802.9 ; 7A(c)(9)

[redacted]

May 5, 1999

VIA FACSIMILE

Richard B. Smith, Esq.
Federal Trade Commission
Premerger Notification Office
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: Application of Investment Purposes Only Exemption

Dear Dick:

This letter is a follow-up to our phone conversation of March 15, 1999, during which we discussed the application of the investment only exemption to a hypothetical transaction. Since that time, we have gathered additional facts regarding the proposed transaction. The facts outlined below are more detailed, but not materially different, than the facts of the hypothetical transaction that we previously discussed with you. We request confirmation that the FTC Premerger Office would not require an H-S-R filing for the hypothetical transaction described herein. If, after you review this letter, you have any questions or would like additional facts, please call me at your earliest convenience.

FACTS

Company A ("A") and Company B ("B") have entered into an agreement whereby a subsidiary of A ("Sub 1") will provide launch services for a satellite network that currently is being developed by B. As a condition of the launch services agreement, A will make an equity investment in B. We can assume that both the H-S-R size-of-person and size-of-transaction tests will be satisfied in the proposed equity transaction.

The terms of the equity investment are as follows: A will pay a total of $40 millinn in cash to B. In exchange, A will receive approximately 1.7 percent of the outstanding voting shares of B. A views its investment in B as a vehicle to obtain the

launch service contract between Sub 1 and B, rather than an attempt to influence the business operations of B through its shareholdings. Although A will have voting rights as a shareholder of B, A does not intend to nominate a candidate for the board of directors of B, nor will any of the controlling shareholders, directors, officers or employees of A (or its subsidiaries) serve as officers or directors of B. There also will be a Voting Agreement pursuant to which A will be required, for several years, to vote its shares in favor of individuals nominated by a nominating committee consisting of members appointed by shareholders other than A. You can assume that A does not intend to propose corporate action requiring shareholder approval, nor will it solicit proxies.

In the course of providing launch services to B, Sub 1 and B will exchange the following types of information:

- engineering-type analyses of the launch vehicles being developed by Sub 1 and the satellites being developed by B in order to ensure that the "system" -- the launch vehicle and the satellite -- will perform within the requirements of the launch services agreement;
- status reports on the development of Sub 1's launch vehicles and B's satellites to ensure that both are meeting developmental milestones and will be ready for use as of the launch date;
- technical interchange about the launch vehicles being developed by Sub 1 and the satellites being developed by B to ensure that the satellites will interface properly with the launch vehicles;
- plans and discussions regarding the proposed schedule for launching the satellites in order to coordinate mutually agreeable launch dates;
- B will receive generic plans about how Sub 1 manages its launch program;
- B will provide Sub 1 with targeting and orbital information so that Sub 1 will know where B wants its satellites located in space.

The information exchanged between Sub 1 and B will relate to the launch services contract. Sub 1 must exchange this type of information with all of its launch customers in order to fulfill its obligations as a launch services provider. The information is necessary to resolve technical and scheduling issues relating to the launching of satellites. A has also obtained proprietary information from B relating to A's due diligence evaluation in connection with the proposed equity investment.

A and B currently are not competitors; however, they may be in the future. One subsidiary of A ("Sub 2") is developing a product that potentially could compete with the satellite network that B is developing. Neither company expects to provide competing services until at least 2002.

In addition to the service agreement and the equity investment, A (or its subsidiaries) and B may enter into further arm's length business relations if each determines such relations would be in its best interests.

ANALYSIS

We believe that the proposed equity transaction is exempt from the requirements of the H-S-R Act under Section 802.9 of the H-S-R rules. Section 802.9 exempts acquisitions if made solely for the purpose of investment and if, as a result of the acquisition, the amount of stock acquired or held does not exceed 10 percent of the issuer's outstanding voting securities. As indicated above, as a result of the proposed acquisition, A will hold approximately 1.7 percent of the outstanding voting securities of B. Therefore, so long as A intends to acquire the voting securities solely for the purpose of investment, the exemption will apply.

According to Section 801.1(i)(1) of the Statement of Basis and Purpose, the phrase "solely for the purpose of investment" applies so long as a person does not intend to participate in the formulation of the basic business decisions of an issuer. The purpose of this definition is to limit the availability of the exemption to situations in which the acquiring person or holder has no intention of participating in the management of the issuer.

In the Statement of Basis and Purpose, the Commission clarified the phrase "solely for the purpose of investment" by identifying certain types of conduct that could be inconsistent with an investment purpose. These include: (1) nominating a candidate for the board of directors of an issuer; (2) proposing corporate action requiring shareholder approval; (3) soliciting proxies; (4) having a controlling shareholder, director, officer or employee simultaneously serving as an officer or director of the issuer; (5) being a competitor of the issuer; or (6) doing any of the foregoing with respect to any entity directly or indirectly controlling the issuer. When such actions have been taken by a person claiming that voting securities are held or acquired solely for the purpose of investment, the facts and circumstances of each case will be evaluated by the Commission to determine if the exemption applies. The Commission also indicates that merely voting the stock will not be considered evidence of an intent inconsistent with investment purpose.

As discussed above, A (including its subsidiaries) does not intend to nominate a candidate for the board of directors of B nor will any controlling shareholders, directors, officers or employees of A serve as officers or directors of B. Moreover, A does not intend to propose corporate action for B requiring shareholder approval or to solicit proxies. A's only intention with respect to the shares is to vote them, which is within the realm of a passive investor.

In our view, the fact that A, through Sub 1, has entered into a launch services contract with B that will become binding at the time it closes on the equity investment described in this letter does not eliminate the applicability of the investment only exemption. Likewise, the ongoing relationship created by the launch service agreement should not render the exemption inapplicable. As described above, the information exchanged between Sub 1 and B will relate to the launch services agreement. B will be a launch customer of Sub 1 and, as such, must provide certain information to Sub 1 to enable it to fulfill its obligations under the launch services agreement. A expects that the information exchanged will be similar to the information that Sub 1 would require from any other launch customer. The information would be exchanged regardless of A's 1.7 percent equity investment in B. Through the information exchange and interface with B, A is not attempting to exercise control over B's business; rather, A is fulfilling its obligations as a launch services provider. In our view, A's communications with B through a launch services agreement will not constitute A's intention to participate in the management of B's business.

Given that A and B currently are not competitors – because neither Sub 2 nor B sell the potentially competing product now -- and given that A does not intend to be involved in formulating the "basic business decisions of B," now or in the future, the investment only exemption should apply to this transaction. Based on our discussion with you, the fact that Sub 2 and B currently are developing products that may compete in the future does not eliminate the applicability of the investment only exemption to the present equity transaction.

Although not addressed in the Statement of Basis and Purpose, we also would like to confirm that the existence of other business relationships between A and B does not render the investment only exemption inapplicable. As described above, aside from the service agreement and the equity investment, A and B may be involved in additional customer/supplier type transactions in the future. Such deals would be arm's length, negotiated business relationships between A and B.

CONCLUSION

Given the above facts, we believe that A's investment of $40 million in B, amounting to approximately 1.7 percent of the outstanding voting securities of B, is exempt as an investment made solely for the purpose of investment. While there may be a significant amount of business in the future between A and B, A will have to compete to obtain future contracts. A will not have the ability to control or influence B's basic business decisions other than as a 1.7 percent shareholder. A has no present intent to participate in B's corporate governance other than by voting its shares. We therefore intend to advise our client that no filing would be required for the equity investment described above, and would appreciate hearing from you as soon as possible if you have any questions regarding the facts, analysis or our conclusion. My direct dial number is [redacted]

Thank you for your consideration of this matter.

Sincerely yours,

[redacted]

5/7/99 - Advised writer that under present factual setting, A can purchase 1.7% of voting stock of B and claim the 802.9 exemption. However, the Premerger Office is of the view that the last two paragraphs on page 4 are too broad. If A + B become competitors, then any future stock purchases by A (B may well not be able to qualify for 802.9 treatment (and the 1.7% would need to be counted in holdings of A.) Also, the last paragraph of pg 4 cannot be endorsed by the Premerger Office. The situation existing at the time of any future stock purchase would need to be evaluated to determine if 802.9 could continue to be used. (N/O agrees). R B Smith