

7A(c)(9); 802.9

TELETYPE
FACSIMILE

April 6, 1998

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

This material may be subject to the
confidentiality provisions of section
7A(b) of the Clayton Act which restricts
release under the Freedom of Information
Act.

Re: [REDACTED]

Dear Mr. Smith:

This is to supplement my letter of March 31 and in furtherance of our call on April 2. In that call, we agreed on the following:

1. IPPs who are entering into formal arrangements to sell their [REDACTED] shares simultaneously or shortly following the closing of the MRA may rely on the § 7A(c)(9) and § 802.9 investment exemption from filing under Hart-Scott-Rodino.

2. IPPs who will cease to operate their facilities at or shortly following the closing of the MRA would not be competitors of [REDACTED] and therefore also may rely on the investment exemption.

3. With respect to IPPs who may continue both to hold their [REDACTED] stock and to operate their facilities, we discussed to what extent they are competitors with NiMo. We told you that our clients have informed us that under the regulatory scheme of the State of New York, independent power producers generally are not permitted to compete with

Richard B. Smith, Esq.

-2-

a regulated utility with respect to retail electric service to industrial, commercial or residential customers. We also informed you that one IPP owns a project which is not subject to the MRA, and that project has received PSC approval to compete with [redacted] with respect to a single industrial customer, which is the same customer that receives steam from that project. In order to be able to sell to that customer, that project had to obtain a certificate and approval from, and submit to light regulation by, the PSC, and as a result that project also has paid and continues to pay substantial compensation to [redacted]. We also informed you that while [redacted] and the IPPs conceivably could compete with respect to the sale of power in the wholesale market, the extent of that activity by [redacted] is minimal. We further noted that while the regulatory scheme in New York, as elsewhere in the country, is rapidly evolving to open up competition, it would be pure speculation at this point as to which IPPs might become competitors of [redacted] in the future. Accordingly, we agreed that, based on the above facts, the IPPs that do not intend immediately to sell their stock or cease operating may also rely on the investment exemption from filing.

Please call me at [redacted] or [redacted] at [redacted] if you disagree with the above conclusions.

Very truly yours,
[redacted signature block]

4/10/98 - Writer confirms that discussion in paragraph 3. as to limited ability of IPPs to compete with a regulated utility with respect to retail electric service would apply to IPPs included in paragraphs 1 and 2.
R.B. Smith