801.1(c), 804.20(b)

[redacted]

May 27, 1992



Richard Smith, Esq.
Federal Trade Commission, Bureau of Competition
6th Street and Pennsylvania Ave., N.W.
Washington, D.C. 20580

Dear Mr. Smith:

Following up on our telephone conversation yesterday, May 26, 1992, you had asked me to clarify the possible results of a transfer by B of the stock in the surviving corporation X, given the description of the transaction contained in my letters to Ms. Nancy Ovuka dated May 13, 1992 and May 21, 1992.

As we discussed on the telephone, a transfer of the Class A Common stock held (indirectly) by B would not in and of itself transfer the right to designate a majority of the directors of X. Because the provisions to be contained in the Articles of Incorporation and Bylaws of X creating the Class A Common Stock do not grant the right to designate a majority of the directors of X, the mere transfer of the stock itself would not convey this right.

Because the right is a contractual right granted by the proposed Stockholders Agreement, the transferee of the stock would need to become a party to the Stockholders Agreement in order to have the benefit of this right. Furthermore, because the Stockholders Agreement, in its current form, has an absolute prohibition on the transfer of the Class A Common Stock held (indirectly) by B (with certain limited exceptions for pledges of the stock for specified purposes), the waiver by A of that restriction on any such transfer of the stock and the consent to A of any assignment of rights granted under the Stockholders Agreement would be required for such a transfer and assignment to be effective. In effect, the transferee would have to reach a new agreement with A in order to have the right to designate a majority of the directors of X.

I would like to emphasize the following points:

- The proposed Stockholders Agreement that gives B the contractual right (as between stockholders of the surviving corporation X) to elect a majority of the Board of Directors of X and also gives X an option to

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all of the Class A Common Stock of the surviving corporation X, which *as a class* had the right pursuant to a Shareholders Agreement (among the shareholders of the surviving corporation) and the surviving corporation to elect a majority (4 out of 7) of the directors of the surviving corporation unless certain events of default occur. You stated that the FTC staff's position was that this existence of a contractual right by *the holders of the Class A Common Stock* (rather that specified individuals or entities) to elect a majority of the directors meant that the voting securities acquired by B (the Class A Common Stock) conferred control over the surviving corporation within the meaning of Rule §802.20.

At the current stage of negotiations, the Articles of Incorporation and Bylaws of the surviving corporation will include the following:

> The Class A Common Stock and the Class B Common Stock (i) will vote together as a class unless otherwise provided by law, (ii) shall be entitled to one vote per share, and (iii) cumulative voting shall not be permitted. The affirmative vote of 80% of the Class A Common Stock and Class B Common Stock (voting together as a class) is required to approve a sale of assets, change of capital structure, issuance of additional Class A Common Stock except at a certain price and for a certain purpose, and amendment to the Articles of Incorporation.
>
> The Class C Common Stock is not voting except as required by law.
>
> The Preferred Stock is not voting except that if there is a default in the payment of dividends or other rights of the holders of the Preferred Stock, the Preferred Stockholders, as a class, can elect a majority of the Board of Directors.

The Articles of Incorporation do not create or recognize any difference in the voting powers or rights of Class A and Class B Common Stock. Looking strictly at the Articles of Incorporation and Bylaws, as long as A owns more than 50% of the combined outstanding Class A Common Stock and Class B Common Stock (initially approximately 75%), it would have the power to elect all of the Board of Directors of X. As a result, applying the calculations specified in Rule §801.12(b), A would be deemed to hold approximately 75% of the voting securities of the surviving corporation and B would be deemed to hold approximately 25% of the voting securities of the surviving corporation. The calculations described in Rule §801.12(b) do not seem to be easily applied to allocation of rights to elect directors contained in the Shareholders' Agreement.

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purchase and redeem Class B Common Stock and Class C Common Stock of X from A also contains a prohibition against B or A selling stock of X and also prohibits assignment without consent.

- X has no cumulative voting and as a matter of corporate law B (and any transferee of B) would not have the power to elect any directors until X redeemed a significant part of the Class B Common Stock and Class C Common Stock. This redemption is expected to be accomplished over a period of approximately 12 years.

- If a third party should become the owner of all or a part of the stock of X initially owned by B (either in violation of the Stockholders Agreement or on foreclosure pursuant to the limited pledge rights given B) they would not become a party to or beneficiary of the Stockholders Agreement without the approval and consent of X and A given at the time. Without such consent such third party would only have such voting rights pursuant to the Articles of Incorporation and Bylaws (but not the Stockholders Agreement) attributable to the Class A Common Stock actually purchased.

- Stock Certificates of X will bear a legend referring to the Stockholders Agreement, and X and A can be expected to contest any unauthorized transfer.

I hope that this letter clarifies the matters that we discussed. After you have had the opportunity to review this letter, please contact me to discuss the position of the FTC staff with respect tot the described transaction.

Very truly yours,

[redacted]

6/8/92 - called [redacted] and advised that, based on the fact scenario outlined above, B would not control X through the holding of voting stock "but rather pursuant to a shareholders' agreement. Accordingly, no filing for the taking of [illegible] would be required by 801.2(d)(2)(b)

cc: [redacted]

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