

802.2
802.4

Verne, B. Michael

From: [REDACTED]
Sent: Friday, November 11, 2011 11:08 AM
To: Verne, B. Michael
Subject: HSR exemption confirmation - wind acquisition

Mike,

I would be grateful if you could provide your opinion on the reportability of the following hypothetical transaction.

Purchaser proposes to acquire 100% of the LLC interests in Wind Power LLC, a limited liability company that owns 100% of the LLC interests in Project LLC. Wind Power LLC is a holding company, with no other assets or holdings aside from the interests in Project LLC. Project LLC owns assets consisting of leasehold rights to real property, contracts, and permits, and in addition, structures and improvements on the leased real property, consisting primarily of towers and wind turbines, and supporting infrastructure, including a substation and operations and maintenance building. The various contracts and permits are essential in order for Project LLC to generate and sell commercial power created by the turbines operating on the leased real property.

Project LLC currently does not generate any revenue except perhaps certain revenues related to testing/debugging. However, Purchaser's proposed acquisition of Wind Power LLC will likely close after the wind turbines are commercially operational and have begun to generate revenues for Project LLC from the sale of power. The parties anticipate that even if closing of the transaction does not occur in the next six months, Project LLC will have generated well below \$5 million in revenues pre-closing, in the aggregate.

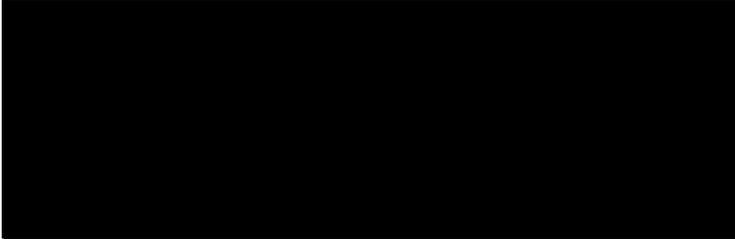
Based on these facts, please let me know if the following conclusions are consistent with HSR regulations.

- 16 C.F.R. § 802.2(a) – The “new facilities” exemption is not applicable if Project LLC will be earning revenues from the commercial sale of power generated by Project LLC’s wind turbines before closing.
- 16 C.F.R. § 802.4 – The acquisition of interests in an unincorporated entity such as an LLC is exempt from HSR notification requirements if acquisition of the underlying assets held by such LLC would otherwise be exempt under other HSR regulations, including for example, the “unproductive real property” exemption set forth at 16 C.F.R. § 802.2(c). (See, e.g., Informal Staff Opinion No. 0806023, dated June 12, 2008.)
- 16 C.F.R. § 802.2(c) – The “unproductive real property” exemption is applicable to the hypothetical transaction, and the hypothetical transaction is therefore not reportable under the HSR Act, because:
 - Leasehold interests in real property are equivalent to ownership of real property, for purposes of applying the § 802.2(c) exemption. (See Informal Staff Opinion No. 0406012, dated July 1, 2004.)
 - The wind turbines affixed to and operated on the real property leased by Project LLC are properly classified as “structures and improvements” as described in § 802.2(c).
 - The wind turbines do not constitute a “manufacturing or non-manufacturing facility” not considered “unproductive real property” pursuant to 802.2(c)(ii).
 - The contracts and permits held by Project LLC, which are inextricably connected to the leasehold interests and structures and improvements held by Project LLC, are properly classified as “assets incidental” to the ownership of the real property leasehold rights, as described in § 802.2(c). (See, e.g., Informal Staff Opinion No. 0806023, dated June 12, 2008.)

- o The entire group of assets held by Wind Power LLC (via Project LLC) are properly entitled to the § 802.2(c) exemption because they are limited to the leasehold rights in real property, structures and improvements on that real property (towers, turbines, infrastructure), and assets incidental to the same real property (permits and contracts).
- o The assets held by Wind Power LLC will have generated less than \$5M in revenues in total, at the time of closing the transaction.

Thanks again for your assistance – please let me know if you have any questions or concerns about this analysis.

Best regards,



AGREE -
BR
11/14/11

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