

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
-vs-	)	97-CV-6294T
	)	
ROCHESTER GAS & ELECTRIC	)	
CORPORATION,	)	
Defendant.	)	

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**PLAINTIFF UNITED STATES' MEMORANDUM OF LAW IN  
SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

**INTRODUCTION**

In 1993, Rochester Gas and Electric Company ("RG&E") recognized that the University of Rochester ("UR" or "University") posed a significant threat to its electric monopoly. The University trustees had voted to develop a modern, efficient, natural-gas-fueled electrical cogeneration plant to replace the University's more than 60-years old coal-burning steam plant. The plant would have efficiently produced sufficient steam to meet the University's heating and cooling needs. As a by-product, it would have produced inexpensive electricity, and substantially more of it than the University needed. Excess electricity cannot be stored or disposed of -- it must be used. The University planned to sell its excess electricity, but had not yet made a commitment to any particular customers.

The University's potential capacity to supply electricity to RG&E customers, combined with its legal ability to do so under New York State law, threatened RG&E's monopoly. Faced with the choice between losing some important customers or offering them discounts to keep

their “load on the system,” RG&E adopted a third, but illegal, option -- it promised to pay the University hundreds of thousands of dollars if it would agree not to “solicit or join with other customers of RG&E to participate in any plan to provide them with electric power and/or thermal energy from any source other than RG&E.” RG&E, in short, paid the University not to compete, leaving RG&E free to demand higher prices from customers the University’s plant otherwise could have served.

The anticompetitive result of the agreement is clear -- as RG&E’s President and COO, the chief negotiator of the contract, admits --- with construction of UR’s new steam plant, “you could use this [University] steam host here to sort of have everybody in town demand some kind of discount.” Richards Depo. at 252.<sup>1</sup> RG&E’s customers never got an opportunity to bargain for those discounts. The agreement between RG&E and UR ensured that RG&E would not face competition from a cogeneration plant on the UR campus. RG&E’s agreement is illegal.

## **I. STATEMENT OF FACTS**

By the early 1990’s, regulated electricity rates had become so high that, all over New York State, industrial customers were beginning to look for alternatives to high-priced power, either by relocating to other states or by cogenerating some of their own electricity.<sup>2</sup> After a period of granting individual utilities’ requests for flexible pricing, the New York Public Service Commission (“PSC”) opened a proceeding that would universally permit utilities to price

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<sup>1</sup> The deposition of Thomas Richards is found as Ex. 6 to Plaintiff’s Rule 56 Statement of Material Facts as to Which There Is No Genuine Issue to be Tried (“Plaintiff’s Rule 56 Statement”).

<sup>2</sup> *Re Competitive Opportunities Available to Customers of Electric and Gas Service*, 93-M-0229, Order Instituting Proceeding (March 19, 1993) (“March 19 Order”). This order was submitted by Defendant with its Motion for Summary Judgment. For the convenience of the Court, it is also found as Ex. 1 to Plaintiff’s Rule 56 Statement.

flexibly, that is, to set prices through individual negotiations with certain customers rather than according to a tariff filed with the state. *Id.* The PSC intended to “afford[ ] utilities the flexibility to compete with their largest customers’ other supply options.” *Id.* at 8.

In the meantime, the University of Rochester, a major industrial customer of RG&E, was grappling with a number of issues in an effort to reduce its energy costs. The University had a decades-old “central utilities plant” that produced steam for heating and cooling campus buildings. Greene Aff. ¶3.<sup>3</sup> The University learned that, by replacing its existing steam plant with a more efficient plant, it could meet its steam needs and also produce -- or cogenerate -- electricity as a byproduct. *Id.*<sup>4</sup>

The University took concrete steps toward the cogeneration alternative in early 1993, when the President of the University formed a group to analyze and evaluate the technical, financial and legal aspects of cogeneration. *Id.* ¶4. The group worked for six months and reached a number of conclusions:

- (1) Cogeneration was a viable alternative for the University.
- (2) The optimal plant for the University would produce 23 megawatts ("MW") of electricity.
- (3) A plant of that size would cost \$36 million.
- (4) Ownership and operation of the plant by the University would provide tax benefits.
- (5) A 23 MW cogeneration plant would substantially reduce the University’s annual energy costs.
- (6) A plant optimally sized for the University’s steam and electricity needs would generate more electricity than the University needed.

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<sup>3</sup> Mr. Greene’s Affidavit was submitted by Defendant along with its Motion for Summary Judgment. For the convenience of the Court, it is also found as Ex. 2 to Plaintiff’s Rule 56 Statement.

<sup>4</sup> In substance, the plant would produce both steam or “thermal energy” for heating and cooling, and electricity. The two products -- electricity and useful thermal energy -- are produced from the same unit of fuel. *See, e.g.*, 18 C.F.R. § 292.202(c)-(e) (1997).

- (7) The University could sell up to one-third of the electrical output of the plant.
- (8) The output could be sold to RG&E.
- (9) The University should proceed with building the 23 MW cogeneration plant.

*Id.* ¶ 5.

On July 20, 1993, the University's Board of Trustees authorized construction of a 23 MW plant for \$36 million. *Id.* The Board also voted to proceed to the next stage of project development and allocated \$1.3 million so the University could undertake the following steps immediately:

- (1) negotiate and execute contracts for fuel supply;
- (2) negotiate and execute natural gas transportation contracts;
- (3) acquire environmental and regulatory permits; and
- (4) contract with a cogeneration design and engineering firm.

*Id.*

University employees began to explore selling the electricity produced by the plant in excess of the University's needs in competition with RG&E. *Id.* ¶15. UR also kept open the option of having a third party or partnership own and operate the plant on its behalf. Daigneau Depo. at 27-29.<sup>5</sup> The University anticipated that the plant would be generating electricity before the end of 1995. Greene Aff. ¶ 5. New York State law expressly permitted (and still permits) the University to sell the plant's excess electricity to other retail customers in competition with RG&E. PSL § 2(13).

The new plant was never built. Instead, in October 1993, RG&E entered into a Memorandum of Understanding ("MOU") with the University.<sup>6</sup> The MOU was signed by

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<sup>5</sup> For the convenience of the Court, Mr. Daigneau's deposition is found as Ex. 3 to Plaintiff's Rule 56 Statement.

<sup>6</sup> The MOU was submitted by Defendant as Ex. G to its Rule 56 Statement. For the convenience of the Court, it is also found as Ex. 4 to Plaintiff's Rule 56 Statement.

Dennis O'Brien, President of the University, and Robert E. Smith, a Senior Vice President of RG&E. In part, the agreement resembles a simple -- and legal -- requirements contract: RG&E agreed to supply the University with electricity at discounted rates calculated in cents per kilowatt hour, and the University agreed to "remain a customer of RG&E for all of its power needs" for seven years. MOU at 1-2.

But the MOU did not stop there. It also (i) contained a seven-year restriction, unrelated to RG&E's sale and UR's purchase of electricity, pursuant to which the University promised not to study 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" (MOU at 4) and (ii) provided for additional payments from RG&E to UR as consideration.<sup>7</sup> Thereafter, the University's ongoing "studies" and its related "activities" in planning for and developing a more efficient steam plant -- a plant that would have produced electricity that UR intended to sell to others -- came to a sudden halt.

RG&E and the University formalized the agreements set forth in the MOU when they entered into a comprehensive contract, or Individual Service Agreement ("ISA"), about six

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<sup>7</sup> *Id.* The first of these payments is a "minimum" payment to UR for undertaking conservation measures that is "guarantee[d]" to provide the full value of the projected energy savings from such measures regardless of whether the University ever actually qualifies for the payments under state regulations or implements any such measures. *Id.* at 2. The second is a commitment that RG&E will award UR a minimum amount in research and development grants in the future. *Id.* at 2-3. Like the energy conservation payments, a portion of this funding or "equivalent value" is guaranteed, regardless of whether the University otherwise qualifies for the RG&E grants. *Id.*

months later.<sup>8</sup> Pl. Ex. 3, Daigneau Depo. at 40. Like the MOU, the ISA includes provisions, unrelated to RG&E's sale of electricity to UR, that 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.<sup>9</sup>

The purpose and effect of the agreement were to prevent the University from replacing its aging steam plant with a cogeneration plant (Pl. Ex. 3, Daigneau Depo. at 49) and thus to protect RG&E from competition. Pl. Ex. 6, Richards Depo. at 252, 270-73.

## II. SUMMARY OF ARGUMENT

(A) The United States is entitled to summary judgment because UR's agreement not to compete with RG&E is, on its face, a *per se* violation of the antitrust laws. The University and RG&E signed an agreement that prevents the University from soliciting “. . . RG&E customers . . . to provide them with electric power . . . from any source other than RG&E.” It is uncontested

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<sup>8</sup> The ISA was submitted by Defendant as Ex. H to Defendant's Rule 56 Statement. A copy is also included as Ex. 5 to Plaintiff's Rule 56 Statement.

<sup>9</sup> These restrictions are set forth in Section 6.3 of the ISA, Pl. Ex. 5, 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.”

*See also* §§ 7.1, 7.2.

that, before the University signed the agreement, it had planned to begin generating and selling electricity. It is also uncontested that the State of New York allows sales by a cogenerator to customers at or near its plant and that University employees had begun to explore selling power to some nearby commercial customers in competition with RG&E. RG&E's agreement prevented UR from becoming its competitor and denied RG&E's customers the benefits of that competition.

(B) RG&E makes two arguments in its motion for summary judgment. Neither is correct.

RG&E's principal argument is that its conduct is immune from antitrust scrutiny because of the state action doctrine. This judicially created defense has two elements, both of which RG&E must establish in order for its conduct to be protected.

First, to establish a state action defense, RG&E must demonstrate that New York State has clearly articulated a policy of displacing competition between utilities and cogenerators. Far from having a policy to displace competition, however, New York actively encourages competition between utilities and cogenerators, by permitting flexible pricing as well as through other means. This policy favoring competition is clearly established in the record before the Court.

Second, in order to prevail on its state action defense, RG&E must also demonstrate that the State actively supervised the particular anticompetitive conduct at issue here -- UR's agreement not to compete. The limited evidence RG&E has offered on the issue is legally insufficient to establish the careful and detailed supervision that the Supreme Court has made clear must be shown before a state's action can immunize anticompetitive conduct, and much of

that evidence is in any event in dispute. The Court thus cannot properly find adequate state supervision on this record.

RG&E also argues that it is entitled to summary judgment on the ground that its agreement with UR does not impact competition because UR did not intend to compete with RG&E and the State would in any event have withheld permits necessary for it to do so. In support of its argument that UR would never have competed with RG&E, RG&E relies entirely on evidence that one University employee expected that the University would sell the excess power from the new steam plant to RG&E itself. This evidence is legally and factually insufficient: (I) Proof of actual or likely anticompetitive effects of an agreement that is illegal *per se* is not required because those effects are conclusively presumed as a matter of law. (ii) RG&E's evidence -- which the United States in any event disputes -- does not contravene the uncontested and legally dispositive evidence that UR planned and had taken affirmative steps to become a net producer of electrical power; that it had not committed the excess output of the plant to any particular customer; that the effect of the agreement was to prevent UR from building the cogeneration plant; and that RG&E's agreement with the University was expressly designed to prevent the University from winning away any RG&E customers or enabling them, because of the availability of an alternative supplier, to negotiate better rates from RG&E. In short, RG&E entered into the agreement with UR, and paid UR millions of dollars in reduced electricity rates and other consideration, precisely because it knew that, absent the agreement, UR could sell electricity in competition with it.

RG&E's argument that the state would have withheld permits necessary for UR to sell electrical power to anyone except RG&E is simply wrong. UR did not need a permit to sell to



customers adjacent to the site of the new steam plant, and RG&E submits no evidence that UR would not have qualified for whatever permits were needed to sell to more distant customers.

### **III. ARGUMENT**

Rule 56 of the Federal Rules of Civil Procedure authorizes this Court to grant judgment as a matter of law where there is no genuine issue as to any material fact. An issue is “genuine” only if “the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Accordingly, the moving party must establish that no such issue remains for trial, even if the evidence is viewed in the light most favorable to the non-moving party. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1187 (2d Cir. 1987).

While summary disposition is of course inappropriate in some cases, summary judgment is not disfavored in antitrust cases. *Capital Imaging Assocs. v. Mohawk Valley Medical Assocs., Inc.*, 996 F.2d 537, 541 (2d Cir.), *cert. denied*, 510 U.S. 947 (1993). Rather, “summary judgment remains a vital procedural tool to avoid wasteful trials and is particularly important in antitrust litigation” to prevent needlessly costly and prolonged litigation. *Id.*

#### **A. The United States’ Motion for Summary Judgment Should Be Granted Because the Uncontested Facts Make Clear That RG&E’s Agreement With UR Is Illegal Per Se**

This case is particularly well suited for summary disposition on behalf of the United States because the United States relies almost entirely on RG&E’s own factual submissions and on well-established legal precedent. Uncontested evidence demonstrates that RG&E’s agreement with UR is a *per se* violation of the Sherman Act.

The agreement between RG&E and UR is a naked restraint on competition -- an explicit agreement that UR will not compete with RG&E. The Court does not have to infer this

agreement; it is expressly stated on the face of a document signed by both parties and conceded by defendant to be accurate: “*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.*” ISA § 6.3 (emphasis added).

RG&E concedes that the University had taken significant steps toward producing electricity for sale to others, including authorizing construction of a plant that would produce significant quantities of electricity -- up to one-third of the output of the plant -- in excess of the University's needs, Greene Aff. ¶4; that the University intended to sell the excess, *id.*; and that University employees had begun to explore selling the excess in competition with RG&E, *id.* ¶15. And RG&E concedes that it did not simply offer UR an attractive supply contract to UR because a supply contract, even a requirements contract, would not have eliminated the University's incentive to build a more efficient steam plant and thus to generate and sell electricity in competition with RG&E. Instead, RG&E sought, and obtained in the agreement, UR's commitment that it would not sell electricity to any RG&E customer. In so doing, RG&E made clear that it considered the University to be a competitor.

RG&E's agreement with UR is precisely the kind of agreement -- one in which competitors eliminate alternatives for their customers instead of allowing the customers to choose -- that the antitrust laws forbid as illegal *per se*. *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990); *United States v. Topco Assoc. Inc.*, 405 U.S. 596, 608 (1972). The vice of the agreement is that it eliminates competition that would otherwise have been likely in the future. Because the concern is with future competition, the cases make clear that agreements like RG&E's agreement are illegal *per se*, even if the parties have not competed in the past. *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1, 9 (1st Cir. 1979) (agreement with a

minibike manufacturer precluding entry into its market by a snowmobile manufacturer held illegal *per se*), *cert. denied*, 449 U.S. 890 (1980); *Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971, 978-79 (8th Cir. 1981) (agreement not to compete between a Japanese firm that had never sold outboard motor engines in the United States and a U.S. manufacturer of outboard motors), *cert. denied sub nom. Brunswick Corp. v. FTC*, 456 U.S. 915 (1982).<sup>10</sup>

Section One of the Sherman Act prohibits “[e]very contract, combination . . . or conspiracy in restraint of trade.” 15 U.S.C. § 1.<sup>11</sup> An agreement not to compete, like RG&E’s agreement with UR, is in economic effect identical to an agreement that allocates markets or customers among competitors and thus denies their customers the benefits of competition. Such agreements have long been recognized as *per se* violations of the Sherman Act. *Palmer*, 498 U.S. at 49-50 (agreement that allocated all customers in a state to one firm is illegal *per se*); *Topco*, 405 U.S. at 608 (agreement by which parties that had never previously competed agreed to stay out of one another’s markets is illegal *per se*); *United States v. Koppers Co., Inc.*, 652 F.2d 290, 294 (2d Cir.) (Section One violation where parties agree not to bid for one another’s

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<sup>10</sup> See also *Otter Tail Power Company v. United States*, 410 U.S. 366 (1973). In *Otter Tail*, a case under Section Two of the Sherman Act, the Supreme Court viewed the town of Hankinson as a competitor in the retail market for electricity, unlawfully excluded by Otter Tail, even though Hankinson had done nothing more than decide to compete and seek a commitment from a supplier. See *id.* at 371, 377.

<sup>11</sup> Defendant argues that the MOU “does not constitute an agreement not to compete” because it is not “an enforceable contract.” See Defendant’s Memorandum of Law in Support of Its Motion for Summary Judgment at 6-7 n.3 (“Defendant’s Memorandum”). But the ISA is an enforceable contract (except to the extent that it is illegal under the Sherman Act). Moreover, liability under Section One of the Sherman Act is predicated, not on whether the parties’ agreement is enforceable in court, but rather on whether the parties have in fact agreed to restrain trade between themselves. See, e.g., *Interstate Circuit v. United States*, 306 U.S. 208, 226-27 (1939).

contracts), *cert. denied*, 454 U.S. 1083 (1981) . To be unlawful, an agreement not to compete need not “divide” a market in the sense that areas or customers are allocated between both existing competitors. Rather, an agreement that a possible new competitor, such as the University, will not enter a market, reserving it for the incumbent, is itself unlawful *per se*. *Palmer*, 498 U.S. at 49-50; *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 574 (2d Cir. 1961) (collecting cases).

Once it is established that an agreement is *per se* illegal, no further inquiry about its anticompetitive effects is necessary. Anticompetitive effects are presumed as a matter of law. As the Supreme Court put it, “[t]he *per se* rules reflect a long-standing judgment that the prohibited practices by their nature have ‘a substantial potential for impact on competition.’”<sup>12</sup>

In this case, the existence and terms of the agreement not to compete are not in dispute. UR, in exchange for substantial discounts and other payments, agreed not to solicit RG&E’s customers. Nor is there any dispute that the University and RG&E were on the verge of being direct, horizontal competitors at the time they entered into the challenged agreement. RG&E’s own submissions establish that the University had the ability and intent to generate and sell electricity and that RG&E’s agreement was designed to and did prevent the University from competing with it. Under well established law, RG&E’s agreement violates Section One of the Sherman Act.

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<sup>12</sup> *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 433 (1990) (quoting *Jefferson Parish Hosp. Dist. v. Hyde*, 466 U.S. 2, 16 (1984)). The Supreme Court has shown little sympathy for the “hapless but harmless” conspirator, for defendants “have little moral standing to demand proof of . . . effects when the most then can say for themselves is that they tried to harm the public but were mistaken in their ability to do so.” *Id.* at 433 n.15 (internal quotation marks and citation omitted).

## **B. RG&E's Motion for Summary Judgment Should Be Denied**

RG&E has moved for summary judgment, principally on the ground that its conduct is a kind of state action that is immune from the antitrust laws. But its motion is not supported by either the facts or the law.

### **1. RG&E's Private Agreement With the University Is Not Exempt From the Antitrust Laws Under the State Action Doctrine**

In order to prevail on its state action defense, RG&E is required to demonstrate both that the State of New York has a “clearly articulated and affirmatively expressed” policy that electric utilities should not be faced with competition and that it “actively supervised” the conduct at issue here. *California Retail Liquor Dealers Ass’n v. MidCal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.)).<sup>13</sup> RG&E cannot establish either of these two required elements of the defense.

#### **a. New York Does Not Have a Policy of Permitting Utilities to Agree Not to Compete with Cogenerators**

To satisfy the “clear articulation” element of the state action defense, RG&E must show that the State has an announced policy “to displace competition with regulation or monopoly public service,” *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39 (1985) (quoting *Louisiana Power & Light*, 435 U.S. at 413 (opinion of Brennan, J.)), and that it expressly authorized agreements of the type challenged here.<sup>14</sup> It is not enough to show that the state has determined

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<sup>13</sup> *Accord FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992); *Patrick v. Burget*, 486 U.S. 94, 100 (1988); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 57 (1985); *see also Addino v. Genesee Valley Medical Care, Inc.*, 593 F. Supp. 892, 896 (W.D.N.Y. 1984).

<sup>14</sup> *MidCal*, 445 U.S. at 105; *Southern Motor Carriers*, 471 U.S. at 63; *Town of Hallie*, 471 U.S. at 41.

to regulate some aspects of the business of utility companies such as RG&E. To the contrary, it is up to the state to determine which “discrete parts of the economy” should be subject to regulation instead of competition. *See Ticor*, 504 U.S. at 632-33. A state may choose to displace competition with regard to some conduct by regulated entities but not other conduct by the same entities.<sup>15</sup>

Determining whether a state has “clearly articulated” a policy of displacing competition requires an objective assessment of the state’s statutes and regulations. *Columbia Steel Casting Co. v. Portland General Elec. Co.*, 111 F.d. 1427, 1436 (9th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3085 (U.S. Sup. Ct. July 2, 1997); *Martin v. Memorial Hosp.*, 86 F.3d 1391, 1396-97 (3d Cir. 1996) (clear articulation prong is a question of law). RG&E has not identified any New York statute or regulation that authorizes agreements between utilities and cogenerators not to compete with one another.<sup>16</sup> In fact, far from articulating a policy to displace competition, the New York PSC has recognized the benefits of competition and has adopted a policy that seeks to promote competition by expressly allowing for cogeneration and for the sale of cogenerated

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<sup>15</sup> *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 594-95 & n.31 (1976).

<sup>16</sup> Defendant argues that the “clear articulation” requirement means only that its otherwise illegal conduct must be shown to be a “foreseeable result” of some state policy. Defendant’s Memorandum at 8. RG&E misstates the law. The foreseeability test set forth by the Supreme Court and applied in *Cine 42nd Street Theater v. Nederlander Org., Inc.*, 790 F.2d 1032 (2d Cir. 1986) (cited by Defendant), is whether the anticompetitive effects are a foreseeable result of the authorized conduct. *Town of Hallie*, 471 U.S. at 42; *see also Cine 42nd Street*, 790 F.2d at 1042. The underlying conduct must still be authorized by the state. RG&E’s reading would dispense with the requirement of finding an express authorization for the conduct, which is the necessary predicate for the Supreme Court’s foreseeability test. To the extent that *Nuggett Hydro Electric, L.P. v. Pacific Gas & Electric Co.*, 981 F.2d 429 (9th Cir. 1992), *cert. denied*, 508 U.S. 908 (1993), implies a different test, it has been rejected by the Ninth Circuit itself. *See Columbia Steel Casting*, 111 F.3d at 1443.

electricity by non-utilities.<sup>17</sup> And the governing statute expressly authorizes companies to sell power that is generated “by the producer solely from one or more co-generation . . . facilities or distributed solely from one or more of such facilities to users located at or near a project site.” PSL § 2 (13).<sup>18</sup>

In recognition of the competition from cogenerators that its policies were intended to encourage, the State has eased regulatory restrictions on utilities like RG&E, so that they may respond to cogenerators -- not by eliminating their competition, but by lowering their rates to compete against them. The PSC thus implemented its “flexible rate program” in 1993 in order to give “*utilities the flexibility to compete with their largest customers’ supply options . . .*” by reducing their prices. *Re Competitive Opportunities Available to Customers of Electric and Gas Service*, 93-M-0229, Order Instituting Proceeding (March 19, 1993) (emphasis added).<sup>19</sup>

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<sup>17</sup> The PSC put it this way in its March 19, 1993 Flexible Rate Order at 4:

“From a resource point of view, there may be some inherent advantages to alternative energy sources when large customers choose to cogenerate: the efficiency of resource consumption (fuel use) increases because the thermal energy incidental to electric generation is captured, thereby yielding a resource advantage as well as an environmental improvement.”

<sup>18</sup> The legislature also empowered the PSC to exempt companies that generate electricity that is “incidental” to their main businesses from full keeping of accounts and books of that “incidental” electric business. PSL § 66(13). The state did not limit this to situations where there is no “unutilized capacity” in the local utility. Defendant’s Memorandum at 21-23.

<sup>19</sup> Flexible tariffs do not specify a single price in the way conventional industrial tariffs do. Rather, they set forth conditions of eligibility required to demonstrate that the customer has a valid competitive alternative so it can negotiate effectively. Among other things, the new tariffs must include a minimum price that is no lower than the utility’s incremental variable cost. *See Opinion and Order Regarding Flexible Rates*, July 11, 1994 (“Opinion 94-15”), submitted as Ex. C to Defendant’s Motion; *see also* RG&E’s S.C. 10 Tariff, included as Ex. I to Plaintiff United States’ Statement Setting Forth Specific Facts as to Which There is

RG&E ignores these PSC policies promoting competition between utilities and cogenerators and, instead, cites generally to PSL § 66(12b), which it says reflects “a policy of the State of New York to encourage the full utilization of utility facilities to avoid increase in the cost of providing service.” Defendant’s Memorandum at 10.<sup>20</sup> RG&E’s broad reading of § 66(12b) is unsupported by the statute itself and is inconsistent with other provisions of the statute, including, for example, the above-referenced section that authorizes cogenerators to distribute electricity to users located at or near a project site regardless of whether doing so will cause the utility to experience a “loss of customers.” PSL § 2(13). RG&E’s argument is, in any event, immaterial because even if the statute did embrace the broad, general policy about facility utilization that RG&E purports to find in it, it would still fall far short of a clearly articulated policy to displace competition, and permit agreements of the type at issue here, that RG&E must establish in order to satisfy the first element of the state action defense. *See, e.g., Columbia Steel Casting*, 111 F.3d at 1436-37 (“state’s intent to *displace competition with regulation*” must be clearly articulated) (emphasis added).

Indeed, the hollowness of RG&E’s position is made clear by its final argument -- that the legislature empowered the PSC to create “special tariff classifications and discount rates” in order to “prevent the loss of those customers from the utility system.” Defendant’s Memorandum at 10. That is precisely the point: New York State decided that utilities should *compete* in order to retain customers. There is nothing to suggest that New York intended for its utilities to avoid competition by entering into anticompetitive agreements with cogenerators.

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a Genuine Issue in Opposition to Defendant’s Motion for Summary Judgment.

<sup>20</sup> PSL § 66(12b) is set out in full in Ex. A to Defendant’s Motion for Summary Judgment.



The flexible rate program authorizes competition, but it does not protect utilities from losses imposed by a competitive marketplace. *See In re Energy Ass'n of New York State v. PSC*, 653 N.Y.S.2d 502, 514 (N.Y. Sup. 1996).

b. RG&E Has Not Demonstrated that the State “Actively Supervised” Its Agreement Not to Compete with UR

To prevail on its state action defense, RG&E must also show that the state “actively supervised” its anticompetitive agreement. *Ticor*, 504 U.S. at 635. Specifically, RG&E must show that the state “exercised sufficient independent judgment and control so that the details of [its agreement with UR] have been established as a product of deliberate state intervention, not simply by agreement among private parties.” *Id.* at 634-35. RG&E cannot come close to satisfying this requirement.

As evidence of active PSC supervision, RG&E relies entirely on the filing of its general S.C. 10 tariff and the initial individual service agreement with the PSC. But there is no evidence, and RG&E does not even suggest, that the PSC reviewed the agreement or issued any kind of an order “approving” it. It is well established that proof of mere filing of a tariff containing an anticompetitive provision does not meet the “active state supervision” criterion. *Cantor*, 428 U.S. at 594-95 & n.31 (anticompetitive program of free light bulb distribution not granted state action immunity even when provision had been part of tariffs for decades and required state commission approval to change).

That the PSC did not review or supervise RG&E's filing is not surprising. As RG&E itself argued before the PSC, regulatory review of flexible tariff contracts would undermine the very purpose of permitting competition and would amount to PSC “micro management” of its

operations. *See* RG&E Filing in Response to March 1993 Rate Order.<sup>21</sup> The simple filing by RG&E does not amount to “active state supervision” of the agreement not to compete.

**2. RG&E's Argument That Its Agreement With UR "Does Not Impact Competition" Is Wrong, Both as a Matter of Law and as a Matter of Fact**

In the last few pages of its Memorandum, RG&E argues that its agreement barring competition from UR is not illegal because, RG&E alleges, UR did not intend to sell excess electricity and the PSC would have withheld the permits necessary for it to do so. Defendant’s Memorandum at 21-23.

As to the first point, the Court need go no further than the agreement itself to determine that, in contrast to RG&E’s statements now, at the time of the agreement it viewed UR as a genuine competitor, capable of causing it to lose important customers. RG&E offered substantial discounts and other payments to UR in exchange for its commitment not to solicit RG&E customers. Indeed, RG&E itself admits that it feared price competition: Mr. Richards was concerned that other customers could demand discounts if UR began selling power in RG&E’s market. Richards Depo. at 252.<sup>22</sup> Moreover, the Court need not examine the

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<sup>21</sup> Defendant’s argument that the PSC policy authorizing flexible rate tariffs immunizes UR’s discounted electric rate is a “straw man.” The United States is not challenging RG&E’s S.C. 10 tariff or the price for electricity negotiated between RG&E and UR. Rather, the United States is challenging the agreement not to compete.

<sup>22</sup> RG&E relies entirely on the statement of one officer of the University that he did not expect the University “to sell the plant output to anyone other than RG&E” and that to the best of his knowledge selling in competition with RG&E “was not the expectation” of others he knew at the University. Greene Aff. ¶13. But even Greene concedes University employees were actively exploring the option of selling the output of the plant in competition with RG&E. Greene Aff. ¶15. Greene's testimony is plainly insufficient to prove that UR would not have sold electricity in competition with RG&E.

anticompetitive effects of an agreement, like RG&E's agreement with UR, that is illegal *per se*. Anticompetitive effects from such agreements are presumed as a matter of law. *Trial Lawyers Ass'n*, 493 U.S. at 435 & nn.16-18.

The cases cited by Defendant are not to the contrary, because the excluded firms in those cases did not have the ability to compete. See *Transsource Int'l, Inc. v. Trinity Indus., Inc.*, 725 F.2d 274, 280 (5th Cir. 1984) (rail car marketing company with only \$1,000 in assets lacked financial resources to compete in rail car manufacturing); *TechniCAL, Inc. v. Allpax Prod., Inc.*, 786 F. Supp. 581, 586 & n.12 (E.D. La.) (firm providing computer services to food sterilization industry not able to compete in manufacture and sale of sterilization equipment because it had never made or sold equipment), *aff'd*, 977 F.2d 578 (5th Cir. 1992). By contrast, UR had the capacity and intention to enter into competition with RG&E.<sup>23</sup>

No doubt recognizing this flaw in its case, RG&E argues that the PSC would not permit UR to sell electricity in competition with RG&E. Defendant's Memorandum at 21-23. But under New York law at the time of the agreement, and now, UR would not have needed any permit to sell power to any of the several important commercial customers located adjacent to its new steam plant. See PSL § 2(13). And RG&E makes no showing that the University would have faced any difficulty obtaining a permit to serve more distant customers. Where, as here, a party made a decision to build a new facility that could be used to compete, the New York

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<sup>23</sup> The *TechniCAL* court did state that the plaintiff was not a potential competitor because it had no "intention" of entering the market, but the court made clear that its conclusion was based on the complete absence of any steps toward entry. See 786 F. Supp. at 586 & n.12. Here, by contrast, abundant evidence shows that the University had taken steps towards entry. The other district court case cited, *TV Communications Network, Inc. v. ESPN Inc.*, 767 F. Supp. 1062, 1075 (D. Colo. 1991), is inapplicable because the complaint there was not concerned with competition between the parties to the challenged agreement.

authorities had in place a system of permits regulating but also enabling entry of new competition.

Defendant cites only one case to support its position, *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co.*, 113 F.3d 405 (3d Cir.), *petition for cert. filed*, 66 U.S.L.W. 3178 (U.S. Sup. Ct. Sept. 2, 1997), and it is inapposite. In that case the plaintiff, a cogenerator, alleged that PP&L had monopolized the market for retail electric service. The Third Circuit affirmed dismissal of the case because, under Pennsylvania law prevailing when the complaint was filed, the plaintiff was *prohibited* from making retail sales and because the plaintiff there anticipated no uncommitted output available for competitive sales to retail customers. *Id.* at 415. The Court further held that the effect of a new law phasing in retail electric competition, which was enacted only shortly before oral argument, was too speculative for the plaintiff to rely upon. *Id.* at 416.

New York's law is quite different. Defendant does not contest that, at the time of the University's agreement with RG&E, New York law expressly provided for retail sales by cogeneration facilities and authorized cogeneration facilities to sell power in the immediately surrounding area without any further permits. *See* PSL § 66. The State of New York thus did not prevent UR from selling to other RG&E customers. It is RG&E's unlawful agreement that prevented such competition, by ensuring that UR's plant would not be built.

#### **IV. CONCLUSION**

RG&E's agreement not to compete is a *per se* violation of Section One of the Sherman Act. It was not entered into pursuant to any clearly articulated state policy to displace

competition. Accordingly, the United States' motion for summary judgment should be granted, and RG&E's motion for summary judgment should be denied.

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