

802.2(a)  
802.4

**Verne, B. Michael**

**From:** [REDACTED]  
**Sent:** Wednesday, September 08, 2010 3:05 PM  
**To:** Verne, B. Michael  
**Cc:** [REDACTED]  
**Subject:** RE: Testing of generating facility

Mr. Verne:

We would be grateful for your advice on the following fact pattern- and whether this transaction (considering the facts presented in both paragraphs below) would qualify for the 802.2(a) exemption:

Company A is constructing a wind energy project through a wholly owned project entity with the intent to sell it. Company A intends to enter into an acquisition agreement where Company B will acquire all of the membership interest of the project entity for total consideration in excess of the HSR threshold amount. The parties anticipate the closing will occur prior to the date the project has produced any income, except for income generated from the sale of energy produced in connection with testing the wind energy project before it is commercially operational. As between the parties, Company B would have the right to receive the income from the test energy. Based on previous informal interpretations by the PNO staff, the parties believe, but are seeking confirmation, that the income generated from the sale of the test energy before the wind project is operational will not prevent the parties from relying on the "new facilities" exemption under 802.2(a). Could you please advise on that question?

Secondly, under the proposed acquisition agreement, Company B would have an option to delay the closing for up to sixty days after the date the project has achieved commercial operation. If the closing has not occurred as of the date on which the project becomes operational, the parties are contemplating closing the transaction into escrow whereby the project entity and all income generated by the wind energy facility after commercial operation would be escrowed and would be owned by Company B upon its satisfaction of the escrow conditions. The escrow period would not exceed sixty days. The parties are wondering if there is still an exemption here under 802.2?

I look forward to hearing from you.

AGREE -  
EXEMPT UNDER 802.4  
VIA 802.2(a)  
BM  
9/9/10

