UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, -vs- ROCHESTER GAS & ELECTRIC CORPORATION, Defendant.	97-CV-6294T Filed: March 20, 1998

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2 of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b), the United States files this Competitive Impact Statement relating to the proposed consent judgment in United States v. Rochester Gas and Electric Corporation, submitted for entry in this civil antitrust proceeding.

I

NATURE AND PURPOSE OF THE PROCEEDINGS

On June 24, 1997, the United States filed a civil antitrust complaint under Section 4 of the Sherman Act, as amended, 15 U.S.C. § 4, alleging that defendant Rochester Gas and Electric ("RG&E") entered into a contract with the University of Rochester ("University" or "UR"), in which RG&E promised UR a number of benefits, including electricity at reduced rates, in

exchange for the University's promise not to compete against RG&E in the sale of electricity to consumers. The complaint alleges that this agreement violated Section 1 of the Sherman Act, 15 U.S.C. § 1, and seeks a judgment by the Court declaring the defendant's agreement to be an unlawful restraint of trade. The complaint also seeks an order by the Court to enjoin the defendant from other activities in the future having a similar purpose or effect.

The United States and defendant have stipulated that the proposed consent judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. The Court's entry of the proposed judgment will terminate this civil action against RG&E, except that the Court will retain jurisdiction over the matter for possible further proceedings to construe, modify or enforce the judgment, or to punish violations of any of its provisions.

II

DESCRIPTION OF THE PRACTICES GIVING RISE TO THE ALLEGED VIOLATIONS OF THE ANTITRUST LAWS

By the early 1990's, regulated electricity rates in New York state had become so high that industrial customers were beginning to look for alternatives to high-priced power, either by relocating to other states or by generating their own electricity.[1] In 1993, the New York Public Service Commission ("PSC") adopted new regulations that permitted utilities to negotiate individual prices with certain customers ("flexible rate contracts") rather than charge a uniform tariff. The PSC intended to afford utilities the flexibility to compete with their largest customers' other supply options.

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[1] Re Competitive Opportunities Available to Customers of Electric and Gas Service, 93-M-0229, Order Instituting Proceeding (March 19, 1993) ("March 19 Order").

In the meantime, the University of Rochester, a major customer of RG&E, learned that by building a modern, efficient plant to replace the decades-old steam plant used to heat and cool its buildings, it could produce the steam it needed and also produce -- or cogenerate -- electricity as a byproduct at a negligible cost. The University formed a study group to analyze and evaluate the cogeneration option, and concluded that a 23 Megawatt (MW) plant would be the optimal size for the University's steam and electricity needs. Such a plant would generate up to one-third more electricity than the University needed, but under New York law, the University could sell the excess electricity to other retail customers in competition with RG&E. PSL § 2(13). In addition, such a plant would be cost effective even if the University continued to buy its electric power from RG&E and sold all the power produced by the cogeneration plant to others. Thus, the University was a potential competitor for RG&E in the retail electricity market. On July 20, 1993, the University's Board of Trustees authorized construction of a 23 MW plant and allocated $1.3 million to begin the project.

The cogeneration project came to a halt in October 1993, when RG&E induced the University to enter into a Memorandum of Understanding ("MOU"). In part, the MOU resembles an ordinary -- and legal -- requirements contract between buyer and seller: RG&E agreed to supply the University with electricity at discounted rates, and the University agreed to purchase of all of its power needs from RG&E for seven years.

But the MOU did not stop there -- RG&E obtained the University's commitment not to compete for RG&E's customers. The bar on competition is unrelated to the electric requirements contract and prohibits the University for seven years from even studying any "alternative sources of electric power and gas supply" unless the "studies and the activities associated with them shall

be confined to the service of the University's own needs." This provision was intended to and did prevent the University from meeting its steam requirements -- which were wholly separate from its demand for electricity -- in a manner that would bring it into competition with RG&E.

RG&E and the University formalized the agreement set forth in the MOU by entering a flexible rate contract (the "Individual Service Agreement" or "ISA") about six months later. Like the MOU, the ISA includes provisions that are not necessary for the respective commitments by the University and RG&E to buy and sell electricity for the University's needs but rather simply prevent UR from competing with RG&E:

- The University may not solicit RG&E customers or seek to supply them with electricity;
- The University may not join in any plan intended to supply electricity to RG&E customers;
- The University may not participate in any plan to provide any RG&E customers with thermal energy; and
- The University may not work with a developer to provide steam to UR and sell electricity to RG&E customers.[2]

As a result of the agreement not to compete, the University abandoned its plans to build the cogeneration plant and enter the retail electric market, depriving RG&E's customers of a competitive alternative. By in effect "paying" the University -- a potential competitor -- not to

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[2]These restrictions are set forth in Section 6.3 of the ISA, which reads as follows:

"Study of Alternatives: The University may, during the term of this Agreement, study alternatives to the acquisition of energy from RG&E as the University deems appropriate; provided, however, that the University shall not solicit or join with other customers of RG&E to participate in any plan designed to provide them with electric power and/or thermal energy from any source other than RG&E."

build the new cogeneration plant, RG&E was free to demand higher prices from the customers the University's plant otherwise could have served.

III

EXPLANATION OF THE PROPOSED CONSENT JUDGMENT

The United States and the defendants have stipulated that a consent judgment, in the form filed with the Court, may be entered by the Court at any time after compliance with the APPA, 15 U.S.C. § 16(b)-(h). The proposed judgment provides that the entry of the judgment does not constitute any evidence against or an admission by any party with respect to any issue of fact or law. Under the provisions of Section 2(e) of the APPA, entry of the proposed judgment is conditioned upon the Court finding that its entry will be in the public interest.

The proposed judgment contains three principal forms of relief. First, RG&E is enjoined from enforcing its anticompetitive agreement with the University. Second, RG&E is enjoined from entering into future agreements with the University or any other competitor or potential competitor that could have similar anticompetitive effects. Third, the proposed judgment places affirmative obligations on RG&E to pursue an antitrust compliance program directed toward avoiding a repetition of its anticompetitive behavior.

A. Prohibited Conduct

Section V(A) of the proposed judgment prohibits RG&E from enforcing the non-compete language in the ISA and enjoins RG&E from including that language in any flexible rate contract with any other customer. Section V(B) prevents RG&E from enforcing Paragraph 10 of its Memorandum of Understanding with the University, which confines the University's study of alternative energy sources to the service of the University's own needs. Section V(C) broadly

enjoins RG&E from entering into or enforcing any agreement not to compete in the retail sale of electricity with any competitor or potential competitor, except where the agreement not to compete is reasonably necessary to achieve the legitimate purposes of certain, specified, common contractual arrangements.

B. Defendants' Affirmative Obligations

Section VIII requires that within thirty (30) days of entry of the judgment, the defendant adopt an affirmative compliance program directed toward ensuring that its employees comply with the antitrust laws. The program must include the designation of an Antitrust Compliance Officer responsible for compliance with the judgment and reporting any violations of its terms. Section VIII further requires that each defendant furnish a copy of the judgment, within sixty (60) days of the date of its entry, to all officers and employees with responsibility for marketing electric power and planning acquisition of electric power and generating capacity. Section IX requires RG&E to certify within seventy-five (75) days that it has distributed those copies and designated an Antitrust Compliance Officer. Copies of the judgment also must be distributed to anyone who succeeds to a position described above.

Furthermore, Section VIII requires RG&E to brief all officers and employees with responsibility for marketing electric power and planning acquisition of electric power and generating capacity as to the defendant's policy regarding compliance with the Sherman Act and with the judgment, including the advice that his or her violation of the judgment could constitute contempt of court.

Under Section X of the proposed judgment, the Justice Department will have access, upon reasonable notice, to each defendant's records and personnel in order to determine

compliance with the judgment.

C. Scope of the Proposed Consent Judgment

(1) Persons Bound

The proposed judgment expressly provides in Section IV that its provisions apply to RG&E, to each of its successors and assigns, and to all other persons in active concert or participation with any of them who receive actual notice of the terms of the judgment.

(2) Duration

Section VII provides that the judgment will expire on the tenth anniversary of its entry. The judgment may be terminated earlier in the event of a substantial restructuring of the retail electricity industry in RG&E's service area. The decree terminates if RG&E demonstrates that there has been substantial entry by others into retail sales of electricity made at unregulated prices in Monroe County, New York. Section VII establishes the procedure for making this determination.

(3) Exception

The exception set forth in Section VI of the proposed judgment states that the judgement does not alter RG&E's right to engage in conduct that is exempt from or immune under the antitrust laws. The conduct alleged in the complaint, however, is not immune from the antitrust laws,[3] and the proposed judgment prohibits similar anticompetitive conduct by RG&E in the future.

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[3]See United States v. Rochester Gas & Elec. Corp., No. 97-CV-6294T (W.D.N.Y. Feb. 17, 1998) (order denying defendant's summary judgment motion seeking state action immunity).

D. Effect of the Proposed Judgment on Competition

The prohibitions in Section V are designed to ensure that the defendant will compete for retail electric customers and will not limit competition by agreement with competitors or potential competitors who may be able to serve RG&E customers. The eliminating of the prohibited language has had an immediate procompetitive effect. The University has issued a request for proposals to build a cogeneration plant.

The general prohibition of Section V (C) ensures that RG&E will not make future agreements in the future with UR or any other firm to pre-empt new competition before it can even occur. Because future competition will likely come from new market entrants who do not currently compete, the proposed consent judgment explicitly enjoins agreements with potential competitors, some of whom like the University may be current customers of RG&E.

Section V(C)'s prohibition on RG&E entering into any agreement not to compete contains some enumerated exceptions. The exceptions include, for example, employment contracts and contracts to sell a business, which often include agreements not to compete for a limited time period that are ancillary to a lawful purpose. Agreements not to compete in the specific types of contracts specified in Section V (C) are not prohibited by the proposed judgment, but remain subject to the antitrust laws.

RG&E continues to be a virtual monopolist for retail sales of electricity in its service area and a broad prohibition on non-compete clauses with potential competitors is particularly important so long as RG&E maintains its current market dominance. If, however, the retail electric market in RG&E's service territory became subject to effective competition, the prohibition of Section V (C) would no longer be necessary to protect consumers of electricity. In

a competitive market, an arrangement between RG&E and one of its numerous competitors would not be likely to restrict output or raise price. Moreover, without market power, RG&E will have less incentive or ability to enter into anticompetitive agreements. For these reasons, Section VI provides that the judgment will terminate once RG&E has less than 50% of the retail sales subject to competitive pricing in its present service area (Monroe County). It is RG&E's burden to establish that this threshold of effective retail electric competition has been satisfied. If the threshold is met, it will mean that barriers to entry into this formerly regulated monopoly market have been removed, and that actual entry has occurred on a significant scale. Unless this substantial restructuring of the industry occurs, the judgment remains in effect.

IV

REMEDIES AVAILABLE TO POTENTIAL PRIVATE PLAINTIFFS

After entry of the proposed judgment, any potential plaintiff who might have been damaged by the alleged violation will retain the same right to sue for monetary damages and any other legal and equitable remedies which that person may have had if the proposed judgment had not been entered. The proposed judgment may not be used, however, as prima facie evidence in litigation, pursuant to Section 5(a) of the Clayton Act, as amended, 15 U.S.C. § 16(a).

V

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED JUDGMENT

The proposed judgment is subject to a stipulation between the government and the defendant which provides that the government may withdraw its consent to the proposed judgment any time before the Court has found that entry of the judgment is in the public interest.

By its terms, the proposed judgment provides for the Court's retention of jurisdiction of this action in order to permit any of the parties to apply to the Court for such orders as may be necessary or appropriate for the modification of the judgment, including the demonstration of retail market conditions outlined in Section VI of the decree.

As provided by the APPA (15 U.S.C. § 16), any person wishing to comment upon the proposed judgment may, for a sixty-day (60) period subsequent to the publishing of this document in the Federal Register, submit written comments to the United States Department of Justice, Antitrust Division, Attention: Roger W. Fones, 325 Seventh Street, N.W., Washington, D.C. 20530. Such comments and the government's response to them will be filed with the Court and published in the Federal Register. The government will evaluate all such comments to determine whether there is any reason for withdrawal of its consent to the proposed judgment.

VI

ALTERNATIVE TO THE PROPOSED JUDGMENT

The alternative to the proposed judgment considered by the Antitrust Division was a full trial of the issues on the merits and on relief. The Division considers the substantive language of the proposed judgment to be of sufficient scope and effectiveness to make litigation on the issues unnecessary, as the judgment provides all of the relief sought against the violations alleged in the complaint.

VII

DETERMINATIVE MATERIALS AND DOCUMENTS

No materials or documents were considered determinative by the United States in

formulating the proposed judgment. Therefore, none are being filed pursuant to the APPA, 15 U.S.C. § 16(b).

Dated: March 9, 1998

DEPARTMENT OF JUSTICE
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