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802.2

September 17, 2001

*By Facsimile (202) 326-2624*

Mr. Michael Verne  
Premerger Notification Office  
Bureau of Competition  
Room 303  
Federal Trade Commission  
6th Street & Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

2001 SEP 17 PM 4:05

Dear Mr. Verne:

This correspondence is a follow-up to our discussions last year, and your discussions with [redacted] on August 9 and 10, 2001, concerning certain aspects of the HSR exemptions relating to (i) the acquisition of unproductive real property, set forth at 16 CFR § 802.2(c), and (ii) the acquisition of new goods in the ordinary course of business, set forth at 16 CFR. § 802.1(b).

The unproductive real property exemption of Section 802.2(c) of the HSR Regulations provides that an acquisition of unproductive real property is exempt from the notification requirements of the HSR Act. The term "unproductive real property" is defined to mean any real property, including raw land, structures or other improvements (but excluding equipment), associated production and exploration assets as defined in Section 802.3(c), natural resources and assets incidental to the ownership of the real property, that has not generated total revenues in excess of \$5 million during the 36 months preceding the acquisition. The term "unproductive real property" does not include manufacturing or non-manufacturing facilities that have not yet begun operation, or manufacturing or non-manufacturing facilities that were in operation at any time during the 12 months preceding the acquisition, nor does it include real property that is either adjacent to or used in connection with real property that is not unproductive real property and is included in the acquisition (the "Qualifications").

Section 802.1 of the HSR Regulations provides that, pursuant to Section 7A(c)(1) of the HSR Act, acquisitions of goods and realty transferred in the ordinary course of business are exempt from the notification requirements of the HSR Act. Section 802.1(b) further provides that an acquisition of new goods is in the ordinary course of business except when the goods are

[redacted]

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acquired as part of the acquisition of an operating unit. The term "Operating Unit" is defined in Section 802.1(a) to mean assets that are operated by the acquired person as a business undertaking in a particular location or for particular products or services, even though those assets may not be organized as a separate legal entity.

The factual circumstances described are as follows. Company A is selling 100 percent of the interests in a partnership that owns an electric generation facility under construction and that has not yet generated any revenues (the "Facility"). The acquiring person, Company B, is acquiring 100 percent of the partnership interests. The transaction is valued at approximately \$450 million.

The electric generation facility assets held by the partnership consist (i) of land; (ii) structures on the land, including the plant services building, water treatment building, water storage tanks, stacks and miscellaneous out buildings (motor control centers, electrical equipment enclosure, continuous emissions monitoring systems, etc.); (iii) equipment, such as turbines (3 gas turbine generators, 1 steam turbine generator and 3 heat recovery steam generators) that are worth in excess of \$50 million; (iv) certain permits; and (v) certain contracts relating to interconnects with gas pipelines and the electrical transmission system, handling of waste water, and engineering and construction services. Construction progress through the end of August 2001 was only 55.4 percent complete and the overall project was only 72 percent complete through that date. The target commercial operation date is May 2, 2002. Gas, water and electrical interconnections remain to be completed as well as the commissioning and start-up activities. Some \$70 million of additional expenditures are expected to complete construction and to begin commercial operations of the Facility. No productive real property adjacent to the Facility is being sold in connection with the transaction.

Based on the discussions referenced above, we understand the following:

1. Company B's acquisition of the land and the structure will fall under the unproductive real property exemption of Section 802.2(c) of the HSR Regulations, as will the permits and contracts which will be viewed as incidental to the ownership of the unproductive real property. The Facility will not be viewed as "manufacturing facilities or non manufacturing facilities that have not yet begun operation" within the meaning of the Qualifications for the reason that such language was intended to refer to "turn-key facilities, i.e., new facilities capable of commencing operations immediately with minimum additional capital investment."
2. With respect to the turbines, Company B, which is engaged in the business of generating electricity, may rely on the exemption concerning "new goods" set forth in Section 802.1(b) of the HSR Regulations. The Facility, which has not yet generated any revenues, will not be considered "an operating unit" within the meaning of certain of the restrictions set forth in the ordinary course of business exemption.

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If you should disagree with the conclusions outlined above, we would appreciate your contacting us as soon as possible. In that regard, we are working with [REDACTED] in connection with this matter. My telephone number is [REDACTED] and the telephone number of [REDACTED] is [REDACTED]. Your assistance in connection with this matter is very much appreciated.

Sincerely,

[REDACTED]

[REDACTED]

AGREE WITH THE CONCLUSIONS OF THE WRITER.

B. Michael Verne  
9/18/01

[REDACTED]