

7A(c)(1)

December 13, 2005

VIA EMAIL and REGULAR MAIL

CONFIDENTIAL

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 voice mail exchanges and our brief telephone conference in late November relating to a proposed acquisition of a portfolio of power contracts. Based on the hypothetical fact pattern that I described to you, you concluded that the acquisition described below would be exempt under the ordinary course of business exemption. Based on our discussion noted above and the analysis set forth below, the parties intend to complete the transaction without making an HSR filing. I note in advance that the fact pattern below contains some more detail than we discussed in November, but I do not believe that additional information changes the HSR filing analysis. 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 forward and financially-settled power and gas derivatives contracts from Seller. Among other business activities, Acquiror (and a few related companies) is a marketer and dealer of wholesale power and power and gas derivatives contracts. It engages in a variety of wholesale power transactions, including long term purchases and sales, full supply requirements contracts and other similar transactions. 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. Acquiror also offers and sells power and gas derivatives contracts which counterparties enter into primarily for price risk management purposes.

Seller is an integrated power and gas company that has contracts to sell power and gas to utilities or other power and gas purchasers. Seller has a power trading business ("Power Business") that is a marketer and dealer of wholesale power and financially-settled power derivatives contracts. Seller's Power Business is focused on merchant trading of energy contracts, including a variety of wholesale power transactions, such as entering supply contracts and long term purchases and sales arrangements, and power derivatives contracts similar to Acquiror's business described above. Seller also has a natural gas trading business ("Gas Business") that is focused on merchant trading of physical and financially-settled gas contracts. The Gas Business is not significantly impacted by the proposed acquisition, and Seller expects to continue operating as a merchant trader of gas contracts following this transaction.

Acquiror and Seller anticipate that Seller will sell to Acquiror roughly 95% of its portfolio of power contracts. Seller will retain a small number of power contracts, which it would either perform until their termination, sell to another buyer or terminate with the consent of its counterparties. Acquiror will neither hire the Seller's Power Business employees nor acquire assets other than the designated contracts (which will need to be novated or assigned to the Acquiror) and related books and records. Seller expects to continue commodity trading and wholesale delivery of natural gas through its Gas Business. However, Seller does not intend to engage in the merchant trading of power contracts as a core business, and expects to substantially wind up the remaining operations of its Power Business.

HSR Analysis

As we discussed last month, under the facts described above you concurred that Acquiror's acquisition of contracts constituting approximately 95% of Seller's power forward contracts and a limited number of financially-settled power and gas derivatives 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"). Acquiror's business involves trading wholesale power and power and gas derivatives contracts, so from its perspective this is a fairly routine trading activity for Buyer, which commonly engages in acquisitions of such contracts. Acquiror will be acquiring only Seller's contracts, and it will not be acquiring employees or other business operations of the Power Business.

You concluded that this transaction would be exempt in the ordinary course of business because Seller will continue to remain in the energy-related commodity trading business following this transaction. Seller will continue its business of the wholesale delivery of natural gas, including buying, selling and trading physical and financially-settled natural gas contracts, through the Gas Business. This transaction involves a Seller that has commodity trading businesses with two different types of portfolios: 1) electricity trading; 2) natural gas trading. You believed that a sale of the substantial majority of one of those portfolios could be completed consistent with the ordinary course of business exemption similar to the situation exempted in Interpretation 8 in the ABA Premerger Notification Practice Manual. In Interpretation 8, a bank

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that has two different loan portfolios (consumer loans and commercial loans) can sell all of its assets related to the consumer loan business to another bank and qualify for the ordinary course of business exemption so long as the selling bank retains its commercial loan operations and portfolio. The acquisition would not be exempt if the selling bank were entirely exiting the loan business as a result of the acquisition. By analogy to Interpretation 8, here the Seller is exiting one of its trading portfolios (the Power Business) but will retain another (the Gas Business). Based on the foregoing, you concluded that the ordinary course of business exemption could apply to this transaction.

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

Sincerely yours,



*Agree -
B. Michael Verne
12/13/05*