801.1(f)

Verne, B. Michael

From: [redacted]
Sent: Wednesday, June 12, 2013 11:54 AM
To: Verne, B. Michael
Cc: Walsh, Kathryn
Subject: RE: Electric Coops

Mr. Verne: We represent two electric cooperatives which are organized as nonprofit corporations under state law. One is engaged in electric generation and the other in electric transmission. The ownership of these cooperatives is very similar (though not identical), but each is its own ultimate parent entity. These two cooperatives now plan to merge.

Early last year you provided an informal opinion with respect to a merger of agricultural cooperatives. http://www.ftc.gov/bc/hsr/informal/opinions/1201002.htm. You stated that there was no generally applicable exemption for such mergers and then said they should be viewed as follows:

1) Are the members entitled to vote for the election of directors? If so, this would be treated as an acquisition of voting securities.
2) Do the members have the right to profits or assets upon dissolution of the cooperative? If so, this would be treated as an acquisition of non-corporate interests.
3) If neither of the above is true, this would be treated as an acquisition of assets.

In the present case, the distinction between asset acquisition and other forms is important in determining whether a filing is required. The gross value of the assets of the acquired entity would exceed the size of transaction threshold, but these assets are encumbered by substantial indebtedness, and the value of the membership interests is substantially less than the threshold.

Here, the members of the acquired entity would have the rights to share in profits as well as in the assets upon dissolution. For this reason, and in light of the specific reference to cooperative interests in the definition of non-corporate interests in § 801.1(f)(1)(ii), we have concluded that the merger should be considered an acquisition of non-corporate interests and no filing should be required. There is also an argument that the membership interests might be treated as voting securities, but here the facts are more complicated. One class of members – other cooperatives – have the right to appoint directors, while other member classes may elect a representative director for each class.

As noted, the question of whether the merger constitutes an acquisition of non-corporate interests or an acquisition of voting securities is irrelevant to us, since no filing is required in either case. However, we would like confirmation from you that the merger would be treated as one or the other and not as an acquisition of assets

AGREE THIS IS AN ACQUISITION OF NON-CORPORATE INTERESTS

BM 6/17/13

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[redacted]

KEEP CONCLUS.

[redacted]