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PLEASE REPLY TO BURLINGTON

The Honorable Joel I. Klein
Assistant Attorney General
Antitrust Division
United States Department of Justice

Re: Textile Energy Association

Dear Mr. Klein:

Please be advised that we represent the Textile Energy Association ("TEA"). We write to request the issuance of a business review letter pursuant to the Department of Justice's business review procedure, 28 C.F.R. §50.6, with respect to the matters set forth below.

TEA is an association of various members of the textile industry who propose to associate for the purpose of joint purchase of energy, thereby taking advantage of newly de-regulated energy markets. The venture proposed by TEA bears strong similarities to a joint purchasing arrangement recently approved by the Department in a Business Review Letter to Jesse W. Markham, Jr., Esq., re: California Large Electric Power Purchasing Association ("CLEPPA") (November 20, 1997). TEA provides many of the same pro-competitive benefits afforded by CLEPPA's arrangement, and imposes similar safeguards to avoid incidental anti-competitive effects.

Although there are strong similarities between the two organizations, TEA spans a larger geographic area and market. TEA's membership presently includes thirty-four members of the textile industry. Membership is potentially open to all members of that industry throughout the country (although the majority of the textile mills are located in the Southeast). CLEPPA, in contrast, had eleven members located in California and, although there was the possibility of expanding the membership beyond the eight cement manufacturers and three steel manufacturers which founded CLEPPA, this was considered unlikely¹.

These differences are significant in that: (1) TEA affects a much larger amount of commerce than CLEPPA (although it does so in the context of larger relevant markets for inputs and outputs); and (2) because TEA's membership cuts across the boundaries of numerous states which are in various stages of de-regulation, it will require a more flexible arrangement

¹Although CLEPPA allowed for the possibility of admitting additional similarly situated electric power consumers, it was not expected that membership would grow appreciably due to the limited number of similar consumers.

with its purchasing agent than CLEPPA required.² We believe, however, that the differences between TEA and CLEPPA do not alter the result and that this proposal, like CLEPPA's proposal, falls well within the guidelines which have been recognized in the Department.

(i) *Organization and membership of TEA.*

Membership in TEA is divided into two groups, "Founding Members"³ and "Full Members." To qualify as either a Full Member or a Founding Member, the member must be an entity which regularly conducts business in or related to the textile industry.⁴ TEA's By-Laws⁵ establish various procedures for termination from membership, and include procedures by which members may challenge terminations. Members may also voluntarily resign in writing.

TEA's business and affairs are to be managed by its Board of Directors. Each of the Founding Members is entitled to appoint one Director to the initial Board, and TEA's Members shall hold a meeting in which they will elect additional directors. Each Member shall have one vote for each position to be filled by election. The right to appoint Directors constitutes the primary difference between Founding Members and Full Members of TEA.

²For example, there may need to be adjustments in a particular member's contract with the energy agent depending on the nature of de-regulation in the state(s) where that member operates its plants.

³The Founding Members are as follows: Alice Manufacturing, Inc.; Avondale Mills, Inc.; Burlington Industries, Inc.; Collins & Aikman, Inc.; Cone Mills, Inc.; Glen Raven Mills, Inc.; Milliken, Inc.; Parkdale Mills, Inc.; Russell Corporation; Spartan Mills, Inc.; Springs Industries, Inc.; and, Unifi, Inc. Fieldcrest Cannon, Inc. was also a Founding Member, but has since withdrawn from TEA.

⁴TEA's membership encompasses the same criteria as membership in three other trade associations, namely the American Textile Manufacturers Institute ("ATMI"), the Institute of Textile Technology ("ITT"), and American Yarn Spinners Association ("AYSA"). Members of ATMI and ITT must be involved in the operation of machinery for the manufacture or processing of textile products. Members of AYSA must be involved in the operation of machinery for spinning, dyeing, texturizing, twisting, or otherwise processing of yarn, thread, or cordage for sale.

⁵ A copy of TEA's Articles of Incorporation, By-laws, and proposed membership agreements are enclosed for your review.

(ii) *The Relevant Market and the Status of De-Regulation in those Markets*

TEA's members are all textile manufacturers with plants located primarily in the Southeast region of the United States.⁶ Thus the relevant output market is the global market for textiles. The affected textile plants are generally fueled by more than one alternative energy source, including electricity and natural gas. The joint purchasing proposed herein concerns the joint purchasing of all alternative energy sources. We take the conservative view that the relevant input market is the Southeast United States for the purposes of this request. In the Southeast region of the country, there have been varying degrees of progress toward restructuring of the energy markets at both the state level and at the federal level.⁷ At the federal level, the White House recently announced a plan to encourage competition in the electricity industry, and seeks to bring about nationwide competition by 2003. At the state level, at least sixteen states have taken steps to implement de-regulation to varying degrees.⁸

⁶TEA's Founding Members, for example, have plants in Florida, South Carolina, North Carolina, Alabama, Georgia, Virginia, Tennessee, Mississippi, Michigan, and Ohio.

⁷In the states where TEA's members operate, de-regulation of the power market is in a formative stage. As such, the nature of de-regulation in those states is less well-defined than in California where CLEPPA operates. While TEA will adhere to arrangements set forth in this letter, its structure and its relationship with the purchasing agent will have to be more flexible than that which is described in the CLEPPA letter. It is contemplated that the purchasing agent's function will be flexible enough to adapt to different regulatory frameworks in each state.

⁸Rhode Island, Pennsylvania, Vermont, Michigan, Massachusetts, and California already offer consumers a choice of electricity providers. Ten other states have passed de-regulation measures. For example, Virginia has passed a bill designed to bring about competition by 2003. South Carolina presently has a bill pending which will be addressed in the 1998 legislative session. North Carolina's General Assembly formed a study commission in 1997 comprised of twelve legislators and eleven representatives of different aspects of the economy (including members of various industries, utility companies, etc.) The study commission is scheduled to report to the North Carolina General Assembly in June of 1998 and to make final recommendations in January of 1999.

Given the seeming inevitability of a widespread de-regulated environment, either as a result of localized efforts or through federal mandate, TEA's members wish to prepare to take advantage of the choices which will be made available to them through competition. A joint purchasing association will allow members to achieve substantial efficiencies in making these preparations, given the significant transaction and information costs associated with purchasing power in a de-regulated market. As de-regulation continues, TEA's members will obtain further efficiencies and benefits to TEA's members in that joint purchasing will maximize the benefit of the aggregate load characteristics due to the geographic diversity of the members and their various plants, the volume of energy purchased, the utilization of fuel switching capabilities of the members' plants, etc., resulting in lower energy rates for TEA's members. 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, these benefits will assist the United States textile industry to become more competitive internationally.

(iii) The Proposed Joint Purchasing Arrangement

TEA will choose the energy agent and negotiate the overall "prototype" contract with the energy agent for the benefit of all members. The agreement will be between the energy agent and the members of TEA, and each member will sign separate "adoption" agreements. TEA will not be a party to the contract between its members and the energy agent.⁹ Each member will be billed directly by the energy agent and no funds will flow through TEA other than the membership dues to reimburse TEA for its costs of administration, including professional fees and auditing fees as addressed below. We believe that this structure will result in substantial savings as to information and transaction costs over what could be achieved by the members acting individually to negotiate their own contracts and to monitor the energy agent.

Under its agreements with the members, the energy agent will provide various forms of service relating to 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 energy 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 upon which source offers the best market price at any particular time.

⁹This structure has been utilized due to tax considerations and also to accommodate disparate circumstances that may exist for purchasers in different jurisdictions and markets.

The energy agent has not yet been chosen by TEA. Some potential agents are affiliated with one or more energy providers and some are not so affiliated. The agent shall not be associated with any of the members. In order to ensure that the purchasing agent is providing the member with the lowest energy costs, TEA may provide for the auditing and verification of the accuracy of the agent's cost representations (in order to ensure that members are at all times receiving the lowest possible energy cost),¹⁰ as well as to audit and oversee the income and expenses of TEA and the calculation of dues.

No negotiations have taken place with any energy agent, and requirements which may be imposed on TEA or its members are therefore unknown. The energy agent will be paid either an agreed-upon amount or will be paid on an incentive basis as a percentage of savings for each member. The purchasing agent may require a minimum aggregate load for all members as a condition of providing services and the agent may have the right to terminate all contracts if the aggregate load drops below a certain level (or have an adjustment mechanism as to pricing).

(iv) TEA Falls within the Guidelines for Permissible Joint Purchasing

The Department has established well-articulated guidelines for permissible joint purchasing arrangements. The Department has recognized that joint purchasing can be pro-competitive, and is presumed to be so under certain conditions. For example, in the health care context, joint purchasing arrangements fall within an "antitrust safety zone" when: (a) "the purchases account for less than 35% of the total sales of the purchased product or service in the relevant market," and (b) "the cost of the products purchased jointly accounts for less than 20% of the total revenues from all products and services sold by each competing participant in the joint purchasing arrangement."¹¹ TEA falls well within both of these standards, and also

¹⁰The need or desire for such verification may depend upon whether the energy agent is associated with an energy provider. It is anticipated that the auditing committee, if necessary, shall consist of persons who have no relation or affiliation with any member of TEA, although no independent CPA shall be disqualified from service as an auditor merely because the accounting firm by whom he is employed performs accounting or auditing services for any member.

¹¹See, Department of Justice and Federal Trade Commission Statements of Enforcement Policy and Analytical Principals relating to Health Care and Antitrust, 4 Trade Reg. Rep. [CCH], ¶13,152 at 20,785 (1994) ("Health Care Guidelines"). See also, Business Review Letter to Jesse W. Markham, Jr., Esq., re: California Large Electric Power Purchasing Association ("CLEPPA") (November 20, 1997) (addressing a joint purchasing arrangement for energy similar to the issues presented herein); Business Review Letter to Ira H. Raphaelson, Esq. re: Utilities Service

imposes certain procedural safeguards to address the confidentiality and autonomy concerns articulated by the Department.

(a) Joint Purchases Account for Less than 35% of Total Sales

Although the textile industry is a substantial consumer of energy, it is nonetheless a small percentage of the total industrial energy use¹² in the United States and, more particularly, the Southeast (where most of the affected plants are located). In 1994, the total industrial energy use in the United States was 21,661 trillion Btu's, whereas the total energy use of the textile industry nationwide was 310 trillion Btu's, or 1.43%.¹³ In that same year, the total energy use by textile industry members in the South Census Region was 267 trillion Btu's, compared to a total regional industrial consumption of 12,150 trillion Btu's, or 2.1%.¹⁴ It is clear that TEA consumes far less than 35% of total energy sales, locally or nationally, measured in Btu's.

TEA's consumption of particular forms of energy also remains well within permissible levels. The net electricity purchased by the textile industry in the United States in 1994 was 32,614 gigawatt hours out of a total of 776,335 gigawatt hours for all industries, or 4.2%. In the South Census Region, the textile industry purchased 30,046 gigawatt hours out of a total of 332,754 gigawatt hours for all industries, or 9.0%.¹⁵ TEA's consumption of other fuels, if these

Alliance (July 3, 1996); Business Review Letter to Robert D. Paul, Esq., re: PRIMESOURCE (Jan. 29, 1993); Business Review Letter to Christopher B. Hockett, Esq., re: Automobile Transport Fleet Affiliation (April 19, 1994); and, Business Review Letter to FRA Shippers' Ass'n (June 15, 1988).

¹² "Total" is defined as the sum of all of the listed energy sources, including "Other," minus the shipments of energy sources produced onsite. It is the total amount of first use of energy for all (fuel and nonfuel) purposes.

¹³Energy Information Administration, Office of Energy Markets and End Use; Energy End Use and Integrated Statistics Division, Form EIA-846; 1994 Manufacturing Energy Consumption Survey; and Office of Oil and Gas, Petroleum Supply Division, Form EIAA-810; Monthly Refinery Report for 1994. These statistics were compiled in the Department of Energy web page at www.eia.doe.gov. These statistics include not only TEA's members, but all members of the textile industry.

¹⁴Id.

¹⁵Id.

are considered, does not alter the result. The consumption of distillate fuel oil by the textile industry was 9.6% of the total industrial consumption in the South Census Region in 1994, and 4.6% of the total consumption in the United States.¹⁶ The consumption of each of the other forms of energy by the textile industry is below 5% of total industrial consumption of each type of energy, both in the United States and in the South Census Region.¹⁷

The foregoing does not take into account residential energy consumption. Of course, if residential energy consumption is included, textile energy consumption is a small percentage of the total energy consumption. For example, the Southeast Electric Reliability Council (SERC) report, "Regional Electricity Supply & Demand Projections," states that the total net generation of electricity in the Southeast region is 575,181 gigawatt hours in 1996. As noted above, the textile industry in the South consumed 30,046 gigawatts of electricity in 1994. Compared with the total net generation of electricity in the Southeast Region, this is approximately 5.2% of the total net generation of electricity, both industrial and residential.¹⁸ To summarize, on any reasonable basis for making the calculation, TEA's membership accounts for far less than 35% of the total marketplace purchases of the jointly-purchased input. Indeed, the joint purchases, however calculated, account for less than 10% of the total market.

(b) Costs of Joint Products Account for Less than 20% of Revenues

Although power is an important input for all of TEA's members, each of TEA's members have confirmed that the total cost of their energy purchases was well within the Guidelines. Each member confirmed that, in the most recent fiscal year for which a calculation could be made, the cost of electric power as a percentage of revenues did not exceed 5%, that the cost of natural gas as a percentage of revenues did not exceed 5%, and that the cost of all other forms of energy as a percentage of revenues did not exceed 5%. Further, each confirmed

¹⁶Id.

¹⁷Id.

¹⁸This percentage is approximate, as the figures for total net generation of electricity encompass the South in 1996, and the figures for the total electricity consumption by the textile industry encompass the Southeast region in 1994.

that their total energy costs did not exceed 7% of their revenues.¹⁹ These figures fall well below the guideline of 20% of revenues.

(c) Confidentiality and Autonomy

In addition to 35%/20% guidelines addressed above, the Health Care Guidelines and consistent business review letters anticipate that participants will not share competitively sensitive information, that purchasing will be conducted by an independent agent, and that purchases through the group generally should not be mandatory. TEA meets these conditions.

With the exception of engaging in the joint purchasing described in this letter, TEA's members will continue to operate as fully independent concerns in all other respects. Further, each member shall retain the right to purchase all or part of its power requirements on its own, outside of the joint purchasing arrangement.

TEA imposes several safeguards to prevent the sharing or disclosure among members of information relating to each member's costs and energy consumption. The purchasing agent, not TEA or its members, shall gather the information necessary to accomplish the joint purchasing. The independent auditor shall review the information necessary to police the purchasing agent. The purchasing agent and the independent auditor shall be prohibited from divulging cost and consumption information about any individual member either to TEA or to any other member. Only information regarding aggregate costs and consumption shall be provided to TEA and its members so that the value of the joint purchasing can be assessed.

Conclusion

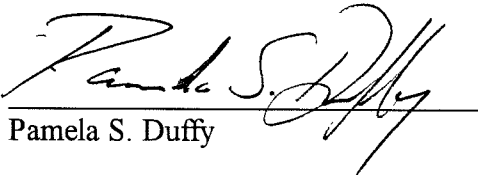
For the reasons set forth above, we believe that the proposed joint purchasing arrangement falls well within the established guidelines relating to market share, percentage of purchases, confidentiality, and freedom on the part of members to purchase their energy needs outside of TEA. Where groups have met these conditions, the Department has consistently stated that it would not challenge joint purchasing arrangements. TEA does not restrict competition in any market, and in fact has many pro-competitive benefits.


¹⁹Each of TEA's Founding Members responded to a questionnaire which included questions regarding the member's energy consumption as a percentage of total revenues. For the purposes of ensuring confidentiality of this information, the responses to the questionnaires were sent to Arthur Andersen, and Arthur Andersen agreed to maintain the confidentiality of individual responses and to provide to TEA's counsel only aggregated information. A copy of this confidentiality agreement is also enclosed for your review.

We request that you consider this proposal and issue a business review determination so that TEA and its members may make preparations for energy purchases in a de-regulated market. We will be happy to provide you and your staff any assistance or additional information which you need to evaluate this proposal.

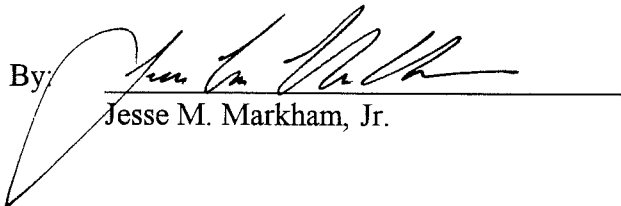
Thank you for your consideration of our request.

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