

Verne, B. Michael

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From: [REDACTED]  
Sent: Friday, April 27, 2007 1:12 PM  
To: Verne, B. Michael  
Cc: [REDACTED]  
Subject: Confirming HSR Guidance re Rule 801.50 Transaction

Mike,

Thanks very much for taking the time to speak with [REDACTED] and me on Tuesday, April 24 regarding our proposed 801.50 transaction. I just wanted to confirm the HSR reporting interpretation and conclusion we discussed.

As we described, our clients A and B propose to form a new partnership (Newco) in a transaction governed by Rule § 801.50. A will contribute its existing equity interests in entities holding certain electric power facility assets, and B will contribute approximately \$80 million in cash. A and B will each acquire a 50% interest in Newco, and the value of those interests will exceed the HSR size-of-transaction test. Accordingly, we then looked to determine if the exemption in Rule §802.4 is applicable to either A's or B's acquisition of non-corporate interests in the newly formed partnership.

For A, Newco's exempt assets consist of the cash contributed by B (pursuant to §801.21) and A's own contributions of its existing interests (pursuant to §802.30(c)). Because all of the assets of Newco are exempt with regard to A, A's acquisition of non-corporate interests in Newco is exempt under §802.4.

For B, Newco's exempt assets include the cash contributed by B, as well as the value of certain interests in non-corporate entities (each interest constituting a direct minority interest in such non-corporate entity) being contributed by A that will not be included within Newco for HSR purposes, and thus do not count toward the \$50 million (as adjusted) limitation for non-exempt assets. (See Rule § 802.4(a)). However, A is also indirectly contributing all of its interests in a limited liability company (X) that owns one of the power plants, which A previously treated as a 50% membership interest when it acquired that interest from the prior holder pursuant to a Notification and Report Form filed in November, 2006, per the staff's instructions. The Commission granted early termination of the waiting period for that prior transaction on the basis that the interest in X was controlling, even though A reported that its acquisition of the 50% membership interest would take place in two steps -- a "Tier 1" closing on 49.9%, and a "Tier 2" closing on the remaining 0.1% no sooner than one year and one day after the closing date of the Tier 1 sale. A has already closed on the Tier 1 step, and, as noted above, the Tier 2 acquisition shall occur no sooner than one year and one day after the Tier 1 closing, at which point B (as an ultimate parent of Newco) will legally hold the full 50% interest in X as a result of A's contribution. If the interests in X being contributed to Newco by A is deemed non-exempt, then the value of Newco's non-exempt assets with regard to B exceeds the size-of-transaction test, and B's acquisition of control of Newco is subject to the requirements of the HSR Act. (Newco is then exempt from filing by operation of §802.41.)

Under these particular circumstances, and in order to be consistent with the prior filings made by A with respect to its acquisition of X, you agreed that a filing should be made by B now with respect to the formation of Newco. You further agreed that neither A nor B would have any additional filing obligation as an ultimate parent of Newco in conjunction with the Tier 2 closing on the remaining 0.1% membership interests in X, given that both A and B would already have filed for the acquisition of a controlling 50% interest (A in November 2006, and B in connection with this formation transaction).

Please let us know as soon as possible if the above summary does not accurately describe our discussion and the staff's position in this transaction, or if there is any additional information you need. As always, your guidance is greatly appreciated.

Sincerely,

AGREE  
B  
4/27/07

[Redacted]

cc: [Redacted]

[Redacted]

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