

801.2

Verne, B. Michael

From: [REDACTED]
Sent: Monday, November 17, 2008 11:37 AM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: Re: Tolling Agreement

From: [REDACTED]
To: 'Verne, B. Michael'
Cc: [REDACTED]
Sent: Thu Nov 13 16:04:43 2008
Subject: Tolling Agreement

Mike

Thanks very much for taking our call this morning.

As I mentioned, we have an energy transaction which involves the direct and indirect acquisition of certain executory contracts. We want to confirm your conclusion on the phone that no HSR filing is necessary.

The transaction value is \$227.5 million and the size-of-parties test is met.

The transaction involves the acquisition of (a) all of the membership interests in an LLC ("Target LLC") from a holding company (Target LLC's sole asset consists of all of the membership interests of another LLC (the "Subsidiary LLC") the sole assets of which are an electric generation "tolling agreement"), and (b) related natural gas supply and transportation agreements held by an affiliate of Target LLC (which are contemplated to be transferred to the Subsidiary LLC at the closing of the transaction). The tolling agreement is a contract under which a party supplies its own fuel to an electric generation plant and receives all of the resulting electricity from the plant in return. In effect, the third party owner of the plant is paid to convert raw material (natural gas) into electricity. The Target and Subsidiary LLC's hold no other material assets, have no employees, and have conducted no other business unrelated to the tolling agreement and related contracts.

The buyer of the membership interests in the Target LLC will indirectly acquire the rights under the tolling agreement and the related contracts (on the basis indicated above). Those rights will enable the Subsidiary LLC to deliver its raw fuel to the generation facility, and, in turn, receive the electric output of the plant. The electric output includes the electric capacity, energy and ancillary services from the electric generation plant, which the Subsidiary LLC will resell into the wholesale electric market.

The term of tolling agreement is 20 years from the commercial operation date of the electric generation facility (expires in approximately 2021).

None of these contracts have been prepaid. To the contrary, after payment of the transaction price to the sellers to acquire the membership interests in the Target LLC and the movement of the related contracts to the Subsidiary LLC, the Subsidiary LLC will pay for all the services contemplated under the tolling agreement and related contracts. This includes payments to the gas supply and transportation providers and the owner of the electric generation plant, respectively, on an ongoing basis for the supply and

11/17/2008

8

transportation of natural gas and for the electric conversion services under these contracts. These ongoing payments will include (1) monthly capacity payments to the electric generation provider, (2) monthly reservation charges to the gas transportation providers, (3) monthly payments to the gas suppliers and transportation providers based on the volumes of gas purchased or transported, and (4) monthly payments to the electric generation provider based on the level of operation of the electric generating facility (with adjustments for performance).

We believe the transaction is not reportable. This transaction would not be notifiable if the contracts were newly negotiated today, even though the buyer would likely negotiate the same terms today. The buyer is simply buying the benefits of the subsidiary LLC's executory contracts, and stepping into the shoes of the seller. Like the seller, the buyer will benefit from all future performance of the subsidiary LLC under each contract. The transaction price was based on the buyer's estimate of the discounted present value of the benefits it expects to receive from marketing the power produced under the contracts over their remaining terms.

Would you please confirm your conclusion this morning that no HSR filing is required for the transaction.

Thanks very much,

[Redacted signature]

[Redacted signature block]

AGREE
JL
11/17/08

=====
Pursuant to U.S. Treasury Department Circular 230, unless we expressly state otherwise, any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties or (ii) promoting, marketing or recommending to another party any matter(s) addressed herein.

This e-mail message, including attachments, is confidential, is intended only for the named recipient(s) above and may contain information that is privileged, attorney work product, proprietary or exempt from disclosure under applicable law. The unauthorized use, dissemination, distribution or reproduction of this e-mail message, including attachments, is strictly prohibited. If you have received this message in error, or are not an intended recipient, please immediately notify the sender and delete this e-mail message, including attachments, from your computer. Thank you.

=====