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FEDERAL TRADE COMMISSION PREMERGER NOTIFICATION OFFICE
DEC 19 3 24 PM '95

Re: Sale-Leaseback Transaction

Dear Dick:

This will summarize our telephone conversations about a transaction essentially constituting a collapsing of a sale-leaseback arrangement.

Background

the site of the Facility from Company A and Company A then leased the Facility and subleased the real property site from the owner trustee.

The lease agreement for the Facility is typical for a sale and leaseback transaction of this type. The lease has a long term -- [illegible] years -- and the lessee has various options to renew the lease at the expiration of its term at either a fixed or fair [illegible] market value at the end of the lease term, which value was estimated at the outset of the lease to be, and continues to be, significantly less than the original fair market value.

As is also typical in these transactions, the lessee assumes all obligations and risks relating to the Facility during the lease term. The lessee agrees to pay all rent and other obligations "come hell or high water". For example, the lessee assumes and [illegible] of damage or destruction of the Facility, to continue the lease payments, to repair or rebuild the Facility at Company A's own cost or, in the event of a total loss, to pay a stipulated amount designed to repay the debt and return part of the equity investor's investment. Even if the [illegible] resource disappears, Company A still is obligated to continue the lease payments through the term of the lease.[1]

The unconditional obligation to pay rent is designed to protect Company B's return on its equity investment and assures the lenders that they will receive all payments of principal and interest. For further security, the rent payments are guarantied by an affiliate of Company A.

At the outset of the lease, title to the Facility and other assets changed, but Company A continued to have the obligation to operate and maintain the Facility at its cost. Company A has sole control of the Facility absent the occurrence of a default under the lease. During the term of the lease, Company A operates the Facility, sells the electricity to a public utility and receives all the revenues from such sales. Company A also pays all sales, use and other taxes relating to this Facility and its operations and is required to maintain property, casualty and liability insurance for the Facility and all participants.

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[1] In this case, the lease provides that "[t]his Lease is a net lease and ... all Rent shall be paid when due without notice, demand, counterclaim, setoff ... deduction or defense and without abatement, suspension, deferment, diminution or reduction".

Current Issue

Negotiations are now in progress for one of Company A's affiliated companies (under common control) to acquire Company B's beneficial interest in the trust estate. Thereafter, Company A expects to terminate the lease entirely and again hold title to the Facility in its own name. For tax and other good business reasons, the acquisition of Company B's interests in the trust estate must close before the end of 1995.

Analysis

As you and I have discussed, the transactions described above would not require a Hart-Scott-Rodino filing because, for Hart-Scott purposes, Company A has at all times retained beneficial ownership of the Facility, *i.e.*, although record title to the Facility was transferred to the owner trustee, the beneficial ownership of the Facility relevant for Hart-Scott analysis was not transferred to Company B in the first place. There are a number of facts supporting this conclusion:

First, the risk of loss or damage to the Facility has been entirely upon Company A because Company A [illegible] regardless of any damage to the Facility or early depletion of the geothermal resources; indeed, Company A may be obligated to rebuild the Facility at its own cost if it is destroyed, as would an owner.

Second, during the course of the lease, the Facility continues to be operated and maintained by Company A at its cost, just as it had been before the [illegible] Facility.

Third, the lease payments are at pre-set levels designed to repay debt and provide a reasonable rate of return to Company B and are not related to fluctuations [illegible] marketplace.

You have agreed that in these circumstances Company A already has beneficial ownership of the Facility, and thus the transaction presently contemplated is not a transfer of beneficial ownership of assets requiring a Hart-Scott-Rodino filing. Please advise me

promptly if you do not agree with this conclusion; Company A, as noted, needs to close this transaction prior to the end of 1995.

Thank you.

12/20/95 - Advised writer that lessee's taking of title (or security interest) in facility would not constitute the [illegible] and thus, no HSR report [illegible] I [illegible] that it [illegible] to lessor [illegible] that set forth in 11/21/90 letter [illegible] not identical to that set forth [illegible] is reasonably comparable and supports the same non-reportable conclusion.

RBSmith