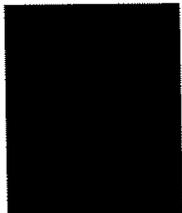


802.63



May 2, 2007

BY E-MAIL

Mike Verne
Premerger Notification Office
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Mike:

We would like to confirm that none of the steps in this transaction (the "Transaction") would be reportable under the Hart Scott Rodino Act (the "Act").

Parties

The acquiring party is HoldCo, a non-corporate entity formed specifically to acquire the assets described below pursuant to a secured party foreclosure. Prior to entering into the transaction, HoldCo will have no regularly prepared balance sheet and no assets other than interests in three wholly owned subsidiary companies — PlantCo 1, PlantCo 2 and ClaimCo — each of which will also hold no assets and have no regularly prepared balance sheet prior to the transaction. Holdco will be its own "ultimate parent entity."

All but one of the related parties in the Transaction were involved in a sale-leaseback financing (the "Pass Through Transaction") for two power plants (the "Plants") in 2000, as set forth in the diagram attached as Appendix A:

Pass Through Trust. The Pass Through Trust is a single purpose investment trust formed in connection with the Pass Through Transaction. As part of the sale leaseback arrangements, the Pass Through Trust issued certain pass through certificates (the "Certificates") to institutional investors and used the proceeds to acquire two nonrecourse promissory notes (the "Lessor Notes") from the equity participant in the sale leaseback (the "Owner Lessor"). The Pass Through Trust holds the Lessor Notes for the benefit of the holders of the Certificates (the "Certificateholders"). The Certificates represent fractional undivided interests in the Lessor Notes and any proceeds or distributions therefrom.



Owner Lessor. The Owner Lessor is a single purpose entity formed to serve as the equity participant in the Pass Through Transaction. The Owner Lessor acquired certain facilities related to the Plants (the "Facilities") with the proceeds of the Lessor Notes and an equity contribution from its immediate parent company. The Owner Lessor leased the Facilities back to the sellers pursuant to identical lease agreements (the "Facility Leases"). The Owner Lessor pledged the Facilities, its rights under the Facility Leases and certain other agreements, and all the proceeds thereof, as security for the Lessor Notes. The Lessor Notes are currently in default, but the Owner Lessor is *not* in bankruptcy.

Parent Corp.; Power Sub 1; Power Sub 2. Parent Corp. is a merchant power company that developed the Plants through two special purpose subsidiaries: Power Sub 1 and Power Sub 2. Power Sub 1 and Power Sub 2 sold the Facilities to the Owner Lessor in the Pass Through Transaction and leased them back pursuant to the Facility Leases. Parent Corp. guaranteed the payment and performance of the obligations of Power Sub 1 and Power Sub 2 under the Facility Leases and certain related agreements. Parent Corp., Power Sub 1 and Power Sub 2 are currently chapter 11 debtors in bankruptcy.

The bankruptcy of Parent Corp., Power Sub 1 and Power Sub 2 gave rise to events of default under the Facility Leases and under the Indenture for the Lessor Notes. After Power Sub 1 and Power Sub 2 moved to reject the Facility Leases in the bankruptcy cases and surrender the Facilities to the Owner Lessor, the Indenture trustee brought suit against the Owner Lessor for payment on the Lessor Notes in federal district court. On motion of the Indenture trustee, the district court appointed a receiver (the "Receiver"), who currently operates and has exclusive control over the Plants.

Assets

The assets to be acquired in the Transaction consist of the Plants, the Facilities and certain bankruptcy claims against Parent Corp. arising principally from Parent Corp.'s guaranty of the obligations of Power Sub 1 and Power Sub 2 under the rejected Facility Leases (the "Claims"). As a preparatory step to acquiring these assets in a foreclosure, HoldCo will acquire the Lessor Notes from the Pass Through Trust and then, by a strict foreclosure on a security for the Lessor Notes, acquire the Plants, the Facilities and the Claims.

Transaction Steps

Capitalization of HoldCo.

The Transaction provides that certain current Certificateholders will capitalize HoldCo by tendering their Certificates and contributing cash to HoldCo in exchange for interests in HoldCo. The majority, if not all, of the group tendering their Certificates in exchange for interests in HoldCo will have acquired these Certificates in the secondary market after the original Pass

Through Transaction. Some of the group tendering their Certificates will have acquired their Certificates after the bankruptcy filing of Parent Corp., Power Sub 1 and Power Sub 2. A subset of this latter group will have acquired their Certificates after the date Power Sub 1 and Power Sub 2 gave notice of their intention to reject the Facility Leases, and a further subset will have acquired their Certificates after the transition of the Plants to the control of the Receiver.

Acquisition of the Lessor Notes.

The Transaction further provides that HoldCo will pay cash and surrender all its Certificates to the Pass Through Trust in exchange for the Lessor Notes.

Acquisition of the Plants and the Claims.

In the final stage of the acquisition, the Owner Lessor and the Indenture Trustee will execute a strict foreclosure agreement, pursuant to which the Owner Lessor and the Receiver will transfer the Plants and the Facilities to PlantCo 1 and PlantCo 2 and the Claims to ClaimCo in consideration for the extinguishment of all indebtedness under the Lessor Notes.

Analysis

We would like to confirm the following:

- 1) The acquisition of Certificates by HoldCo is exempt from the requirements of the Act.

Because the Certificates are obligations which are non-voting securities, the capitalization of HoldCo is an exempt transaction pursuant to Section 7A(c)(2).

- 2) The acquisition of the Lessor Notes by HoldCo is exempt from the requirements of the Act.

Like the Certificates, the Lessor Notes are obligations which are non-voting securities. Consequently, the acquisition of the Lessor Notes is an exempt transaction pursuant to Section 7A(c)(2).

- 3) The acquisition of the Plants and Claims by HoldCo pursuant to the strict foreclosure agreement is exempt from the requirements of the Act.

The acquisition of the Plants and the Claims by HoldCo pursuant to the strict foreclosure is exempt from the requirements of the Act pursuant to Rule § 802.63, which exempts, among other things, acquisitions in foreclosure if made by a creditor in a bona fide credit transaction entered into in the ordinary course of the creditor's business. The Pass Through Transaction was a bona fide credit transaction entered into in the ordinary course of business of the Pass Through Trustee and the original Certificateholders. As

successor in interest to the original Certificateholders and to the Pass Through Trustee as holder of the Lessor Notes, HoldCo is a creditor in a bona fide credit transaction.

Furthermore, the so-called "Vulture Fund" exception to the foreclosure exemption does not apply. Albeit some Certificateholders acquired their Certificates after the bankruptcy filing of Parent Corp., Power Sub 1 and Power Sub 2, the debtor in this case is the Owner Lessor, which is *not* in bankruptcy.

- 4) Notwithstanding the "Vulture Fund" exception, the acquisition of the Claims by HoldCo is not subject to the requirements of the Act.

Parent Corp. and its affiliates have not yet filed a plan of reorganization. Consequently, the Claims may represent a right to receive either (i) voting securities or securities convertible into voting securities; (ii) non-voting securities; or (iii) cash. Thus, the Claims against Parent Corp. can be considered either (i) the equivalent of convertible securities, the acquisition of which is exempt under Rule § 802.31; (ii) the equivalent of non-voting securities, the acquisition of which is exempt under Section 7A(c)(2), or (iii) the equivalent of cash, the acquisition of which is exempt.

In the event that the foreclosure transaction is not exempt, and the acquisition of the Plants and Claims is subject to the requirements of the Act, we would also like to confirm the following additional points:

- 5) Assuming HoldCo has no assets other than the Lessor Notes and its interests in PlantCo 1, PlantCo 2 and ClaimCo prior to the foreclosure transaction, the total assets of HoldCo for the purposes of the size-of-person test would be \$0.

Because HoldCo will not be controlled by any other person and will have no regularly prepared balance sheet, the total assets of HoldCo will be determined pursuant to 16 C.F.R. 801.11(e). Since the Lessor Notes are securities of the acquired person, they are deducted from the total assets of HoldCo pursuant to 16 C.F.R. 801.11(e). Furthermore, prior to the acquisition, PlantCo 1, PlantCo 2 and ClaimCo will have no assets. Consequently, HoldCo will have no assets for purposes of the size-of-person test.

- 6) For the purposes of the size-of-transaction test, HoldCo may consider only the value of the assets received in consideration for debt acquired after the bankruptcy filing of Parent Corp., Power Sub 1 and Power Sub 2.

According to informal interpretations of the PNO, the acquisition of debt prior to a debtor's bankruptcy filing is regarded as a bona fide credit transaction in the ordinary course of a creditor's business, whereas the acquisition of debt after a bankruptcy filing is not. Consequently, the acquisition of assets in foreclosure is exempt to the extent the discharged debt was acquired in a bona fide credit transaction prior to a bankruptcy

[REDACTED]

Mike Verne

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filing, and the acquisition of assets in foreclosure is reportable to the extent any discharged debt was acquired after a bankruptcy filing.

In determining the size of the foreclosure transaction, therefore, HoldCo would consider only the value of the Certificates acquired after the bankruptcy filing of Parent Corp., Power Sub 1 and Power Sub 2.

- 7) Assuming the Claims are not exempt from reporting, and to the extent that premerger notification is required, the Receiver is the acquired person in the Transaction.

Pursuant to Rule § 801.1(a)(1), the term "person" means an "ultimate parent entity and all entities which it controls directly or indirectly. The phrase "ultimate parent entity," in turn, signifies an entity that is not controlled by any other entity. Rule § 801.1(a)(3). The term "entity" expressly includes "a receiver for [a corporation, company or partnership], acting in his or her capacity as such." Rule § 801.1(a)(2).

Although title to the Plants will not be transferred until the foreclosure is accomplished, the Receiver, as an agent for the federal district court, has control of the Plants for all purposes, including operating the Plants for commercial purposes pending a resolution of the suit for payment on the Lessor Notes. Neither the Owner Lessor nor the Owner Lessor's ultimate parent has any control over the Receiver. Consequently, the Receiver is the "ultimate parent entity" for the Plants under his control and is the acquired person for purposes of the Transaction.

We look forward to your advice. Thank you for your assistance with this matter.

Yours sincerely,

[REDACTED]

cc: [REDACTED]

[REDACTED]

AGREE - THIS IS
NON-REPORTABLE
B
5/3/07

APPENDIX A

2000 PASS THROUGH TRANSACTION

