

WK

[REDACTED]

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July 10, 1987

PLEASE REPLY TO

FEDERAL EXPRESS

Premerger Notification Office
Bureau of Competition
Room 301
Federal Trade Commission
Washington D.C. 20580

Attention: Wayne Kaplan

Dear Mr. Kaplan:

We spoke with you last month relative to the need for submitting a Hart-Scott-Rodino Premerger Notification Report under certain described facts. As a follow-up, we would like to confirm our understanding of such advice.

We understand from our discussions that for any one of the reasons set forth below, the transaction described below is not one that requires the submission of a Notification and Report Form pursuant to the Hart-Scott-Rodino Premerger Notification Act and Section 803.1(a) of the Premerger Notification Rules set forth at 16 C.F.R. Part 803. We will appreciate your confirming that our analysis set forth in this letter is correct. If we have not heard further from the Federal Trade Commission by July 31, 1987, we will assume that, based on the facts presented, you are in agreement with the analysis contained in this letter.

FACTS

Background

The proposed transaction involves the acquisition of approximately 4,900 acres of unimproved real property (the "Real Property") by a newly-formed [REDACTED] limited partnership (the "Acquiring Person") from [REDACTED] corporation originally formed to own the Real Property (the "Seller"). The Seller is a wholly-owned subsidiary of a [REDACTED] holding company with other

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subsidiaries principally involved in the businesses of natural gas transmission, digital telecommunication and real estate development.

The acquired person (as such term is used pursuant to the Act) (the "Acquired Person") has total assets in excess of \$100 million. The Seller had held the real property for possible phosphate mining. However, the Seller decided to dispose of the property rather than mine it. The only uses that the Seller has made of the Real Property are inconsequential uses for cattle grazing and inconsequential leases of the property to permit cattle owned by others to graze on the property, to permit others to farm portions of the property, the boy scouts to conduct recreational activities on the property and beekeepers to maintain beehives thereon. The aggregate annual rental from these leases is approximately \$30,000.

The Acquiring Person is a newly-formed Florida limited partnership, formed for the purpose of acquiring and developing the Real Property. The Acquiring Person will have three types of investors; general partners, limited partners and Debenture Holders.

General Partners

The first type of investor will be the general partners who collectively have contributed as general partners a total of \$20 in cash. The entire aggregate contribution by the general partners was made at the time of formation.

Limited Partners

The second type of investor will be a limited partner. Each limited partner will acquire a limited partnership interest on a staged pay-in basis with an initial amount to be paid in cash at the time of subscription (\$50,000) and with the balance to be paid in three annual installments. In particular, a person acquiring a limited partnership interest will be legally obligated to make the remaining installment payments for the limited partnership interest in accordance with the following schedule:

<u>Date Due</u>	<u>Amount</u>
September 1, 1988	\$38,000
September 1, 1989	38,000
September 1, 1990	24,000

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If all of the limited partnership interests are sold, it is anticipated that total cash in the amount of \$3,500,000 will be paid in at the time of subscription by the limited partners and such limited partners will have committed pursuant to the terms of their subscription agreements to contribute an additional aggregate amount of \$7,000,000 over the next 3 years.

Debenture Holders

The third type of investor in the limited partnership will be an investor who lends money to the limited partnership in exchange for a Debenture issued by the limited partnership. Under the Debenture arrangement, each person agreeing to acquire a Debenture will at the time of the issuance of the Debenture only advance a portion of the total purchase price that he becomes obligated to advance. The balance of the funding under the Debenture will be obtained by the limited partnership by advances from each of the Debenture Holders in three annual installments corresponding with the dates on which additional capital contributions are due from the persons purchasing limited partnership interests. The Debentures will be secured by a second mortgage on the Real Property. Although the Debentures may be issued in denominations of \$1,000 and any integral multiple thereof, the limited partnership anticipates that each Debenture Holder will be investing a minimum of \$200,000.

In particular, a person acquiring a Debenture or Debentures will be legally obligated to advance with respect to each \$200,000 of Debentures subscribed for, \$61,000 at the time the Debenture is first issued. The balance of the advances under the Debenture is required to be made in accordance with the following schedule:

<u>Date</u>	<u>Amount</u>
September 1, 1988	\$47,000
September 1, 1989	47,000
September 1, 1990	45,000

Use of Initial Cash Proceeds

The limited partnership as the Acquiring Person will use, at a minimum, approximately \$3,950,000 of the \$5,452,000 received in cash at the time of the subscriptions for the limited partnership interests and the initial advances under the Debentures to make the cash down payment on the purchase of the Real Property from the Seller and to pay for closing expenses incidental to the acquisition. In connection with the acquisition, the Acquired



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Person will accept a purchase money note and mortgage for the balance of the purchase price.

ANALYSIS

1. The Sale of the Real Property is Exempt from the Notification Requirements of the Hart-Scott-Rodino Anti-Trust Improvements Act of 1976 Because the Transfer is in the Ordinary Course of Business

Section 7A(c)(1) of the Hart-Scott-Rodino Anti-Trust Improvements Act of 1976 (the "Act") provides that "acquisition of ... realty transferred in the ordinary course of business" is exempt from the requirements of the Act and therefore is exempt from the premerger notification and waiting period provisions.

To be exempt, the transfer of realty must either be in the ordinary course of business of the purchaser or the ordinary course of business of the seller but need not be in the ordinary course of both.

You have indicated to us that because the Real Property is unimproved and has not been generating any material income stream in the hands of the Seller, the transfer of the Real Property will be treated as being in the ordinary course of business of the Seller and the parent of the Seller for purposes of Section 7A(c)(1).

The Real Property being acquired is a small portion of the property of the Acquired Person and therefore, as a result of the acquisition of the Real Property by the Acquiring Person, the Acquiring Person will not hold all or substantially all of the assets of the Acquired Person of any operating division of the Acquired Person. See, Section 802.1(b).

Accordingly, on the basis of these facts, neither the Acquired Person, the Seller nor the Acquiring Party would need to file a Premerger Notification with respect to the transfer of the Real Property from the Seller to the Acquiring Person.

2. The Acquisition of the Real Property is not Subject to the Notification Requirements Because the Acquiring Person does not Satisfy the Minimum Size Requirements

- a. Rights to Receive Additional Capital Should Have Minimal Value.



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We have assumed for purposes of this analysis that the Acquired Person has total assets in excess of \$100 million. Accordingly, in order to be subject to the notification requirements, the Acquiring Person must have total assets or annual net sales of \$10 million or more. Section 7A(c) of the Act.

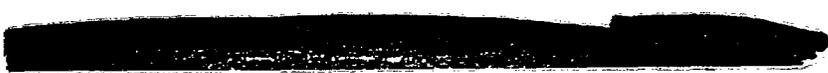
Because the Acquiring Person is a newly formed partnership, it does not have a regularly prepared annual statement of income and expense. Therefore, for purposes of Section 801.11 of the Premerger Notification Rules (16 C.F.R. 801.11), the Acquiring Person does not have any annual net sales.

In determining the total assets of the Acquiring Person, we understand that several rules and interpretations come into play.

First, under new Section 801.11(e) (adopted by the Federal Trade Commission, effective April 15, 1987), because the Acquiring Person under our facts does not have a regularly prepared balance sheet, the total assets of such Acquiring Person for purposes of the Act shall be determined by reducing the actual total assets of the Acquiring Person by "all cash that will be used by the acquiring person as consideration in the acquisition of assets from... [the] acquired person... and less all cash that will be used for expenses incidental to the acquisition...".

Under this analysis, almost three-fourths of the cash held by the Acquiring Person at the time of the acquisition will be used to acquire the Real Property or for payment of expenses incidental to the acquisition. The portion of cash so used may be subtracted from the total assets that the Acquiring Person will have at the time of the acquisition.

The only other "assets" that the Acquiring Person will have at the time of the acquisition are the rights to receive additional capital contributions from the limited partners and the rights to receive additional advances from the Debenture Holders. You have advised us that in computing total assets, the rights to receive the additional contributions and the rights to receive additional advances, to the extent they constitute assets of the Acquiring Person, should be valued at an amount equal to the value of such rights to the Acquiring Person (which is essentially the value of the respective contract rights); this value would not necessarily be equal to, and indeed in all likelihood would be substantially less than the total additional amounts required to be contributed or advanced. One would expect that such contract rights would have a relatively small value because of the unsecured nature of the obligations of the limited partners and the Debenture Holders



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and the fact that there could be no assurance that the additional contributions and advances will be made.

Assuming that the assets of the Acquiring Person at the time of the acquisition are limited to (1) cash and (2) the rights to receive additional contributions and the rights to receive additional advances, then if the cash held by the Acquiring Person at the time of the acquisition (net of the cash to be used to acquire the Real Property or to pay for expenses of the acquisition) plus the value of the rights to receive additional contributions and the rights to receive additional advances is less than \$10,000,000, the transaction as described in this letter will not be subject to the prenotification filing and waiting period of the Act.

b. Rights to Receive Additional Capital Should Not Be Considered as Assets for Purposes of the Act.

Even if the right to receive additional contributions from the limited partners and additional advances from the Debenture Holders have a value such that the total assets of the Acquired Person immediately prior to the acquisition exceed \$10,000,000 the transaction will be exempt from the prenotification filing and waiting period because the rights to receive additional contributions and additional advances under these circumstances should be treated the same as cash for purposes of Section 801.11(e).

In the background material preceding the new final rules, (effective April 10, 1987) and recently adopted by the Federal Trade Commissions, the Federal Trade Commission has stated that "the Commission staff has for some time stated that acquiring persons should not include as assets cash or loans that will be used to make an acquisition.

The introduction goes on to state that "the Commission is intending to adopt this staff position and incorporate it in Section 801.11(e)." The clear implication is that assets that are on hand for purposes of making the acquisition should not be counted in determining the size of the acquiring person.

As previously described, the Real Property that is being acquired by the Acquiring Person will become subject to a purchase money note and first mortgage in favor of the Seller and a second mortgage in favor of the Debenture Holders. The dollars that are to be received pursuant to the additional capital contribution requirements and the additional advances under the Debentures are



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designed to be used and, when received, will be used, to make installments of principal and interest on the first mortgage and installments of interest on the second mortgage.

Therefore, although the cash is being received on a deferred basis, the rights to receive additional capital contributions and the rights to receive additional advances on the Debentures are assets in the nature of cash or loans that will be used to make the acquisition (even though such amounts will not be received until a later date).

Clearly, from a policy standpoint, the deferred obligations should be treated the same as cash and the staff's position appears to be consistent with such a policy. Accordingly, even if the right to receive additional capital contributions and the rights to receive additional advances on the Debentures should be valued at an amount such that the total assets of the acquiring person would exceed \$10,000,000 (if the value of such rights were to be included in the assets), these assets should not be included in the calculation of total assets for purposes of Section 7A(c)(1) of the Act but instead should be treated the same as cash as described in Section 801.11(e).

SUMMARY

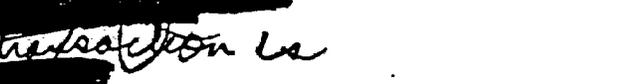
In sum, given the above described facts and analysis and our discussions with your office, the acquisition of the Real Property by the Acquiring Person will not be a transaction that is subject to the prior notification or the waiting period under the Act.

If we have misunderstood our discussions with your office or if your analysis and conclusion are other than we have described under the above-described facts, we will appreciate hearing from you. If we have not heard from you to the contrary before July 31, 1987, we will proceed on the basis that the analysis set forth in this letter as applied to the described transaction is in accord with the position of the Federal Trade Commission.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact the undersigned.

*Partially confused
but the transaction appears to be subject
to the 801.11(e) size of
person test and this transaction is
not a charitable.*

Sincerely,


7/12/87