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***Case No COMP/M.3297 - NORSK HYDRO / DUKE ENERGY***

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89**
**MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 19/12/2003

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19/12/2003

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

**To the notifying party**

Dear Sir/Madam,

**Subject:** **Case No COMP/M.3297 – Norsk Hydro Energy BV/Duke Energy Europe Northwest BV**
**Notification of 20 November 2003 pursuant to Article 4 of Council Regulation No 4064/89**[1]

1. On 20 November 2003, the Commission received a notification of a proposed concentration by which the Norwegian group Norsk Hydro ASA ("Norsk Hydro"), through an acquisition vehicle Norsk Hydro Energy BV ("Norsk Hydro Energy"), acquires sole control of the undertaking Duke Energy Europe Northwest B.V. ("DEEN") by way of purchase of shares.

## I. THE PARTIES

2. **Norsk Hydro** is a vertically integrated company active in the exploration and production of oil and gas, power generation, refining, crude oil and gas transport and supply, service stations, production of aluminium and aluminium metal products, carbon products, automotive components, fertilizers, nutrition products and chemicals.

[1] OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17).

The proposed acquisition will be carried out via Hydro Energy, one of the three main divisions of Norsk Hydro.

3. **DEEN** is a company active primarily in the wholesale supply of gas. Its core activities are located in the Netherlands. DEEN has one subsidiary Duke Energy Europe Northwest LLC, which was formerly called Mobil Europe Gas Inc. and was bought from Mobil Corporation in 2000 following the compulsory divestiture of certain businesses by Exxon/Mobil as a result of the conditional approval of the Exxon/Mobil merger[2] by the Commission.

## II. THE OPERATION

4. The operation consists of the acquisition by Norsk Hydro (through Norsk Hydro Energy) of 100% of the shares in DEEN, as a result of which the latter will be solely controlled by Norsk Hydro Energy. The Duke activities sold are mainly the former divested Mobil Europe Gas assets. The share purchase agreement was signed on 18 November 2003.

## III. CONCENTRATION

5. Norsk Hydro acquires sole control of DEEN and in the light of the above, it can be concluded that the operation constitutes a concentration within the meaning of Article 3 (1)(b) of the Merger Regulation.

## IV. COMMUNITY DIMENSION

6. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR […] billion (Norsk Hydro: EUR […] million; DEEN: EUR […] million)[3]. Norsk Hydro and DEEN each have a Community-wide turnover in excess of EUR […] million (Norsk Hydro EUR […] DEEN EUR […]). Norsk Hydro does not achieve more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

## V. RELEVANT MARKET

7. The only market where Norsk Hydro and DEEN are both active is the market for the wholesale supply of natural gas in the Netherlands. Although Norsk Hydro is vertically integrated into the exploration, production and trading of gas, the transaction will not change its degree of vertical integration, as DEEN is only active in the downstream Dutch wholesale gas supply market.

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2 Case IV/M.1383-Exxon/Mobil, Commission decision of 29.09.1999

3 Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25). To the extent that figures include turnover for the period before 1.1.1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

RELEVANT PRODUCT MARKETS

8. The Dutch gas market has experienced in the past few years a progressive liberalisation, which started with the Gas Act that entered in force in August 2000 implementing the EC Directive 98/30. The objective of the Gas Act is to achieve a complete liberalisation of the gas market in three separate stages in accordance with the size of the customers: i) large customers using more than 10 million $m^3$ of gas per year; ii) medium-sized gas customers using between 1 million and 10 million $m^3$ of gas per year; iii) small customers using less than 1 million $m^3$ of gas per year.

9. The large customers (as from August 1998) and medium-sized customers (as from 1 January 2002) are already free to purchase gas from the supplier of their choice. The small customers are still bound to purchase gas from Gasunie, the former Dutch monopolist. The liberalisation of supplies to these customers is envisaged by 1 July 2004, although the law that should implement this phase of the liberalisation has not yet been adopted.

10. The parties submitted two possible definitions of the relevant product market, one limited to the wholesale supply of natural gas to all non-household customers (liberalised segment), and another one, which they consider would be the most accurate starting 1 July 2004, that involves the market for the supply of natural gas.

11. In its *TotalFinaElf/Mobil Gas* decision[4] the Commission left the relevant product market definition open. Nevertheless, the market investigation in this case appeared to support the segmentation of the wholesale gas supply market by customer size since different sized customers have different consumption profiles, face different transport cost and therefore pay different prices for their supplies.

12. It can neither be excluded that in the Netherlands the product market could be further subdivided on the basis of the supply of high calorific value (HCV) and low calorific value (LCV) gas. The parties consider that the supply of HCV and LCV gas is part of the same relevant product market. This is based on the decision Exxon/Mobil, where the Commission has accepted that both HCV and LCV gas belong to the same product market. However, the analysis of the product market in that case concerned the German gas market and depended on the specific characteristics of the gas pipeline networks in Germany. Therefore it is not certain that the circumstances are the same in the Dutch gas market. The parties state that HCV gas can be readily converted into LCV gas via the converting process which is performed mainly by Gasunie. According to the parties there exists not only supply side substitutability between HCV and LCV gas because the suppliers on the market supply both types of gas, but also demand side substitutability as some category of customers can switch from LCV to HCV by adapting the gas burner.

13. However for the purpose of this decision the precise product market definition can be left open as the concentration will not create any significant competition concerns regardless of the product market definition used.

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[4] Case No IV/M.3096-TOTALFINAELF / MOBIL GAS, Commission decision of 28.02.2003

*B. Relevant Geographic Market*

14. The parties, in accordance with previous decisions of the Commission[5], submit that the wholesale supply of natural gas is for the moment still largely a national activity. It can be concluded that the relevant geographic market has a national dimension (the Netherlands).

15. It may be left open whether, due to Directive 2003/55 and other efforts to liberalise the gas market, the relevant geographic market could in the future become larger than only the Netherlands.

## VI. COMPETITIVE ASSESSMENT

HORIZONTAL RELATION

16. The transaction leads to a horizontal overlap in the Dutch wholesale gas supply market (liberalised segment). After the proposed operation, the parties' combined market share based on 2002 figures in the overall wholesale gas supply market would be of [10-20]% (NHE [0-10]%, DEEN [0-10]%). The parties therefore would constitute a medium-sized player in the Dutch market but still remain considerably smaller than the strong operator Gasunie, which on the same basis has a market share of [60-70]%. Gasunie used to be the monopolist for all customer segments and still is for the small-sized customers. Other operators such as Essent [0-10]%, NUON [0-10]%, ENECO [0-10]%, Centrica [0-10]%, BP [0-10]%, Delta [0-10]% and several smaller competitors are active on the market.

17. It appears that on all the alternative product market definitions discussed above the combined market shares of the parties would be below 15 %, with the exception of the wholesale supply of LCV natural gas in the Netherlands. On this market the combined market share of the parties would be at most [25-35]%. If this market is further subdivided on the basis of customer groups (power stations, industry,…) the combined market shares would be in the same range. Even on the basis of these product market definitions the parties would still face sufficient competition from the main player in the Dutch wholesale gas supply market, Gasunie, as well as from around ten competitors.

VERTICAL RELATION

18. Norsk Hydro is active in the exploration, production, and other vertical upstream gas markets. However, in none of these markets has Norsk Hydro a market share of 25% or more. Norsk Hydro also produces mineral fertilisers, which is an activity downstream and uses natural gases as raw material. Regarding the delivery of gas to the fertilizer plant of Norsk Hydro, the acquisition of DEEN will not change Norsk Hydro's position on the fertiliser market. First, Norsk Hydro is already a supplier of gas in this market and is already vertically integrated, which means that the transaction

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[5] Case COMP/M.3007-E.on/TXU Europe Group, Commission decision of 18.12.2002

does not create any additional foreclosure of competing gas suppliers. Secondly, the parties account for only a modest proportion of gas sales in the market so fertiliser competitors would easily be able to find alternatives.

20. In light of the above, the Commission has concluded that the proposed transaction is not likely to create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the EEA or any substantial part of that area.

## VII. CONCLUSION

21. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EEC) No 4064/89.

For the Commission

***(Signed)***

Mario MONTI
Member of the Commission