of whether this leads to the conclusion that the Rules require the filing of the HSR Premerger Report.

[2] In the event that the actual asset value and/or market value of Company B, Company C and Company D, exceeds, in the aggregate, $100 million, acquisition of Company A *after* the acquisitions of Company B, Company C and Company D by the Holding Company may lead to the required filing of the HSR Premerger Report.

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4. Finally, Holding Company (with Subsidiary Company A, Subsidiary Company B and Subsidiary Company C in tow) acquires Company D, a $21 million company. Because the Holding Company has a pre-transaction asset value of $109 million (aggregate value of Holding Company, Subsidiary Company A, Subsidiary Company B and Subsidiary Company C) and, therefore, the "acquiring person" (i.e., Holding Company) is a "$100 million person", the question becomes whether the "acquired person" has assets of $10 million or more; if so, the size of person test is met. Because Company D has assets of $10 million of more (i.e., Company D has an asset value of $21 million), the question becomes whether the size of transaction test is met.[3] Here, the size of transaction test is not met because the "aggregate total amount of voting securities and assets of the acquired person" (i.e., Company D) is not in excess of $50 million (it is $21 million). For this reason, the HSR Premerger Report is not required under the Rules.

Our Request

Please confirm that we do not have to file the HSR Premerger Report based on the facts of the Reorganization as presented above.

Sincerely,

[redacted]

By: [redacted]

cc: [redacted]

AGREE THIS IS NOT REPORTABLE NO MATTER HOW IT IS ANALYZED. N. OUUKA CONCURS.

B. Mehlman
3/7/05

[3] Because the Reorganization transaction as a whole involves assets of less than $200 million, both the size of person and size of transaction tests must be met before the HSR Premerger Report is required by the Rules. *See also*, n.2, *supra*.