802.50

[redacted]

LAW OFFICES
PROFESSIONAL CORPORATION

[redacted]

TELEPHONE:
FACSIMILE:

July 2, 2003

VIA FACSIMILE & FEDERAL EXPRESS
(202) 326-2624

Mr. B. Michael Verne
Premerger Notification Office
Room 303
Federal Trade Commission
Washington, D.C. 20580

Re: [redacted]
File No. [redacted]

Dear Mr. Verne:

This letter is to request that the Federal Trade Commission ("FTC") confirm your view, expressed in our telephone conversation of June 19, 2003, that no notification pursuant to Section 7A of the Clayton Act is required in connection with the transaction described below on the terms and conditions described below. Capitalized terms used in this letter without definition are intended to have the meaning ascribed to such terms by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "Act") and the FTC's implementing rules (the "Rules").

[redacted]

TELEPHONE:
FACSIMILE:

[redacted]

TELEPHONE:
FACSIMILE:

[redacted]

TELEPHONE:
FACSIMILE:

[redacted]

I. THE FACTS

We represent [redacted]., a [redacted] corporation ([redacted]). [redacted] has advised us of the following facts: [redacted] directly holds 100% of [redacted], a United Kingdom company [redacted] directly holds 100% of [redacted]., a Delaware corporation [redacted] and [redacted] Japan Ltd., a Japan company [redacted]. In this letter, [redacted] and [redacted] Japan are sometimes collectively referred to as the "Subsidiaries").

[redacted]

LAW OFFICES

VIA FEDERAL EXPRESS

Mr. B. Michael Verne
Premerger Notification Office
July 2, 2003
Page 2

[redacted] and the Subsidiaries own, operate and maintain a trans-Pacific fiber optic cable system (the [redacted] System"). The [redacted] System is a four-fiber pair, self-healing ring of approximately 13,076 miles in length using advanced dense wavelength division multiplexing technology. The [redacted] System provides wholesale capacity under long term IRU's as well as short term leases for capacity on a point to point basis between its four landing stations that are located in the western United States and Japan.

[redacted] and the Subsidiaries are debtors in possession in voluntary proceedings commenced under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. Sections 101 et seq. (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"), under Case Nos. [redacted] (such cases are jointly administered and are referred to herein collectively as the "Case"). [redacted] has also filed a winding-up petition and has been placed in Provisional Liquidation by virtue of the appointment of [redacted], as Provisional Liquidator in the Supreme Court of Bermuda, Companies (Winding-up) [redacted]: No [redacted] pending in the Supreme Court of Bermuda.

[redacted] is a majority-owned direct and indirect subsidiary of [redacted], Ltd., a Bermuda company ([redacted] is a wholly owned subsidiary of [redacted], a Bermuda company. [redacted] is subject to its own separate bankruptcy proceedings unrelated to the Case.

[redacted] and the Subsidiaries are the Sellers and [redacted], a Delaware limited liability company ("[redacted]") is the Buyer under an Amended and Restated Asset Purchase Agreement dated as of [redacted], as amended by a First Amendment to Amended and Restated Asset Purchase Agreement dated as of [redacted] (as amended, the "APA"). Under the APA, [redacted] and the Subsidiaries have agreed to sell, and Buyer has agreed to purchase, substantially all of the operating assets of [redacted]

[redacted]

LAW OFFICES

VIA FEDERAL EXPRESS

Mr. B. Michael Verne
Premerger Notification Office
July 2, 2003
Page 3

and the Subsidiaries, including the [redacted] (the "Transaction Assets") for consideration of $63 million, subject to certain adjustments.

II. THE ANALYSIS

Based on the facts set forth in Part I of this letter, we are of the view that no Notification and Report Form is required to be filed pursuant to Section 7A of the Clayton Act or Part 803 of the Rules in connection with the purchase and sale transaction contemplated by the APA (the "Transaction"). This view is based on the conclusion that, after excluding the value of assets exempt under Section 802.50 of the Rules, the value of the assets to be acquired in the Transaction is less than $50 million. We have reached this conclusion as follows:

A. Identification of the Acquired Person

[redacted]has sought and obtained an order of the Bankruptcy Court approving the Transaction, and this order has become final and non-appealable. The order was entered pursuant to Section 363(b)(1) of the Bankruptcy Code, which permits a bankruptcy "trustee," after notice and a hearing, to sell property of the estate other than in the ordinary course of business. Section 363(b)(2) expressly addresses compliance with the Act and the Rules by Chapter 11 companies. If notification is required under Section 7A(a) of the Clayton Act for a Section 363(b) sale, subparagraph (A) of Section 363(b)(2) section provides, in pertinent part, that notwithstanding Section 7A(a), such notification shall be given by the "trustee."

Upon the commencement of a bankruptcy case, all property of the debtor by operation of law is transferred to the bankruptcy estate of the debtor. In a Chapter 11 case, the representative of the estate is typically the debtor in possession. Only in certain extraordinary cases is a trustee appointed. The Bankruptcy Code

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LAW OFFICES

VIA FEDERAL EXPRESS

Mr. B. Michael Verne
Premerger Notification Office
July 2, 2003

makes clear that, commencing with the filing of a Chapter 11 case, a "debtor-in-possession" like [redacted] (i.e., a debtor for whose estate no trustee has been appointed) is functionally identical to a trustee. Specifically, Section 1107 states, in pertinent part, that "a debtor-in-possession shall have all the rights . . .and powers, and shall perform all the functions and duties . . .of a trustee serving in a case under this chapter."

The effect of these provisions has been acknowledged by the FTC's Premerger Notification Office ("PNO"). As reflected in ABA Interpretation Number 280[1], the PNO staff found Section 363(b)(2)(A) to require that "the trustee file notification as the acquired person in reportable transactions involving the sale of property from a debtor's estate. For purposes of the size-of-person test, the bankrupt debtor is the ultimate parent entity, and the relevant annual net sales and total assets are those of the debtor, including any entities controlled by the debtor."

Based on Section 363(b)(2), as interpreted by the PNO staff, we believe that [redacted] and the Subsidiaries are the "acquired person" in the Transaction and that [redacted] as debtor in possession, is the ultimate parent entity of the acquired person. Interpretation 280, quite properly in our view, draws no distinction in the case of a Chapter 11 company between a "trustee" and a "debtor-in-possession."

B. **Exemption under Section 802.50(a) of the Rules**

Pursuant to Section 802.50(a) of the Rules, the acquisition of assets located outside the United States shall be exempt from the requirements of the Act "unless the foreign assets the acquiring person would hold as a result of the acquisition generated sales in or into the U.S. exceeding $50 million during the acquired person's most recent fiscal year."

[1] ABA Section of Antitrust Law, Premerger Notification Practice Manual (1991 ed.) at 237.

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LAW OFFICES

VIA FEDERAL EXPRESS

Mr. B. Michael Verne
Premerger Notification Office
July 2, 2003
Page 5

A portion of the Transaction Assets is located within the United States and the remaining portion is located outside of the United States. The Transaction Assets located outside of the United States (the "Non-U.S. Assets") consist primarily of real property owned and leased, tangible personal property, including fiber optic cables and landing station equipment, certain contracts to which [redacted] apan are a party, and intangible property. Clearly, the Non-U.S. Assets are "foreign assets" that the acquiring person would "hold as a result of the acquisition" within the meaning of Section 802.50. Accordingly, the acquisition of these assets is presumed to be exempt under Section 802.50 unless they generated more than $50 million of sales in or into the U.S. during the acquired person's most recent fiscal year.

In our view, Section 802.50(a) entitles [redacted] to rely, in determining the amount of U.S. sales generated by the Non-U.S. Assets, on the financial statements of the acquired person for its most recent fiscal year. As discussed in Part II.A above, the acquired person in the Transaction consists only of [redacted] and the Subsidiaries. Therefore, the acquired person in the Transaction does not include any other entity that, by reason of its ownership or control of voting securities of [redacted], might (other than in a bankruptcy context) be deemed to be included within the acquired person. Accordingly, we do not believe it is necessary to review the financial statements or take into account any sales of [redacted] or any other entity other than [redacted] and its Subsidiaries in order to determine the amount of any sales generated by the foreign assets to be sold in the Transaction.

We have been advised that, based on the consolidated financial statements of [redacted] and the Subsidiaries for the year ended December 31, 2002 (prepared in accordance with U.S. generally accepted accounting principles), Total Sales of [redacted] and the Subsidiaries for the most recent fiscal year were less than $50 million. It follows that U.S. sales attributable to the Non-US Assets (which comprised only a portion of Total Sales) must also have been

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less than $50 million during such year. Accordingly, the Non-U.S. Assets should be exempt under Section 802.50.

C. **Fair Market Value of Assets to be Acquired.**

Under 16 C.F.R. § 801.15(b), the value of assets exempt under § 802.50(a) is not included in the total value of the assets to be acquired from the acquired person. Assuming that [redacted] determines that the fair market value of the non-exempt U.S. assets to be acquired is not greater than $50 million, the acquisition would not be reportable under the Act.

III. REQUEST FOR CONFIRMATION

Based on the foregoing, we ask that you confirm our understanding that no notification of the FTC and the Department of Justice will be required in connection with the acquisition of the Transaction Assets under the circumstances described in this letter. Please be advised that, in reliance upon your oral advice of June 19, 2003, the parties do not intend to file a Notification and Report Form in connection with the Transaction. In addition, it is our understanding that the Department of Justice generally conforms to the FTC's interpretations of the Act and the Rules. Accordingly, we have not sought confirmation of the foregoing matters from the Department of Justice.

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LAW OFFICES

VIA FEDERAL EXPRESS

Mr. B. Michael Verne
Premerger Notification Office
July 2, 2003
Page 7

So that the parties may proceed to consummate the Transaction, we respectfully request that you telephone the undersigned with your response to this letter no later than July 7, 2003.

Very truly yours,

[redacted]

cc: [redacted]

[redacted]

AGREE -
B. Michael Verne
7/3/03