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November 21, 2005

BY FACSIMILE

Michael B. Verne
Federal Trade Commission
Premerger Notification Office
Bureau of Competition
Room 301
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Unproductive Real Property and New Facilities Exemptions

Dear Mike:

I am writing to confirm the circumstances under which the unproductive real property exemption and/or the new facilities exemption would apply to the facts we discussed on the telephone on October 31, 2005 and November 1, 2005. As you may recall, we discussed in pertinent part the following.

A owns over 50% of the voting securities of a subsidiary, Sub A, that is a supplier of gas. A's wholly-owned limited liability company, LLC A, is currently in the process of constructing a pipeline system that will transport some of Sub A's gas and possibly third party gas. A is not in the business directly or indirectly of operating a pipeline system and A/LLC A has been looking for a buyer for the system while LLC A has been engaged in constructing the system. Although A/LLC A hopes to sell the pipeline system, it is prepared to operate the system if it cannot find a satisfactory purchaser for the system. For this reason, LLC A has entered into an operating agreement with X under which X would operate the pipeline system for LLC A once it is built.

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Subsequent to the execution of the operating agreement, X and LLC A have entered into an acquisition agreement under which X will acquire 100% of the interests of LLC A in exchange for over $200 million. The only assets of LLC A consist of assets related to the pipeline construction project, including among other things pipelines that are under construction, contracts, and permits. It is possible that the parties will not close on the agreement until early 2006. The parties expect, however, that part of the pipeline under construction could possibly be operational by December 2005.

Based on our conversations and the facts described above, I understand that X's acquisition of 100% of the interests of LLC A would be exempt under the **unproductive real property exemption** if X acquires 100% of LLC A before any portion of the pipeline project is completed and operational **and** if LLC A's assets have not generated total revenues in excess of $5 million during the 36 months preceding the closing. See 16 C.F.R. § 802.2(c).1/ However, if a portion of the pipeline project is completed and becomes operational before the closing with X, X's acquisition of 100% of the interests of LLC A would not be exempt under the unproductive real property exemption with respect to that portion of the pipeline project, even if the operational portion of the pipeline is only used to transport Sub A's product prior to the closing. This is because the unproductive real property exemption does not apply to "facilities that were in operation at any time during the twelve (12) months preceding the acquisition." 16 C.F.R. § 802.2(c)(2)(ii).

I also understand that the **new facilities exemption** could apply to X's acquisition of 100% of the interests of LLC A. Specifically, § 802.2(a) provides that "[a]n acquisition of a new facility shall be exempt from the requirements of the act. A new facility is a structure that has not produced income and was either constructed by the acquired person for sale or held at all times by the acquired person solely for resale. The new facility may include realty, equipment or other assets incidental to the ownership of the new facility." I understand that this exemption would apply to X's acquisition of 100% of the interests of LLC A under the facts described above even if part of the pipeline becomes operational before the closing with X, so long as at the time of the closing no third party (*i.e.* an entity that is not under common control with A under the HSR rules) has obtained transport

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1/ I understand that this is the case despite the fact that unproductive real property does not include "[m]anufacturing or non-manufacturing facilities that have not yet begun operation." 16 C.F.R. § 802.2(c)(2)(i).

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for its product across the completed portion of the pipeline. Thus, the exemption would apply if the only product shipped through the completed portion of the pipeline before the closing with X is product belonging to another subsidiary of A, such as Sub A, even if Sub A has made an intercompany transfer to LLC A to compensate for the shipment before the closing with X. I also understand that this exemption would apply if A/LLC A hoped to find a purchaser for the pipeline system while it was engaged in developing and constructing the system, even if A/LLC A took steps to operate the system in the future should its attempts to find a satisfactory purchaser prove unsuccessful.

If a third party requests transport on the finished portion of the pipeline, LLC A could be obligated to provide such transport under energy regulations. I understand from our discussions that if A/LLC A provides a third party with transport through the completed portion of the pipeline before the closing with X, the parties would not be able to use the new facilities exemption for that portion of the pipeline. This is true even if A/LLC A does not have an opportunity to bill the third party for such transport before the closing with X. However, even if the exemption is lost with respect to the completed portion of the pipeline, it would still apply to the uncompleted portion of the pipeline project. This would mean that for purposes of determining whether the HSR size-of-transaction threshold test were satisfied, X would only need to value the assets held by LLC A that are related to the completed portion of the pipeline should third party product be transported across this portion of the pipeline before the closing.

Mike, please advise if you disagree with any of my understandings and conclusions stated above. As always, thank you for your help.

Best regards,

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Agree.
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11/25/05

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Enclosures