

802.2

Verne, B. Michael

From: [REDACTED]
Sent: Wednesday, November 07, 2012 6:20 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: question regarding application of 16 C.F.R. § 802.2(b)
Attachments: 0406008.pdf

Mike:

I am writing to confirm application of the exemption under 16 C.F.R. § 802.2(b), relating to treatment of "used facilities," to the facts below.

Description

Buyer is an affiliate through a common ultimate parent entity ("Holding Company") of Company A, the lessee and operator of a waste-to-energy facility (the "Facility") owned by Lessor. Lessor is in the business of providing financing, and has held its interest in the Facility in the ordinary course of its business since the Facility was built new in 1992. (Technically the interest is held by an owner trustee for the benefit of Lessor and controlled, for HSR purposes, by Lessor). First Operator was the sole lessee and operator of the Facility when it was built new in 1992. In 1997, First Operator was operating the Facility at a loss and entered into a transaction with Company A in which First Operator assigned all of its rights under the lease to Company A, and the lease between Lessor and First Operator was amended and restated to reflect this assignment and to keep First Operator obligated under the lease to pay a portion of the rent for the Facility to Lessor, which obligation was backed by security provided by First Operator's parent company. Company A has been the sole and continuous operator of the Facility since 1997. In 2005, Company A was acquired by Holding Company as part of a larger transaction, and continues as an indirect, wholly-owned subsidiary of Holding Company. (The transaction in which Holding Company acquired Company A was reported under the HSR Act without incident). Buyer now proposes to acquire Lessor's interest in the Facility.

Discussion

This acquisition appears exempt under 16 C.F.R. § 802.2(b), provided that:

- "the facility is acquired from a lessor that has held title to the facility for financing purposes in the ordinary course of the lessor's business,"
- "by a lessee that has had sole and continuous possession and use of the facility since it was first built as a new facility."

The first condition is plainly satisfied here, because Lessor holds and has at all material times held its undivided interest in the ordinary course of its business of providing financing. We understand that the fact that the interest is the beneficial ownership in the "title to the facility" (rather than a direct ownership of the title) makes no difference. The second condition requires more analysis, but Informal Interpretation 0406008, attached and available at <http://ftc.gov/bc/hsr/informal/opinions/0406008.htm>, seems to be on point. In that interpretation, a transaction was non-reportable where a buyer was the successor-in-interest to the lease interest held by the first operator of the facility.

Here, as in Informal Interpretation 0406008, First Operator caused the Facility to be built, was the lessee in the original transaction with Lessor, and had sole and continuous possession and use of the Facility. Company A in essence succeeded to First Operator's rights under that original lease, and assumed all operating responsibility of First Operator relating to the Facility. Company A had sole and continuous possession and use of the facility after it succeeded to First Operator's right. Both Company A and Buyer are wholly-owned subsidiaries of their common ultimate parent entity, Holding Company. Under these circumstances, do you agree that Company A would be deemed to have stepped into the shoes of First Operator as the "lessee that has had sole and continuous possession and use" of the Facility, and that

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Buyer, as a subsidiary of Holding Company and affiliate of Company A, is therefore exempt under Section 802.2(b) from reporting this acquisition?

Many thanks,

Agner
BM
11/8/12

[Redacted]

[Redacted]

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