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**CONFIDENTIAL**

December 9, 2003

**VIA FACSIMILE and REGULAR MAIL**

Mr. B. Michael Verne  
Federal Trade Commission  
Premerger Notification Office  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Re: **Ordinary Course Of Business Exemption**

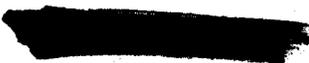
Dear Mike:

This letter follows up on our discussion on Friday, December 5, 2003 relating to a proposed acquisition of a group of energy contracts. During our call, we concluded that the acquisition described below would be exempt under the ordinary course of business exemption. Based on our discussion last week and the analysis set forth below, the parties intend to complete the transaction without making an H-S-R filing. Please advise me as soon as possible if you have any questions regarding the analysis set forth below, or if you believe a filing is required under the facts described in this letter.

**Facts**

Acquiror expects to purchase a portfolio of power contracts from Seller. Acquiror is a marketer and dealer of wholesale power, the commodity involved in this transaction. It engages in a variety of wholesale power transactions, including full supply requirements contracts and long term purchases and sales, among others. Acquiror has a staff of employees dedicated to the marketing, trading and the operational aspects of wholesale power transactions. Most frequently, Acquiror enters into new power contracts, but sometimes it acquires existing contracts, such as contemplated in this transaction.

Seller is an integrated power firm that produces power and has contracts to sell power to utilities or other power purchasers. Seller has a subsidiary ("Trading Sub") whose business has been focused on merchant trading of energy contracts (similar to



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Acquiror's business). Acquiror and Seller anticipate that Trading Sub will sell to Acquiror a portfolio of power contracts that have been selected from the Trading Sub's two "books" of contracts (East Book and West Book). Acquiror will not hire Trading Sub's employees or acquire assets other than the designated contracts (which will need to be novated or assigned to the Acquiror) and related books and records. The contracts Trading Sub will sell to Acquiror constitute the vast bulk of Trading Sub's power contracts. The power contracts currently held by Trading Sub that are not being sold to Acquiror will either be sold to one or more third parties, or will be transferred to Seller or another of its subsidiaries to hold until their terms expire.<sup>1</sup> Seller will continue to operate as an integrated utility, and in that role expects to continue to enter into contracts for the purchase and sale of power. However, Seller does not intend to operate as a "merchant trader" of power contracts, which has been the business of Trading Sub, and Trading Sub will cease operations after the contracts are sold to Acquiror and any remaining contracts it holds are sold to one or more third parties or transferred to another subsidiary of Seller.

HSR Analysis

As we discussed last week, under the facts described above you concurred that Acquiror's acquisition of contracts constituting the majority of [redacted] power contracts would be exempt as a transaction in the ordinary course of business. See 15 U.S.C. §18a(c)(1) (exempting from filing "acquisitions of goods or realty transferred in the ordinary course of business.") We concluded on our call that the exemption would apply to Acquiror's acquisition of contracts from Trading Sub because the Acquiror's business involves trading wholesale power. In addition, Acquiror will not be acquiring all of Trading Sub's contracts, nor will it be acquiring employees or other business operations.

As always, we very much appreciate your assistance in this matter.

Sincerely yours,

[Redacted signature]

[Redacted signature]

[redacted] also has handled gas contracts as well as power contracts. Trading Sub's gas contracts are not included in the transaction discussed in this letter. However, Trading Sub likely will sell some or all of its gas contracts in the near future, and Acquiror is a potential buyer of Trading Sub's gas contracts. While we did not discuss this aspect with you on Friday, we do not believe that this fact should impact the conclusion we reached. Our discussion focused on the Trading Sub's power activities, and the conclusion that the ordinary course of business exemption applied was not based on the Trading Sub's gas contract activity. If Acquiror later reaches an agreement to purchase the gas book(s) from the Trading Sub, the parties would evaluate any potential filing obligations relating to that transaction.

[Redacted signature]

AGREE -  
*B. Michael Verne*  
12/10/03