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September 11, 1985

Wayne E. Kaplan, Esquire
Staff Attorney
Federal Trade Commission
Pre-Merger Notification Section
Sixth & Pennsylvania Avenue, N.W.
Room 301
Washington, D.C. 20580

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SEP 12 1985
FEDERAL TRADE COMMISSION

Dear Mr. Kaplan:

This will confirm the gist of our conversation of this morning concerning a filing under the Hart-Scott-Rodino amendments to the Clayton Act. While I shall repeat all that I told you before, I shall also be adding some facts which I hope will help confirm your conclusions. I know of no additional facts which appear to me to have a contrary influence.

For several years [redacted] has provided [redacted] and [redacted] to [redacted] with its own facility located on [redacted] and owned by [redacted]. About a year and a half ago, [redacted] issued invitations to [redacted] to make proposals for replacement long term contract. Ultimately, [redacted] concluded that the proposal of [redacted] was the most attractive.

The proposed transaction is for the facilities owned by [redacted] to be purchased for a sum somewhat in excess of \$20 million. The rights under an option shall be assigned by [redacted] to a financing institution which will in turn lease [redacted] facilities to [redacted] for 15 years with an option for [redacted] to buy the facilities at the end of such term for their fair market value, thus making the lease a "true" lease rather than a "financing" lease. The financial institution will get all tax benefits [redacted] will then turn the facility over to [redacted] under an operating agreement with a sublease with [redacted] agreeing to provide [redacted] needs.

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[REDACTED]

for oxygen and nitrogen at the [REDACTED] and with the right to sell any excess of those gases to other customers of [REDACTED]. It is expected that about a year in the future [REDACTED] will have completed additional facilities including one for extracting argon and shall turn those facilities over to the same owner/lessor financial institution which will lease them to [REDACTED] in the same manner as the original facilities. Such additional facilities will also be subject to [REDACTED] option to purchase.

You and I discussed the possible availability of an exemption under Section 802.63 of the regulations which exemption related to financing transactions. While we agreed that this transaction had many of the attributes of a sale and lease back, you concluded that the exemption under that section really did not apply. Therefore, notwithstanding the appearance that a filing by the owner-lessor-financial institution did not go to the basic purpose of the Hart-Scott-Rodino Act, you opined that, since such institution was the purchaser, the rules required that it make the filing under that Act. You further stated that the lease to [REDACTED] and the further arrangements with [REDACTED] were not subject to the requirements of the Act but you suggested that, in view of [REDACTED] consent order, we may wish voluntarily to file market information so as to expedite the entire matter.

If the foregoing does not accurately represent our conversation, please call me at [REDACTED], in my absence,
[REDACTED]

Very truly yours,
[REDACTED]

[REDACTED]

[REDACTED]

T.K.
W.E.K. 9/16/85