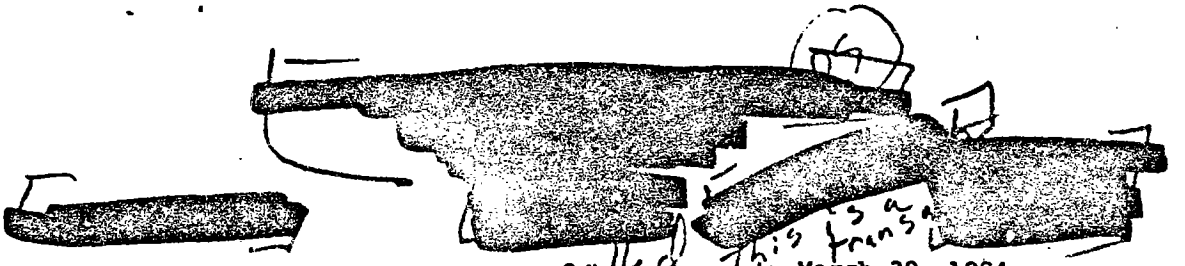

called this is a transaction 4-2-84 reportable

March 30, 1984

BY HAND

Patrick Sharpe, Esq.
Premerger Notification Office
Federal Trade Commission
Room 301
7th & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Mr. Sharpe:

Pursuant to our telephone conversation of March 29, 1984, I am writing to request an informal interpretation that the hypothetical transaction described below need not be reported under the Commission's Premerger Notification Rules.

Company A is a metal producer with ownership interests in electric power generating facilities that supply power to some of its metal operations. In addition, Company A owns land and mineral rights in the United States from which it obtains lignite, a form of coal used as an energy source to operate electric power generating stations.

Company B is an electric utility and mining company which owns and operates electric power generating facilities and holds interests in certain land and mineral rights in the [redacted]

Company A owns 30 percent of a non-operational electric power generating plant ("generating plant") which is presently under construction but is not scheduled to begin commercial operation until the late 1980's. Company A also owns 39 percent of the lignite mining facilities and equipment ("mining facilities") associated with supplying lignite as an energy source to the generating plant. These mining facilities include the mining sites, reclamation shop, auxiliary equipment and all land, buildings, facilities and improvements that will be constructed on the mining sites. The remaining 70 percent of the generating plant and 61 percent of the mining facilities are already owned by Company B. Companies A and B are parties to an agreement pursuant to which they are jointly to construct, own and operate the generating plant and mining facilities. Under this agreement, Company B has a right of first refusal should Company A wish to sell its interests.

Company A also owns certain land and lignite reserves in close proximity to the generating plant. This land is not income producing property in the sense that no mining activity is presently being conducted. Some of these reserves were

previously acquired from a utility company which has subsequently been merged into Company B. Both Company A and Company B from time to time purchase and sell land and mineral rights such as these which supply the energy necessary to operate electric generating power plants.

Company A intends to sell its minority interest in the generating plant and mining facilities to Company B which, after the transaction, will own 100 percent of these assets. At the same time, Company B will also purchase from Company A land and lignite reserves located in the vicinity of the generating plant. The aggregate value of the assets being acquired by Company B from Company A is approximately $109 million, with the land and lignite reserves being valued at less than $10 million. The value of the land and lignite reserves represents less than two-tenths of one percent of Company A's assets.

We believe that the transaction as described above need not be reported under the Premerger Notification Rules of Hart-Scott-Rodino. The purchase by Company B of Company A's minority interests in the generating plant and mining facilities are assets in which Company B already owns a majority or controlling interest. Thus, the acquisition of these assets is exempt by analogy to Section 7A(c)(3) of the Act, 18 U.S.C. §18(A)(c)(iii) and Rule 802.30, governing intraperson transactions. Section 7A(c)(3) exempts "acquisitions of voting securities of an issuer at least 50 per centum of ... of which are owned by the acquiring person prior to such acquisition." Similarly, Rule 302.30 exempts "intraperson" transactions such as the repurchase by a corporation of a portion of its voting securities from other sellers. Although the purchase and sale here involves assets rather than voting securities, the same rationale applies in this case for holding a majority asset holder's purchase of another's minority interest in an asset exempt from the Hart-Scott-Rodino reporting requirements. This rationale was expressed in the Statement of Basis and Purpose accompanying these exemptions:

> This exemption [Section 7A(c)(3)] expresses a Congressional determination that such acquisitions are unlikely to raise questions under the antitrust laws that were not raised by acquisition of the 50-percent interest. The rule [802.30] extends the exemption to other situations to which the same rationale applies: transfers of assets between subsidiaries of the same parent, formations of new wholly owned subsidiaries, repurchases of stock by a corporation, and the like. 43 Fed. Reg. 33450, 33495 (1978).

Since Company B already controls the generating plant and mining facilities in question, its purchase of Company A's minority interests in these non-operating assets would present no substantive antitrust concerns.

Because the land and mineral rights disposed of in this transaction are valued at less than $15 million and are non-producing properties, we believe that under present Commission guidelines this component of the transaction likewise is not reportable. It is also exempt under Section 7A(c)(1) of the Act, as an "acquisition of goods or realty transferred in the ordinary course of business." 18 U.S.C. §18A(c)(1). As noted, Company B is to acquire only a very small part of Company A's assets, which assets clearly do not constitute "all or substantially all of the assets of that entity or an operating division thereof." See Rule 802.1(b). In addition, both Companies A and B have bought and sold mineral rights in the past as supportive adjuncts to their businesses. Indeed, some of the lignite reserves being purchased by Company B in this transaction were previously purchased by Company A from another utility which has since been merged into Company B.

NOT TRUE should agree with assets being

We would appreciate your giving this matter your prompt attention and will, of course, be pleased to provide any clarification of the above hypothetical transaction that you may require.

Sincerely,

BERGSON, BORKLAND, MARGOLIS & ADLER

I can understand your ratinale since B holds a majority of the assets. However, under H-S-R V/S and assets are clearly treated as Two different animals. Company B does not "control" the 30% assets owned by Company A or the 39% mining assets owned by B. An acquisition of the minority share by B is a reportable transaction if the size-of-person test is met. The size-of-Transaction is clearly $109 mm