

Gillis, Diana L.

Subject: FW: Question Regarding Applicability of Exemption under Rule 802.5

From: Walsh, Kathryn E.

Sent: Monday, July 27, 2015 3:25 PM

To: [REDACTED]

Cc: [REDACTED]; Gillis, Diana L.

Subject: RE: Question Regarding Applicability of Exemption under Rule 802.5

Doing the leasing directly to wireless services providers is enough to be in the business for our purposes. Indeed, that means the seller is also in the business. Both of these reasons mean the exemption does not apply to your transaction.

From: [REDACTED]

Sent: Monday, July 27, 2015 2:16 PM

To: Walsh, Kathryn E.

Cc: [REDACTED]

Subject: Question Regarding Applicability of Exemption under Rule 802.5

Dear Kate

This email is to confirm the conclusion of myself and [REDACTED] that a transaction to which our clients may be parties would not be reportable. The transaction is an acquisition of non-corporate interests, and you should assume that it exceeds the size-of-transaction and size-of-parties thresholds. The only issue on which we seek your input is the applicability of Rule 802.5, in light of the PNO's recent policy statement thereon.

SUMMARY OF TRANSACTION

As a result of the transaction, the Buyer would acquire assets primarily consisting of cell tower structures that support telecommunications antennae or other equipment. The Buyer intends to lease the space on those structures to third party wireless service providers.

The Seller currently leases the space on those structures to third party wireless service providers in addition to using some of the space for its own telecommunications transmission equipment while, in certain circumstances, the towers being sold are currently unused by Seller or anyone else. After the transaction, the Seller will pay rent to the Buyer to the extent that Seller's equipment remains on the structures.

BUYER IS NOT A TELECOM COMPANY AND WILL ACT SOLELY AS A LANDLORD POST-TRANSACTION

Buyer is in the business of owning cell tower structures and renting space thereon to third parties. Buyer intends to use the cell towers subject of this transaction in the same way – it will act solely as a landlord by renting space on the subject towers to unrelated third-party entities. For the avoidance of doubt, Buyer is not a telecommunications company and does not have its own telecom-related operations, does not transmit its own signals, does not provide backhaul services, etc.

In sum, Buyer will do the following with the tower structures once acquired:

- Own the steel structure
- Maintain the surrounding land to which the structures are affixed, including lawn mowing
- Provide and maintain access to the structure for tenants, including arranging for snow removal and the like
- In certain limited cases, arrange for security of the structure, or installation of appropriate fencing

It is important to note what the Buyer will not do, which is the following:

- It will not affix any of its own telecom equipment to the structures (it is not in the telecom business)
- It will not conduct any operations of its own *via* use of the structures whatsoever

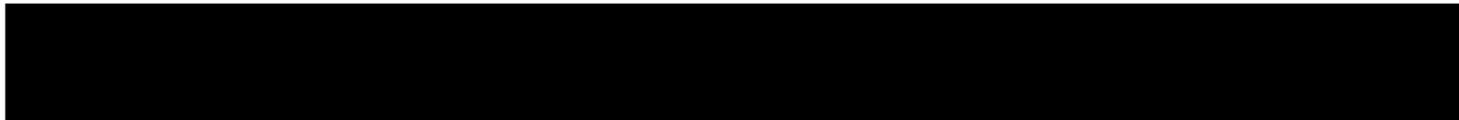
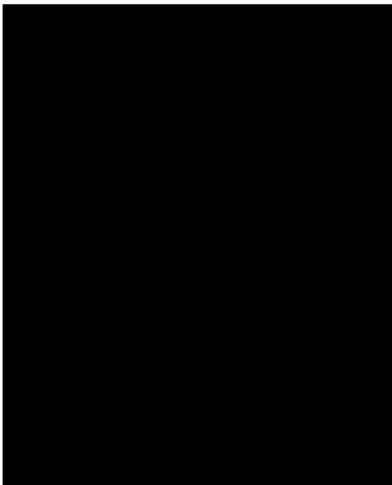
- It will not provide colocation services – *i.e.*, it does not intend to offer to install tenant equipment or provide maintenance of tenant equipment for an additional fee
 - Instead, tenants are solely responsible for climbing structures, affixing equipment, and “plugging in” as necessary
- It will not provide backhaul services
- It will not provide data storage

APPLICATION OF RULE 802.5

The PNO recently announced a policy statement on the application of Rule 802.5. That statement states that if the “buyer is simply going to maintain the property, such as keeping a facility in good repair, and collect rent, it’s acting as a landlord” and Rule 802.5 is available to exempt the transaction. *HSR Rule 802.5: the Investment Rental Property Exemption* (FTC Jul. 20, 2015). Accordingly, the Buyer does not intend to participate, “even in a small way,” in the business conducted on the subject structures – *i.e.*, it will not provide telecommunications and/or colocation services for its wireless provider tenants, among other things. *See id.*

In light of these two key facts, we have concluded that the transaction qualifies for the Rule 802.5 exemption even under the PNO’s recent policy statement. Based on the above, we have concluded that Buyer will act as a landlord after this transaction is completed. We do not consider the fact that Seller currently uses some of the space on the structures being sold for its own equipment as changing this conclusion.

Please let me know by return email if you agree with our analysis. We are happy to discuss the transaction with you by phone if you need more information. Thank you in advance.



For more information visit 

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