To: Mike Verne
Federal Trade Commission

802.4

From: [redacted]

Date: September 20, 2006

I would appreciate your review of our HSR analysis on the following hypothetical:

Facts: Four investment companies intend to form a new corporation ("Newco") for the purpose of acquiring interests in a limited partnership ("Cogeneration LP") that operates a cogeneration project (the "Project"). Collectively, the investment companies (in varying amounts) will contribute approximately $53.3 million in cash to Newco and also lend money (or borrow it from third party lenders) in the sum of $110 million. In exchange, they will receive voting securities in Newco. None of the investment companies will own 50% or more of the voting securities in Newco, although the investment advisor to three of the investment companies, pursuant to contract and in light of its stock ownership in the three investment companies, will have the ability to vote 87.5% of the shares and appoint the majority of the directors of Newco. The acquisition will take place in two transactions.

In the first transaction, Newco will acquire 100% of the membership interests in an LLC ("LLC A") for $13 million. LLC A owns approximately 43% of the economic interests and 51% of the voting interest in Cogeneration LP.

Newco will also form a wholly owned subsidiary, Newco II. In the second transaction, Newco II will purchase 100% of the stock of Corporation B for $60.5 million. This purchase will occur after Newco purchases 100% of LLC A. Corporation B owns two assets: (1) 100% of the membership interests in an LLC ("LLC B"), which, in turn, owns an approximate 49% economic and voting interest in Cogeneration LP[1] and (2) an approximate 46% interest in a limited partnership ("Project LP") that owns a beneficial interest in a trust that owns an approximate 75% undivided interest in the Project and has leased its undivided interest to Cogeneration LP pursuant to a 25 year lease. The remaining approximate 25% undivided interest in the Project is owned in varying amounts by four other trusts, which also lease their undivided interests to Cogeneration LP under separate 25 year leases. Cogeneration LP has no ownership interest in the Project, but only a contractual right to lease the Project from the five trusts. Cogeneration LP has the option of purchasing the Project under certain circumstances, including at the end of the lease. In addition, Newco II will provide an $85 million letter of credit to support the pre-existing obligation of the UPE of Corporation B to pay money if Cogeneration LP terminates a contract to supply steam from the facility to a third party.

Here is how we analyze the transactions:

[1] LLC B's only asset is this minority interest in Cogeneration LP.

1. Formation of Newco. This is not reportable because all of the assets of Newco consist of cash or debt. Sections 802.4 and 801.21.

2. Newco's acquisition of 100% of the membership interests in LLC A. This is not reportable because LLC A's only asset is a minority interest in a limited partnership. Section 801.2(f)(1)(i).

3. Formation of Newco II. This is not reportable because it is an intraperson transfer. Section 802.30.

4. Newco II's acquisition of 100% of the voting stock of Corporation B. This is not reportable because Corporation B does not own non-exempt assets with an aggregate fair market value of more than $56.7 million. Corporation B owns 100% of the membership interests in LLC B, which owns approximately 49% of the economic interests in Cogeneration LP (the same limited partnership in which Newco will have previously purchased certain interests), which together with Newco's acquisition of 43% of the economic interests in Cogeneration LP in the acquisition described above in #2, results in Newco controlling Cogeneration LP. As a result of the acquisition of control of Cogeneration LP, the purchase of the interests in LLC B (whose only asset consists of interests in Cogeneration LP) is not exempt. To determine the value of these non-exempt interests, we apply the test set out in Section 801.10(d). We add the fair market value of the Cogeneration LP interests previously acquired (approximately $13 million)[2] to the allocated purchase price of Corporation B's ownership of approximately 49% of the interests in Cogeneration LP (approximately $5 million out of the overall $60.5 million purchase price for the stock of Corporation B)[3] For purposes of this analysis, you may assume that, at the time of the second transaction, the sum of the acquisition price of the interests in Cogeneration LP to be acquired and the fair market value of the interests in Cogeneration LP held by the acquiring person prior to the acquisition is approximately $18 million. Corporation B also owns an approximate 46% economic interest in a limited partnership that owns an approximate 75% undivided interest in the Project, which it leases to Cogeneration LP pursuant to a long term lease. The allocated portion of the $60.5 million price for the stock of Corporation B attributable to the 46% economic interest in the limited partnership is approximately $55.5 million.[4] The acquisition of a minority interest in Project LP is exempt because it is the acquisition of a minority interest in an unincorporated entity. Section 802.1(f)(1)(i). Without consideration of the letter of credit (discussed below), Newco II's acquisition of 100% of the voting securities of Corporation B is not reportable because it does not hold non-exempt assets with an aggregate fair market value of more than $56.7 million as established by Section 802.4.

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[2] To determine the fair market value of the interests previously acquired, we should apply the test of Section 801.10(c)(3) for defining fair market value. This test requires that the board of directors of the UPE of Newco II determine the fair market value in good faith as of any day within 60 calendar days prior to the consummation of the second acquisition

[3] The purchase agreement will not allocate the overall $60.5 million purchase price for the voting securities of Corporation B between the acquisition of interests in Cogeneration LP and Project LP. However, in making the acquisition, Newco II will have internally calculated that $5 million of the overall purchase price should be allocated to the acquisition of Corporation B's 49% interests in Cogeneration LP. Since the buyer so allocates the acquisition price, the acquisition price of the interests in Cogeneration LP is considered "determined" within Section 801.10(d).

[4] In making the acquisition of the voting securities of Corporation B, Newco II will have internally calculated that $55.5 million of the overall purchase price should be allocated to the acquisition of Corporation B's 46% economic interests in Project LP. The acquisition price for these interests is thus "determined." *See* footnote 3.

5. The UPE of Corporation B has a back up agreement that supports an obligation of Cogeneration LP to pay money if Cogeneration LP terminates a steam contract with a third party. As part of the transaction in which Newco II acquires 100% of the stock of Corporation B, Newco II will agree to provide a letter of credit in favor of the UPE of Corporation B that the UPE may draw down if, among other circumstances, the steam contract is terminated and Cogeneration LP does not discharge the obligation or if a defense to payment by Cogeneration LP for the termination is not honored. The purchase price for the letter of credit is $85 million. Whether this sum (or a part thereof) may be drawn down by the UPE of Corporation B depends on the circumstances. Without characterizing the likelihood of whether the letter of credit will be drawn down, it is clearly possible, based on its own terms, that the letter of credit may not be drawn down (or only a part thereof will be), and the balance will be returned to Newco II. We do not believe that the obligation to purchase and collateralize the letter of credit in favor of the UPE of Corporation B should be valued and added to the consideration which Newco II pays to acquire 100% of the voting securities of Corporation B for purposes of calculating the size of the transaction because the purchase price of Corporation B's voting securities should already reflect any such uncertainties. Also, Newco II would not make the acquisition of the voting securities of Corporation B, subject to the letter of credit, but for the value attributable to the 46% interest in the limited partnership. For that reason, any assumed value of the letter of credit would be consideration for the 46% interest in the limited partnership, which is exempt. Any such value would not count toward the $56.7 million threshold. If the amount should be added, however, it would be incumbent upon the board of directors of the acquiring person to value the contingent liability and add it to the value of the interests in Cogeneration LP which the acquiring person shall hold as a result of the acquisition of the voting securities of Corporation B (approximately $18 million) to determine whether the size of the transaction threshold is met for reportability. To make that determination, the likelihood that the contingent liability would be realized and the amount of its realization would have to be estimated.

Agree
B
9/20/06