[redacted]

ATTORNEYS

[redacted]

June 14, 1999

Richard B. Smith, Esq.
Premerger Notification Office
Federal Trade Commission
Bureau of Competition, Room 303
Washington, DC 20580

Dear Mr. Smith:

[illegible] the parties to the following transactions:

**Transaction One**

Company Y markets and sells telecommunications products and services. Company X operates a marketing facility in a particular medium that would allow X and Y to develop new Y products that could not be developed without access to a facility using the medium of the kind owned by X. The facility would also allow Y to market Y's existing products in a new fashion through the facility. X and Y have executed a co- [illegible] agreed to purchase voting stock of Y, for an amount of money that satisfies the size-of-the-transaction test. X will control less than ten percent of Y, however, and will have no [illegible]

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The co-marketing arrangement will account for only a part of Y's sales of its products and services; it will garner the majority of its sales from activities conducted wholly apart from X. Although it intends to vote its Y stock, X intends to limit its involvement with and influence over Y to the exercise of its contractual rights under the co-marketing agreement. Any actions proposed by X will be proposed within the four corners of the co-marketing agreement and will be proposed solely to further the success [illegible]

[illegible] in the X facility, X will not have, nor does it intend to seek, control or influence over

[redacted]

prices charged by Y for Y products or services. X also intends to enter into other co-

[redacted]

[redacted]

the correct outcome. The circumstances do not suggest that X has any intention of influencing the "basic business decisions" of Y. The two companies are not competitors.

[redacted]

defines each party's rights sharply, and does not include the right to set or influence

[redacted]

If you agree that X and Y need not file under these circumstances, would your opinion change if, assuming all else remains the same:

- X and Y were competitors; or
- [redacted]

**Transaction Two**

The second hypothetical is divided into three parts, each building on the other:

a. Company X will obtain nonvoting preferred stock in Company Y in an amount which, if converted immediately after the acquisition, would give X approximately ten

[redacted]

to the shareholders that X's nominee be elected to Y's Board at the next shareholders' meeting. The nonvoting preferred Y shareholders cannot vote for the election of Y directors, so X will have no power to elect its nominee. Nevertheless, both parties to the agreement fully expect that X's nominee will be elected to the Board. If X's nominee is

[redacted]

Would X's nonvoting preferred stock be deemed presently voting securities by

[redacted]

[redacted]

[redacted]

reject the nomination.

b. Assuming that X's nonvoting preferred shares of Y would not be deemed [redacted]

gives X the right to nominate one director, also provided that Y must use any opportunity [redacted]

current Board, rather than elected by the shareholders. In a recent telephone conversation [redacted]

nonvoting preferred into present voting securities. Again, this seems to be the correct result; otherwise, preferred shareholders may have their shares suddenly deemed voting securities by the occurrence of an event over which they have no control.

[redacted]

voting power to appoint one director if the nonvoting shares were converted immediately into voting securities, and the contract will give X the right to appoint one director. On [redacted]

**Transaction Three**

[redacted]

noted, X and Y satisfy the size-of-the-person test. As was the case in parts a. and b. of Transaction Two, X will have the right to nominate a director of Y and the Board of Directors of Y will be contractually obligated to recommend X's nominee for election at [redacted]

[redacted]

shares of Y will be exchanged automatically for voting securities of Z. The exchange [redacted]

[redacted]

preferred stock for common stock of Z be a "conversion" under 16 CFR § 801.1(f)(3)? In your prior telephone conversations with [redacted] and with me, you have stated that an exchange of nonvoting preferred for voting common would not meet the definition of a "conversion" if possible intervening events could thwart the planned exchange. This is consistent with prior written informal opinions of the PNO.

For instance, in this example, at the time that the nonvoting preferred stock is acquired by X, the shareholders of Y and Z will not yet have formally approved the merger. For that matter, the antitrust authorities reviewing the merger may decide not to approve it, or to approve it with conditions that would be unacceptable to one or both parties to the merger. Any number of events, both likely and unlikely, may occur to prevent the merger, and thus the exchange of nonvoting for voting securities. Therefore,

Nevertheless, we ask that the PNO confirm the prior oral interpretations that we have received. If you agree with our analysis, would your conclusion change if the nonvoting preferred shareholder were heavily involved in the merger negotiations between Y and Z, even to the point that X could, as a practical matter, determine whether

Thank you for your consideration of these questions. We await your response. Please do not hesitate to call me at [redacted] or [redacted] [redacted] with any questions.

Sincerely yours,

[redacted]

By [redacted]

6/16/99 - Discussed with co-counsel and letter writer. As to Issue One, if X and Y are competitors, presumption would [illegible] against any 802.9 X's entering into [illegible] agreement [illegible] [illegible] X and Y [illegible]. On these facts, 802.9 is unavailable. Issue Two [illegible] [illegible] [illegible] stock held by X. [illegible]

held by X based on [illegible] exchange (even though automatic) of Y nonvoting stock [illegible] Issue Three, exchange [illegible] the [illegible] in the merger is [illegible] under 801.1(f)(3)? Not a conversion [illegible] it still a bona-fide [illegible] possible transaction [redacted] [illegible] ABA Section #111.

R.B.Smith [redacted]