

would be appointed by the Joint Venture as manager of the Building receiving from the Joint Venture both a management fee and leasing commissions pursuant to a Management Agreement between Crow and the Joint Venture; (h) the Pension Plan would be required to approve leases in excess of 10,000 square feet or for terms in excess of five years and any capital expenditure in excess of \$50,000 would have to be submitted to the Pension Plan for approval; and either (i) partner in the Joint Venture could cause a sale of the project subject to a right of first offer to the other partner.

Aside from the formation of the Joint Venture, PTE 85-79 provided specific exemptive relief that permitted the Pension Plan to make the \$2 million loan to Crow under the terms specified above. PTE 85-79 also allowed Crow to receive lease commissions paid by the Joint Venture pursuant to the terms of the Management Agreement.

7. Also commencing in October 1982, the Pension Plan began occupying office space in the Building for its administrative offices and also leasing space therein to the Maritime Association—I.L.A. Welfare Fund (the Welfare Plan) and the Maritime Association I.L.A. Vacation Plan (the Vacation Plan). The Welfare Plan and the Vacation Plan are not parties in interest with respect to the Pension Plan but they do have common trustees. The applicant represents that the leasing arrangement between the Pension Plan, the Welfare Plan and the Vacation Plan satisfies the terms and conditions of PTE 77-10 (42 FR 33918, July 1, 1977).¹

8. In October 1992, two events occurred involving the Pension Plan. First, Ameritrust Texas, N.A. (Ameritrust), a national banking association with locations in Houston and other Texas cities, began providing custodial, investment management and securities lending services to the Pension Plan as well as to the Welfare Plan and the Vacation Plan. At that time, Ameritrust had no relationship to First City or to Texas Commerce. Second, First City was taken over by the Federal Deposit Insurance Corporation (the FDIC) due to First City's insolvency.

9. In December 1992, the Pension Plan acquired the 40 percent interest in the Building that was held by Crow as a result of Crow's default, in October 1991, on the \$2 million loan and failure to cure the event of default. The Pension

Plan then foreclosed on Crow's interest in the Joint Venture. The Joint Venture was dissolved and the Pension Plan assumed exclusive ownership of the Building. The Pension Plan incurred no loss in connection with the assumption of the Building.

10. In February 1993, Texas Commerce acquired all of the assets of First City from the FDIC. The office space became a bank lobby for Texas Commerce and Texas Commerce executed a new lease with the Pension Plan effective April 18, 1993. The applicant represents that no administrative exemptive relief was requested because Texas Commerce was not a party in interest at the time of the execution of the lease.

11. The terms of the Texas Commerce lease provide for a primary term of five years with an option to renew and extend for up to three successive five year terms of five years each. The rentable area is 15,713 square feet of space. The rental amount includes base rent of \$14.67 per square foot or \$230,509.58 per year (\$19,209.14 per month) and an operating expense of \$6.67 per square foot or \$104,805.71 per year. Thus, the total rent is \$21.34 per square foot or \$335,315.39 per year. The lease also includes an alteration allowance of \$50,000.² In the event of a default, Texas Commerce is required to reimburse the Pension Plan on demand for all costs reasonably incurred by the Pension Plan on demand for all costs reasonably incurred by the Pension Plan in connection therewith, including attorney's fees, court costs and related costs plus interest thereon at an annual rate equal to the prime rate charged by Texas Commerce to its most creditworthy borrowers for short-term commercial loans. The same default provisions also apply in the event of a default by the Pension Plan.

12. The trustees of the Pension Plan utilized the services of Mr. Brint Davis of Trammel Crow Houston, Inc., an

independent building property manager and Mr. O'Connell, the independent fiduciary for the Pension Plan in PTE 85-79, to represent the interests of the Pension Plan in negotiating the lease with Texas Commerce. The applicant represents that neither Mr. O'Connell nor Mr. Davis are employees, officers, or directors of Texas Commerce nor is there any other relationship or connection between these individuals and Texas Commerce. Mr. Davis's employer is the exclusive leasing agent and property manager for the Building. Mr. O'Connell reviews all leases in the Building on behalf of the Pension Plan to ascertain that the leases are comparable in terms to the conditions prevailing in the market. Mr. O'Connell states that he has advised the Pension Plan on real estate matters for more than 15 years.

13. In negotiating the terms of the lease for which Texas Commerce pays a base rent of \$14.67 per square foot on an "as is basis," Mr. O'Connell represents that the subject Building is located in an isolated area with very few comparables and no comparable bank leases. He explains that office space in this unique area enjoys almost 100 percent occupancy so that rents, if and when available, are about \$16 per square foot. He further explains that the closest areas that might be considered comparable to the Building are the Clearlake area and the Hobby Airport area where rents are approximately \$12 per square foot.

14. On September 15, 1993, Texas Commerce acquired 100 percent of the stock of Ameritrust. This event caused the existing lease to become a prohibited transaction in violation of the Act but not under the Code. Also effective as of September 15, 1993, Ameritrust was renamed Texas Commerce Trust Company, National Association (Texas Commerce Trust). Texas Commerce Trust continued to provide to the Plans the same services initially provided by Ameritrust.

On December 17, 1993, Texas Commerce Trust was dissolved and merged into the Trust Department of Texas Commerce. As a result of the merger, the lease became a prohibited transaction under the Code as well as under the Act.³

³ According to the applicant, Texas Commerce was a party in interest with respect to the Pension Plan under section 3(14)(H) of the Act because it was a 10 percent or more shareholder of Texas Commerce Trust, which was a service provider to the Pension Plan. Because section 4975 of the Code does not include 10 percent shareholders of service providers in the list of disqualified persons, the applicant represents that the lease transaction was not subject to the excise tax provisions under

¹ The Department expresses no opinion herein on whether the leasing arrangement between the Pension Plan, the Welfare Plan and the Vacation Plan complies with PTE 77-10.

² Article 9.01 of the Texas Commerce lease allows the lessee to move, relocate or demolish interior walls inside the leased space and to paint or finish the walls as the lessee may choose. The lessee is also permitted to add cabinets and fixtures as needed for its business and to select floor coverings for the area.

Notwithstanding the alteration allowance provision set forth in the lease, it is represented that the Trustees of the Pension Plan did not allow the office space currently occupied by Texas Commerce to be altered in such a manner that such space could be leased only to certain types of lessees. The applicant states that the original buildout of the subject space was pursuant to a 1979 lease between Crow and First City. The applicant further represents that the 1979 lease was negotiated at arm's length by unrelated parties and had a primary term of 20 years. The applicant notes that the Pension Plan did not acquire an equity interest in the Building until 1982.