[redacted]

[redacted]

March 31, 1998

Richard B. Smith, Esq.,
Federal Trade Commission,
Premerger Notification Office,
Room 303,
6th Street & Pennsylvania Ave., N.W.,
Washington, D.C. 20580.

Re: [redacted]

Dear Mr. Smith:

I am writing to memorialize our telephone conversation of this morning involving you, me and [redacted] concerning the applicability of the § 7A(c)(9) and § 802.9 investment exemption to the purchase of [redacted] common stock by various independent power producers ("IPPs"). The facts we discussed are as follows:

[redacted] a New York utility, has entered into a Master Restructuring Agreement (the "MRA") with 15 IPPs with respect to 28 above market power purchase agreements ("PPAs"), pursuant to which such PPAs will be terminated, amended or restated in exchange for approximately $3.6 billion in cash, 42.9 million shares of [redacted] Common Stock and a series of fixed price swap contracts. This pool of consideration is allocated among the various IPPs on terms unknown to [redacted] as well as the individual IPPs. Although [redacted] is unaware of which IPPs are acquiring Common Stock, it does know that twelve IPPs will be receiving stock

and that no IPP will own, following the closing of the MRA, more than 5% of the then outstanding Common Stock, except for one group of affiliated IPPs which will hold not more than 5.6% of the then outstanding Common Stock. [redacted] is required to file a shelf registration statement so that the IPPs can, if they wish, immediately resell the [redacted] Common Stock they will acquire, which will constitute in the aggregate approximately 23% of the then outstanding Common Stock. [redacted] has been told that approximately half of the IPPs presently plan to sell their shares immediately. [redacted] Common Stock is presently trading in the $12-13 range.

[redacted] and the IPPs believe that, assuming the IPPs individually have the appropriate investment intent, their acquisitions of [redacted] stock would be exempt from filing requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, pursuant to § 7A(c)(9) of this Act and § 802.9 of the Premerger Notification Rules. Obviously, should any individual IPP's investment intent subsequently change, a filing would be required prior to the acquisition of any additional shares. In furtherance of the conclusion that no filings will be required, we additionally noted the following:

1. Each IPP who will receive 2% or more of the Common Stock pursuant to the MRA is required to sign a 5 year standstill prohibiting them from seeking to acquire control of [redacted], acquiring more than an additional 5% of the outstanding stock (with an absolute limit of 9.9%) or acting to control [redacted] or its management, board of directors, policies or affairs. All shares held by such 2% holders will be voted on a pass-through basis (e.g., in the same percentages as all other holders), except for certain extraordinary transactions and, when there is a pending proposal to acquire [redacted] for directors.

2. In approving the MRA, the New York Public Service Commission (the "PSC"), in its written order dated March 20, 1998, stated, in response to the objections of one intervenor to [redacted] issuing Common Stock to the IPPs, that the "proponents have convincingly demonstrated that the [IPPs] cannot use their combined interests in the company to improperly influence its operations. Were they to attempt

[redacted] may be subject to the [redacted] exemptions of section [redacted] Act which restricts [redacted] the Freedom of Information Act

to do so, we would investigate any such circumstances and take proper steps to preclude improper manipulations of the competitive market."

3. As with other New York State utilities, [redacted] is being required by the PSC to auction its non-nuclear generation facilities, and if a statewide nuclear operating company is not established, to file a detailed plan analyzing other proposals regarding its nuclear facilities including feasibility of an auction, transfer and/or divestiture. Thus, the PSC is requiring [redacted] to exit the non-nuclear electric power generation business in which the IPPs have engaged in the past and in which some may continue to engage in the future.

4. As we finally noted on our call, the MRA did permit the following IPP input into the selection of two directors to fill two vacancies on [redacted]s board: [redacted] and the IPPs jointly selected a nationally recognized executive search firm who developed a list of qualified individuals unaffiliated with either [redacted] or any IPP. While [redacted] and the IPPs were free to make suggestions, the search firm had the sole determination of which individuals were on the list. From that list, [redacted] and the IPPs mutually agreed on a final list of 10 individuals, with [redacted] to fill its two vacancies from that list (which [redacted] doing, although the identity of the two individuals is unknown to the IPPs). Once elected for a three year term at the 1998 annual meeting, there is no further agreement with the IPPs with respect to directors. Both [redacted] and the IPPs feel this limited input into the selection of totally unaffiliated nominees should not affect the exemption available under § 7A(c)(9) and § 802.9.

Based on the above facts, you expressed the initial view, subject to review of this letter, that the IPPs' acquisitions of [redacted] common stock pursuant to the MRA

would be exempt from Hart-Scott filing requirements under § 7A(c)(9) and § 802.9. Please call me at [redacted] or [redacted] if you disagree with the conclusion that the acquisitions would be exempt.

Very truly yours,

[redacted]