



DEPARTMENT OF JUSTICE

Antitrust Division

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September 4, 1998

Mr. Jesse W. Markham, Jr.
Jackson, Tufts, Cole & Block, LLB
650 California Street
San Francisco, California 94108-2613

Dear Mr. Markham:

This letter responds to your request on behalf of the Textile Energy Association ("TEA") for the issuance of a business review letter pursuant to the Department of Justice's business review procedure, 28 C.F.R. §50.6. You have requested a statement of the Department's current antitrust enforcement intentions regarding a proposal by a number of textile manufacturing firms to purchase some or all of their energy needs through a joint purchasing agent. Based on the information and assurances that you have provided, the Department has no current intention to challenge the joint purchasing arrangement that TEA proposed to its members.

The proposed joint purchasing arrangement represents a response to what TEA's members perceive will be the eventual deregulation of energy markets in the U.S. and particularly in the southeastern region of the country. They believe that the anticipated deregulation will provide them with considerable competitive choice, and that establishing a joint purchasing agent will enable them to reduce the significant transaction and information costs associated with purchasing power in a deregulated market. As deregulation continues, TEA's members hope to obtain further efficiencies and benefits to the extent that joint purchasing enables them to obtain load characteristics that result in lower energy rates for TEA's members. TEA asserts that these benefits will extend to a substantial group of industrial power consumers located primarily in the Southeast, as well as to customers in downstream markets. In addition, they assert that these benefits will assist the United States textile industry to become more competitive internationally.

The members of TEA will be firms engaged in businesses in or related to the textile industry. TEA will choose the joint purchasing agent and negotiate with it a “prototype” contract for the benefit of all members. Each member will sign separate “adoption” agreements. Under its agreements with the members, the agent will provide various forms of service relating to the purchase of energy and, on an individualized basis, may offer analysis of the members’ energy needs. The objective of the arrangement is to obtain energy for the members at the lowest cost. The agent will purchase various forms of energy for the members including electricity, gas, compressed air, chilled water, etc. Power will be purchased from various sources nationwide depending on which source offers the best market price at any particular time.

TEA believes that joint purchasing by its members will enable them to obtain lower prices for electricity and other forms of energy and to otherwise reduce their energy costs compared to individual procurement. It suggests that power generators can lower their costs of generation by entering into large and level demand contracts that give the generators greater planning assurance than is possible in selling in spot sales markets. Customers, such as TEA’s energy agent, who are willing and able to purchase power in a manner that enables generators to operate more efficiently (by reducing risks of underutilization of generating capacity and increasing the units over which fixed costs can be spread) can be expected to negotiate better prices than individual purchasers with smaller or less regular needs.

TEA also claims that joint purchasing will create benefits to its members in the form of reduced transaction costs in negotiating with energy providers. In the past, the existence of rate regulation meant that purchasers did not need to be expert about generation or transmission costs -- the regulatory authority argued about such issues with the regulated firms. In the new deregulated environment, purchasers will have to amass such information if they want to negotiate effectively with generation and transmission suppliers. TEA believes that the utilization of an expert joint purchasing agent will reduce information costs for its individual members and provide them with more effective negotiation representation, completely independent of the savings attributable to the aggregation of the demand for energy.

TEA’s proposed joint purchasing program will include several operational safeguards designed to ameliorate the anticompetitive potential of joint purchasing arrangements. The purchasing agent will be independent of TEA’s members. It will collect from individual members information about their energy needs and will negotiate on behalf of the group. The members will not communicate any information interse; all information will be provided to the independent purchasing agent who will not communicate to other members any information about individual member needs and costs, and will only provide such aggregated information to individual members as is necessary for them to determine whether they want to participate in particular joint procurements. In addition, TEA’s individual members will remain free to purchase all, or part, of their energy requirements independently of the joint venture. The members will continue to conduct all other aspects of their businesses independently of one another.

On the basis of the information that you have provided to the Department, it does not appear that the aggregation of their purchases would give TEA’s members any market power with respect to the purchase of any source of energy. Even if the joint purchasing agent purchased all of its members’ needs, it would account for no more than 2.1 percent of all industrial energy consumed in the Southeast and only 1.43 percent of all industrial energy consumed in the U.S. Nor would the aggregate demand of

TEA's potential members exceed ten percent in any individual fuel market. Moreover, the contemplated joint purchasing is not likely to reduce horizontal competition amongst TEA's members by eliminating rivalry with respect to such a large input that output price rivalry might be reduced. You indicate that the aggregate energy purchases of all TEA's members constituted but seven percent of their revenues, a percentage too small, under general antitrust analysis, to raise concerns about adverse effects on textile price rivalry. Finally, the prophylactic measures that will be adopted by TEA to prevent potentially anticompetitive information exchanges between its members, if effective, should substantially reduce any risk that the joint purchasing of energy will adversely affect competition in the various textile markets.

To the extent that the contemplated joint purchasing reduces the costs of energy to TEA's members, it could have the procompetitive effect of increasing output for the benefit of consumers.

This letter expresses the Department's current enforcement intentions, and is predicated on the accuracy of the information and assurances that you have presented to us. In accordance with its normal practice, the Department reserves the right to bring an enforcement action in the future if the actual operation of the proposed joint purchasing program proves to be anticompetitive in any purpose or effect.

This statement is made in accordance with the Department's business review procedure, 29 C.F.R. §50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data will be made publicly available within thirty days of the date of this letter, unless you request that any part of the material be withheld in accordance with Paragraph 10(c) of the business review procedure.

Sincerely,

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JOEL I. KLEIN
Assistant Attorney General