

~~18(c)(10)~~ 7A(c)(3) and (c)(10); 801.90

July 8, 1999

Richard B. Smith
Deputy Assistant Director
Premerger Notification Office
Bureau of Competition
Room 301
Federal Trade Commission
Sixth and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

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FEDERAL TRADE
COMMISSION
PREMERGER NOTIFICATION
OFFICE
JUL - 8 P 11:19

Re: Analysis of Proposed Transaction Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as Amended

Dear Dick:

This letter is to confirm the telephone conversation that [redacted] you and I had on July 2, 1999, in which we discussed a proposed transaction and the need to file a Notification and Report Form under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act") in connection therewith. The background and structure of the transaction is discussed below. In connection with this discussion, reference should be made to the diagrams attached as Exhibit A to this letter.

On November 9, 1998, Party B formed the LLC for the purposes of acquiring all the voting securities of 1 Inc. from one seller ("Seller 1"), and all the voting securities of 2 Inc.

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and 3 Inc. from another seller ("Seller 2")^{1/}. Party B and Seller 1 filed under the HSR Act with respect to the acquisition of the voting securities of 1 Inc. by the LLC, and Party B and Seller 2 filed under the HSR Act with respect to the acquisition of the voting securities of 2 Inc. and 3 Inc. by the LLC. The waiting period under the HSR Act expired with respect to these filings in May, 1999. On June 15, 1999, Party A acquired a 50% interest in the LLC, and the LLC acquired all the voting securities of 1 Inc., 2 Inc., and 3 Inc. (the "Corporations") on June 16, 1999.^{2/} The structure of the relevant entities following this acquisition, which is the currently existing structure, is shown on Exhibit A as the "Pre-Option Exercise Structure."

Party C intends to exercise an option granted by Party A to acquire all of Party A's interest in the LLC (*i.e.*, a 50% interest in the profits, and in the assets upon liquidation and dissolution, of the LLC). The structure following the exercise of that option and consummation of that acquisition, is shown on Exhibit A as the "Post-Option Exercise Structure."

After Party A sells its interest in the LLC to Party C, Party C and Party B will cause the LLC to distribute all of the stock of 1 Inc. to Party C and all of the stock of 2 Inc. and 3 Inc. to Party B (the "Distribution"). The structure following the Distribution is shown on Exhibit A as the "Post-Distribution Structure."

As we discussed, notwithstanding that the JV -- which is a general partnership -- has total assets of over \$100 million, the acquisition of the 50% interest in the LLC by Party C should not require a filing under the HSR Act because it does not result in Party C holding 100% of the interests of the LLC.^{3/}

As we further discussed, the Distribution also should not require a filing under the HSR Act. As you noted, following Party C's acquisition of Party A's interest in the LLC, Parties

^{1/} The voting securities of 2 Inc. and 3 Inc. were actually held by two different entities. Because each of these two entities had the same ultimate parent, however, I have referred to a single Seller 2 for convenience.

^{2/} Party A was not required to file under the HSR Act because it did not have total assets or net sales of \$10 million or more.

^{3/} See Formal Interpretation No. 15, 64 Fed. Reg. 5808 (1999).

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C and B each will be deemed to hold 100% of the voting securities of each of the Corporations.^{4/} Following the Distribution, Party C will continue to hold 100% of the voting securities of 1 Inc. but will hold no voting securities of 2 Inc. or 3 Inc., while Party B will hold all of the voting securities of 2 Inc. and 3 Inc. but will hold no voting securities of 1 Inc. Consequently, I understand that it is the position of the Premerger Notification Office that the Distribution would be exempt from filing based upon Section 7A(c)(10) of the HSR Act because neither Party B nor Party C's per centum share of the outstanding voting securities of any issuer will have increased as a result of the Distribution.^{5/}

During our conversation, you indicated that, although these transactions as currently structured would not require filing under the HSR Act, an issue may arise as to whether they will constitute a transaction or device for avoidance under Rule 801.90.^{6/} As we discussed, provided that the structure of a transaction was not driven by a desire to avoid filing under the HSR Act, and there is a significant good faith business purpose for the structure of the transaction, the transaction should not be considered a device for avoidance.^{7/}

Although I understand that a determination as to whether a particular transaction is deemed a transaction for avoidance depends upon all of the facts and circumstances surrounding that transaction, I note that in the instant case the structure of the transaction was determined primarily by regulatory and tax concerns, and the requirements of the HSR Act had no bearing on that structure. A brief summary of the circumstances surrounding the structuring of the transactions follows.

^{4/} See, e.g., FTC Informal Interpretation No. 253, ABA Premerger Notification Practice Manual (1991).

^{5/} 15 U.S.C. 18a(c)(10). Arguably, the Distribution also would be exempt under Section 7A(c)(3) of the HSR Act on the basis that it constitutes the acquisition of voting securities of an issuer at least 50% of the voting securities of which were owned by the acquiring party prior to the Distribution. 15 U.S.C. 18a(c)(3). See also FTC Informal Interpretation No. 256, ABA Premerger Notification Practice Manual (1991).

^{6/} 16 C.F.R. 801.90.

^{7/} See S. Axinn, B. Fogg, et. al., Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act, 1.03[1][c].

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For a large portion of last year, Party B was negotiating with Sellers 1 and 2 to acquire the stock of the Corporations in order to acquire an indirect interest in the JV, which owns an independent power producing plant (an "IPP"). Under federal law, Party B, an affiliate of an electric utility, cannot hold a greater than 50% interest in an IPP.

The acquisition of a 50% interest in the JV will provide Party B with certain tax benefits, but in order to prevent deterioration of these tax benefits Party B needed to consummate the acquisition of its indirect interest in the JV as early in 1999 as possible. Consequently, Party B desired to proceed with negotiation of the acquisition of the securities of the Corporations without waiting until it had first located a partner which would ultimately hold the other indirect 50% interest in the JV.^{8/} To accomplish this, Party B formed a single-member LLC to act as the vehicle which would acquire the securities of the Corporations. Negotiation of the acquisition agreement between the LLC and Sellers 1 and 2 proceeded with the understanding that the agreement would be signed, and that steps toward closing (including the filings under the HSR Act described above) would be taken, but that the acquisition of the securities of the Corporations would not be consummated until Party B had located a suitable partner and Party B's interest in the LLC had been reduced to 50%.

Because of the need to consummate the acquisition of the securities of the Corporations as soon as possible in order to preserve the tax benefits to Party B, Party A agreed to be a 50% member of the LLC for a limited period of time until a more permanent member was located. Subsequently, Party B did locate another partner (*i.e.*, Party C) which will acquire the interest of Party A in the LLC as described above. Following that acquisition, in order to most effectively utilize the tax benefits associated with the JV's ownership of the IPP, the securities of the Corporations will be distributed to the respective members of the LLC as described above.

Please confirm that my understanding regarding the treatment of the above-described transactions under the HSR Act is accurate, or let me know if you disagree in any

^{8/} Party B's search for a partner to hold a 50% interest prior to Party B having negotiated the terms of the acquisition of the securities of the Corporations was also hindered by the fact that a number of likely candidates were unwilling to discuss the terms of such a partnership until Party B had first reached agreement with Sellers 1 and 2 with respect to such acquisition.

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respect with my understanding. Thank you for taking the time to speak with [REDACTED] and me about this matter last Friday, and to respond to this letter.

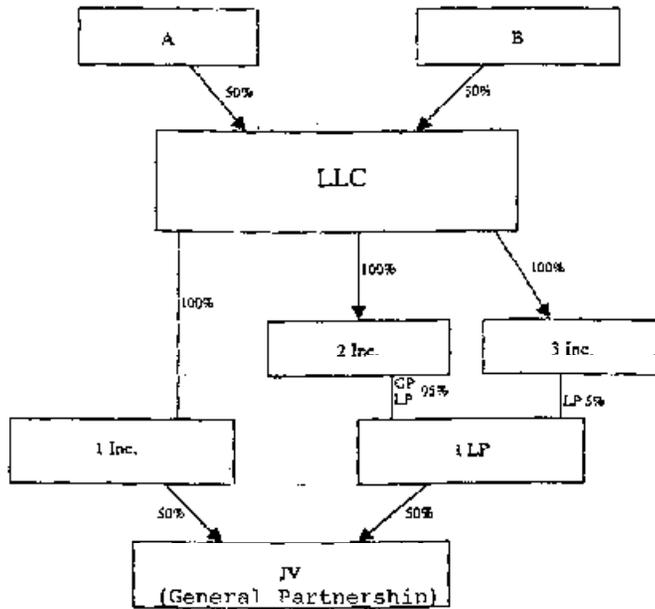
Very truly yours,

[REDACTED]
cc: [REDACTED]
[REDACTED]
[REDACTED]

7/9/99 Left phone mail message for writer that no reportable events were taken place here under the provisions of 7A(c)(3) and (c)(10). Also, the explanations seemed to resolve any potential 801.90 questions.
(MV and NO agreed with these conclusions.)
RBSmith

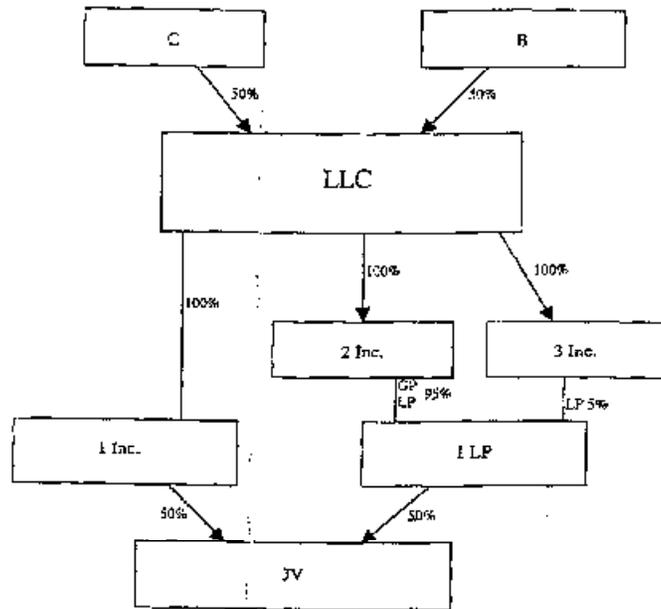
EXHIBIT A

Pre-Option Exercise Structure

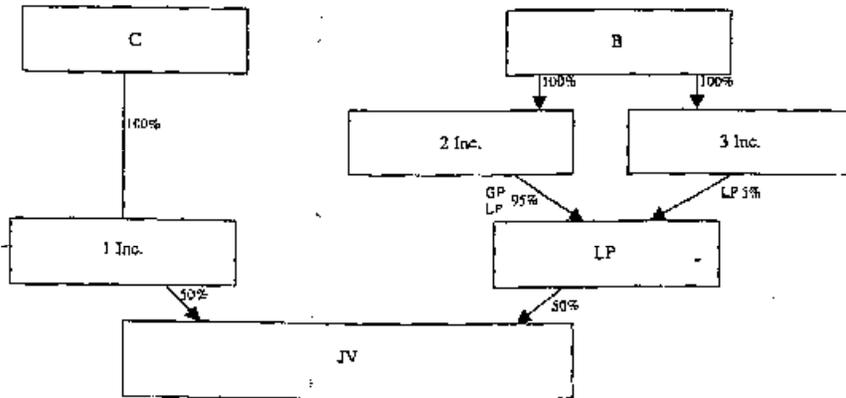


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Post-Option Exercise Structure



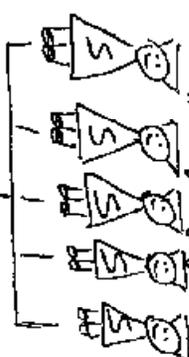
Post-Distribution Structure



TO: MICHAEL VERNE
[REDACTED]

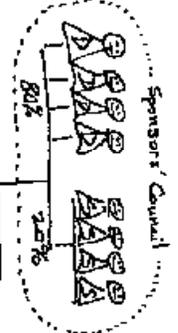
Congregation of the [REDACTED]

Elected Officers of Congregation + 2



[REDACTED]
(Mo. Non-profit)

Hospitals, etc



Recently forwarded
Mo. Nonprofit
[REDACTED]

[REDACTED]
(Mo. Non-profit)

Hospitals, etc

[REDACTED]