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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of)
)
Niagara Mohawk Power Corporation,)
New York State Electric & Gas)
Corporation,)
And)
AmerGen Energy Company, LLC)
(Nine Mile Point, Units 1 & 2))

ADJ
Docket Nos. 50-220 & 50-410 -LT
License Nos. DPR-63 and NPF-69

RESPONSE OF ROCHESTER GAS AND ELECTRIC CORPORATION TO THE RESPONSES TO ITS NOTIFICATION OF THE EXERCISE OF THE RIGHT OF FIRST REFUSAL AND AMERGEN'S REQUEST TO LIFT THE TEMPORARY SUSPENSION

I. INTRODUCTION

Pursuant to Subpart M of the Nuclear Regulatory Commission's ("NRC" or "Commission") Rules of Practice and Procedure, specifically 10 C.F.R. § 2.1325, Rochester Gas and Electric Corporation ("RG&E") hereby files its response to AmerGen Energy Company, L.L.C.'s ("AmerGen") response to RG&E's notification of exercise of its right of first refusal ("ROFR") and AmerGen's request that the NRC lift the temporary suspension imposed in the above-captioned license transfer proceeding. In addition, RG&E briefly responds to Niagara Mohawk Power Corporation's ("Niagara Mohawk") response to RG&E's notification. As set forth below, AmerGen raises issues beyond the scope of the Commission's statutory authority, and has otherwise failed to substantiate its request to lift the temporary suspension and expedite proceedings under Subpart M. Accordingly, AmerGen's request should be denied, and this

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proceeding (as well as the NRC Staff's review of the present license transfer application) should be suspended indefinitely.¹

II. BACKGROUND

The Basic Agreement dated September 22, 1975, executed among Niagara Mohawk, New York State Electric & Gas Corporation ("NYSEG"), Central Hudson Gas and Electric Corporation ("CHG&E"), the Long Island Lighting Company (now Long Island Power Authority ("LIPA")), and RG&E, governs the construction, operation and ownership rights of the co-tenants of Nine Mile Point Unit 2 ("NMP 2"). The Basic Agreement was approved unconditionally by the New York State Public Service Commission ("NYPSC") in 1977.²

The Basic Agreement contains a provision that grants to each of the original non-operating co-tenants a ROFR in the event that Niagara Mohawk desires to assign or transfer its percentage interest in NMP 2. Specifically, Section 13.05(b)(i) provides:

Upon receipt of a bona fide offer to purchase from a third party, that offer shall be transmitted in writing to the other Parties and the other Parties . . . shall have the right within one hundred and eighty (180) days from the date of transmittal of such bona fide third party offer . . . to make an offer to purchase the Niagara Mohawk Respective

¹ Because RG&E's notification of its exercise of the ROFR did not trigger a right to respond, Niagara Mohawk's and AmerGen's filings must be taken as "requests" pursuant to 10 C.F.R. § 2.1325 to which RG&E has the right to respond. Alternatively, if viewed as merely a response to RG&E's notification, Niagara Mohawk and AmerGen were without express authority to file such responses under Subpart M, the Commission's Memorandum and Order (CLI-99-30) dated December 22, 1999 (the "Order"), or pursuant to a motion for leave to file responses, and thus they may be stricken from the record as unauthorized submissions.

² Opinion No. 77-23 in Cases 27103 and 27120, Opinion and Order Approving Petitions Regarding Roseton and Nine Mile Point No. 2 Generating Stations (issued December 5, 1977).

Percentage upon terms at least as favorable as those contained in the bona fide third party offer.³

Section 13.04(b)(i) of the Basic Agreement contains a similar provision that pertains to the exercise of a ROFR in the event that NYSEG, or another non-operating co-tenant, desires to assign or transfer its Respective Percentage to a third party. The ROFR provides protection and a preferred position for the existing co-owners by affording them the right to make a preemptive offer to purchase the interest being sold upon terms at least as favorable as those contained in a bona fide third-party offer.

On December 21, 1999, RG&E formally exercised its ROFR by a notice delivered personally to the Chief Executive Officer of Niagara Mohawk. RG&E also telecopied and sent by overnight delivery a notice to the President of NYSEG. Because the third party (AmerGen) offer forwarded to RG&E had been accepted by Niagara Mohawk (and by NYSEG), and hence was in the form of a contract, RG&E had the right to take that contract and to "step into AmerGen's shoes."⁴ That is what RG&E elected to do. Having adopted the terms and conditions of the now superseded AmerGen contracts, it is obvious that RG&E has "matched" those terms and conditions, and that the financial terms of RG&E's "offer," being identical, are "at least as favorable" as those in the AmerGen "offer."⁵

³ See Petition of Central Hudson Gas & Electric Corporation, Long Island Power Authority, and Rochester Gas and Electric Corporation for Leave to Intervene and Request for Hearing dated October 20, 1999, at Exhibit B.

⁴ Although this is a matter of contract law, it is not necessary for purposes of this response to resolve or rule upon it, and this is not the appropriate forum in which to adjudicate any dispute that ultimately may exist regarding such contract law.

⁵ RG&E proposed a reallocation between Nine Mile Point Unit 1 ("NMP 1") and NMP 2 of the same total decommissioning funds provided that doing so will have no material adverse financial impact on either Niagara Mohawk or RG&E.

Pursuant to the Order, the NRC imposed a temporary suspension of the above-captioned license transfer proceeding. When the Commission granted the temporary suspension, it concluded that "[i]f any or all of the co-owners exercise their asserted right of first refusal under the Basic Agreement to buy Niagara Mohawk's and New York Electric's interest in Unit 2, some or all issues would be rendered moot." (Order at 8.) As stated in our notification filed pursuant to the Order, RG&E has timely exercised its ROFR under the Basic Agreement to buy Niagara Mohawk's and NYSEG's interests in NMP 2 and Niagara Mohawk's interest in NMP 1.

III. RESPONSE

A. THE NIAGARA MOHAWK RESPONSE

Niagara Mohawk's response to RG&E's December 23rd notification indicates that it is currently evaluating the offer presented by RG&E to determine "whether the terms of the RG&E offer are as favorable as those contained in the AmerGen offer." (Response of Niagara Mohawk at 2.) RG&E expects that Niagara Mohawk and NYSEG will soon accept that, as a matter of law, they have a contract with RG&E as a result of the ROFR, as applied to an accepted third party offer, and RG&E's exercise of its right, and that a joint license transfer application will be submitted in the near future.

Niagara Mohawk respectfully disagrees with RG&E's endorsement of the Commission's conclusion that the proceedings "may well be rendered moot in the immediate future" (Order at 9), suggesting that the AmerGen proposal remains "in full force and effect" pending RG&E's receipt of all federal and state regulatory approvals. (Response of Niagara Mohawk at 2.) RG&E submits that the exercise of its ROFR has

the effect of preempting AmerGen's contracts.⁶ In fact, the NMP 2 Asset Purchase Agreement, attached to the Joint Application at Tab 4 (page 89), expressly conditions the sale of NMP 2 on the expiration or waiver by the co-tenants of the ROFR. In any event, as discussed below, any contractual issues concerning the effect of RG&E's exercise of its ROFR need not be considered in the first instance by the NRC. If any such issues cannot be resolved by the parties, they would have to be resolved by the appropriate federal, state or local forum.

B. AMERGEN'S REQUEST TO LIFT THE TEMPORARY SUSPENSION IS UNSUPPORTED AND SHOULD BE DENIED AS A MATTER OF LAW

AmerGen's response claims that: (1) continuation of the suspension constitutes "inappropriate prejudgment" of the continuing vitality of AmerGen's application; and (2) the temporary suspension is contrary to the Commission's policies underlying the adoption of Subpart M. (Response of AmerGen at 2-3.) As demonstrated below, AmerGen's request is insufficient as a matter of law and should be denied.

Under Commission precedent, to justify a request to lift the suspension imposed by the Commission, AmerGen must demonstrate an intervening change in circumstances or new evidence received that establishes that a suspension of the proceeding is no longer justified. *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), 42 N.R.C. 1, CLI-95-10 (1995) (holding temporary stay of discovery on intervenor's contention no longer necessary in light of new facts received in a license renewal application proceeding that probably rendered the contention moot.) AmerGen's request presents no changed circumstances and for an

⁶ To hold otherwise would require the Commission to needlessly duplicate efforts and maintain parallel proceedings to consider mutually exclusive applications.

obvious reason: the sole intervening change (RG&E's actual exercise of its ROFR) does not warrant lifting the temporary suspension, but rather supports its continuation. In the absence of any demonstration by AmerGen of changed circumstances, the present suspension should continue indefinitely and any further NRC Staff action on the pending application should be halted.⁷

AmerGen asserts that maintaining the temporary suspension would "necessarily . . . constitute an inappropriate prejudgment of the complex contractual, commercial, and state regulatory issues associated with this right of first refusal" Notwithstanding that RG&E's exercise of its ROFR does not raise complex contractual or commercial issues, AmerGen's assertion presupposes that the NRC is statutorily authorized to adjudicate contractual and commercial matters.⁸ As the NRC has recognized, it is not the proper forum to resolve such matters. *See Gulf States Utilities Co. (River Bend Station, Unit 1), LBP-94-3, 39 N.R.C. 31, 39 n. 5 (1994)*("Absent radiological health and safety concerns, environmental concerns, or antitrust matters subject to NRC license conditions, contractual disputes between co-owners in nuclear facilities ordinarily should be resolved by the appropriate state, local, or federal court.") Consideration of the effect of RG&E's ROFR is a private contractual matter

⁷ As a result of RG&E exercising its ROFR, in the New York State Public Service Commission proceedings in the same matter (Cases 99-E-0933 and 99-E-0935), Administrative Law Judge Bouteiller issued an order on January 7, 1999 holding the proceedings in abeyance.

⁸ AmerGen conveniently ignores its previous concession that adjudication of contractual matters between co-owners of a nuclear generating facility is beyond the scope of NRC authority. AmerGen specifically stated "the multiple issues Petitioners raise in their Petition that relate to the present and future business relationships between Petitioners and the Applicants are beyond the scope of this proceeding." (Answer of AmerGen to Motion of RG&E, CHG&E and LIPA for Leave to Intervene and Request for a Hearing at 6, n. 3.)

properly adjudicated, if necessary, in a federal, state or local forum and is not a proper matter for NRC consideration.

AmerGen's assertion that maintaining the temporary suspension would "be contrary to the Commission's policies underlying the adoption of Subpart M which call for expedited review and decision in license transfer proceedings" is an attack on the Commission's inherent authority to govern adjudicatory proceedings. The Commission expressly considered and rejected this argument in its Order. The Commission unequivocally concluded that "We do not view a temporary suspension of this proceeding as contravening our stated policy of expedition in Subpart M proceedings." (Order at 9.) AmerGen's attempt to revisit this issue must be denied.

AmerGen also casually suggests that its application merits the Commission's active consideration because NMP 1 is "a facility not covered by the Basic Agreement," and RG&E's retention of an affiliate of Entergy Nuclear Corporation ("Entergy") to operate the facility somehow makes Entergy the "true beneficiary" of the exercise of RG&E's ROFR. (Response of AmerGen at 2.) Niagara Mohawk and AmerGen, however, have made clear that any sale of NMP 2 is contingent on the purchase of NMP 1 as well. As a condition of closing, the NMP 2 Asset Purchase Agreement (at page 89) requires that the simultaneous sale of NMP 1 under the NMP 1 Asset Purchase Agreement to the same "Buyer" shall have been completed. Similarly, the NMP 1 Asset Purchase Agreement, attached to the Joint Application at Tab 3 (page 83), includes a condition of closing that require the purchase of NMP 2 by the same "Buyer" prior to or concurrent with the closing for NMP 1.

Moreover, Niagara Mohawk repeatedly has informed RG&E that a key and inseparable term of the Asset Purchase Agreement with AmerGen for the sale of NMP 2 is the coincident sale of NMP 1, and that Niagara Mohawk would not accept from

RG&E an offer to acquire NMP 2 unless the NMP 1 plant and liabilities were adequately addressed as part of the offer. (Letter from Davis to Richards of 12/16/99, at 2.) Niagara Mohawk has further advised RG&E that the terms of the AmerGen transaction require the purchase of both Nine Mile 1 and the interests in Nine Mile 2, and that there is no way to bifurcate the transactions and provide an offer "at least as favorable" as prescribed in the Basic Agreement. Thus, it is utterly disingenuous for AmerGen to suggest that the purchase of NMP 1 and NMP 2 can be bifurcated.

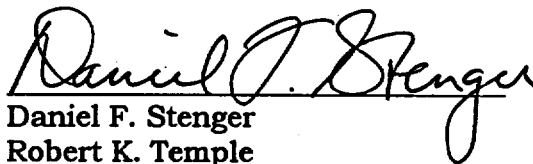
AmerGen's assertion that Entergy is the beneficiary of RG&E's exercise of its ROFR is similarly baseless. RG&E exercised its ROFR in its own name and will acquire the ownership interests of Niagara Mohawk and NYSEG in NMP 1 and NMP 2 in its own right. Thus, there is no basis for AmerGen to contend that Entergy is the "true beneficiary" of RG&E's exercise of the ROFR. It is clear then that AmerGen's assertions are unfounded, and if AmerGen were to pursue these unsupported claims, it must do so in a proper forum other than the NRC.

IV. CONCLUSION

AmerGen's request to lift the temporary suspension should be denied as AmerGen has presented no legitimate grounds for moving forward. The proceedings should be indefinitely suspended and the NRC should halt further Staff review of AmerGen's application as an unnecessary expenditure of resources on a proceeding

that has been mooted by the exercise of RG&E's valid contractual right under the Basic Agreement.

Respectfully submitted,



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DATED: January 10, 2000

**UNITED STATES OF AMERICA
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing RESPONSE OF ROCHESTER GAS AND ELECTRIC CORPORATION TO THE RESPONSES TO ITS NOTIFICATION OF THE EXERCISE OF THE RIGHT OF FIRST REFUSAL AND AMERGEN'S REQUEST TO LIFT THE TEMPORARY SUSPENSION were served upon the following persons by e-mail in accordance with the requirements of 10 C.F.R. § 2.1313 this 10th day of January 2000, and a courtesy hard copy pursuant to the Commission's Memorandum and Order (CLI-99-30) by U.S. mail, first class postage prepaid:

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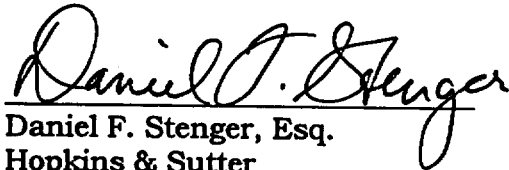
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