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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))

OFFICE OF THE)
GENERAL)
ADJUDICATOR)
Docket Nos. 50-220 & 50-410)
License Nos. DPR-63 and NPF-69)

**MOTION OF ROCHESTER GAS AND ELECTRIC
CORPORATION TO STRIKE THE UNAUTHORIZED
REPLY OF AMERGEN ENERGY COMPANY, LLC**

I. INTRODUCTION

Pursuant to Subpart M of the Nuclear Regulatory Commission's ("NRC" or "Commission") Rules of Practice and Procedure, Rochester Gas and Electric Corporation ("RG&E") hereby files its motion to strike the reply of AmerGen Energy Company, LLC ("AmerGen") submitted January 18, 2000. As explained below, RG&E's response to AmerGen's request to lift the temporary suspension of these proceedings triggered no right of reply under Subpart M, and thus AmerGen's reply is unauthorized and should be stricken from the record. AmerGen's unauthorized reply should be stricken for the further reason that it misrepresents RG&E's position and misinterprets the Commission's action.

II. BACKGROUND

On December 23, 1999, RG&E filed its Notification of Exercise of Right of First Refusal ("RG&E's Notification") in accordance with the Commission's Memorandum and Order dated December 22, 1999, CLI-99-30 (the "Order"). The Order temporarily suspended the above-captioned license transfer proceedings based on the finding 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.)

On January 3, 2000, AmerGen and Niagara Mohawk Power Corporation ("Niagara Mohawk") filed separate "responses" to RG&E's Notification. AmerGen's response concurrently requested that the Commission lift the temporary suspension on the grounds 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.

On January 10, 2000, as provided by 10 C.F.R. § 2.1325(b), RG&E timely filed its response opposing AmerGen's request.¹ No further filings are contemplated under Subpart M, which governs the present license transfer proceedings. Subsequently, however, on January 18, 2000, AmerGen filed an unauthorized "Reply to the Response of Rochester Gas and Electric Corporation to AmerGen's Request to Lift the Temporary Suspension" ("Reply"). This unauthorized reply was made without leave to file a reply and without any prior notice to RG&E.

¹ 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 ("RG&E Response").

III. ARGUMENT

A. AMERGEN'S UNAUTHORIZED REPLY SHOULD BE STRICKEN FROM THE RECORD BECAUSE COMMISSION PROCEDURES DO NOT PROVIDE FOR SUCH SUBMISSIONS

Subpart M's provisions governing motions and requests are explicit and unambiguous: there is no provision for a party to file a "reply" to a response to a motion or request it has made. In pertinent part, 10 C.F.R. § 2.1325 provides:

(a) Motions and requests shall be addressed to the Presiding Officer, and, if written, also filed with the Secretary and served on other participants.

(b) Other participants may respond to the motion or request. Responses to written motions or requests shall be filed within 5 days after service unless the Commission or Presiding Officer directs otherwise.

Conspicuously absent from these controlling provisions is any express or implied authorization for AmerGen to submit its self-styled Reply.² Thus, AmerGen's January 3, 2000 submission was its initial and only opportunity to sustain its burden of justifying its request to lift the temporary suspension.

The appropriate and indeed only remedy for a party's failure to comply with the NRC's Rules of Practice and Procedure is to remove the offending submission from the record. The NRC has not hesitated to grant a party's motion to strike a reply that was unauthorized by Subpart M or Commission order. *See, e.g., North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-27, 50 NRC ___, slip op. at 11 (1999)

² Although AmerGen only makes reference to its "request," its January 3 submission was in fact titled a "response." As RG&E stated in its January 10 Response "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 . . . or pursuant to a motion for leave to file responses, and thus they may be stricken from the record as unauthorized submissions." (RG&E Response at 2 n. 1.)

(granting intervenors' motion to strike applicant's unauthorized response in Subpart M license transfer proceeding). AmerGen's attempt to solicit Commission action through an unauthorized filing is highly prejudicial and should not be condoned. Accordingly, AmerGen's Reply should not be considered by the NRC and should be stricken from the record of this proceeding.

**B. AMERGEN'S UNAUTHORIZED REPLY SHOULD BE STRICKEN
BECAUSE IT MISCHARACTERIZES THE COMMISSION'S ACTION
AND RG&E'S RESPONSE**

In its unauthorized Reply, AmerGen asserts that the temporary suspension was imposed solely "to allow Petitioners time to notify the Commission whether they would 'avail themselves of their purchase rights under the operating agreement.'" (Reply at 4.) This assertion fundamentally misapprehends the purpose of the Commission's Order. In essence, AmerGen contends that the Commission's imposition of the temporary suspension was substantively meaningless.

AmerGen's interpretation is belied by the express language of the Order itself, wherein the NRC explicitly stated: "[i]f any or all of the co-owners exercise their asserted right of first refusal . . . some or all issues would be rendered moot." (Order at 8.) Clearly, the Commission's purpose in entering the suspension was to obviate "the expenditure of both public and co-owner funds on a proceeding, part or all of which may well be rendered moot in the immediate future." (*Id.* at 9.) The Commission imposed the temporary suspension in view of the potential that one or more of the co-owners would exercise the right of first refusal ("ROFR"). It is thus nonsensical to suggest, as AmerGen does, that once RG&E had exercised its ROFR, the temporary suspension should be lifted.

With respect to RG&E's exercise of its ROFR, AmerGen states at page 6 of its Reply:

Serious questions exist concerning the legitimacy and validity of RG&E's actions under the terms of the NMP 2 Basic Agreement and New York law. Indeed, RG&E itself acknowledged such potential commercial issues in its Response, i.e., "issues may very well be raised regarding the effect of its exercise of the right of first refusal." RG&E Response at 5.

Significantly, however, the quoted language AmerGen attributes to RG&E does not appear at page 5 of RG&E's Response, or indeed anywhere in RG&E's Response. Thus, AmerGen's attribution of this position to RG&E and subsequent representation of it to the Commission as a basis for lifting the temporary suspension is materially inaccurate and provides a further basis to strike AmerGen's Reply.³

It is also patently untrue to imply, as AmerGen does (Reply at 6), that RG&E's exercise of its ROFR was interposed solely to obstruct AmerGen's deal with Niagara Mohawk and New York State Electric & Gas Corporation. To the contrary, RG&E acted justifiably and in good faith to protect its contractual and ownership rights after considerable study, expense and due diligence. RG&E has, in fact, entered into a lease and operating agreement by which an affiliate of Entergy Operations, Inc. would operate the Nine Mile Point facility for a defined period. In these circumstances, AmerGen's thinly veiled and unsubstantiated assertion of bad faith should not be countenanced.

The Commission's suspension of this proceeding is eminently reasonable and consistent with NRC precedent. Once the interest of an applicant providing the Commission with jurisdiction has expired, the NRC is no longer obligated to maintain

³ Regardless of AmerGen's inexplicable error, RG&E never questioned whether its exercise of the ROFR is permitted under New York law. To the contrary, RG&E specifically explained that, if any party sought to raise any private contractual matters attendant upon the exercise of RG&E's ROFR, "they would have to be resolved by the appropriate federal, state or local forum." (RG&E Response at 6.)

the proceedings. See *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 NRC 153, 154 (1980) (adjudicatory tribunals have “the inherent authority . . . to dismiss those matters placed before them which have been mooted by supervening developments”). As foreseen by the Commission in its Order here, the present proceeding has been rendered moot by virtue of RG&E’s exercise of its ROFR.⁴

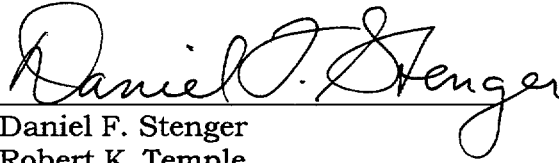
Finally, AmerGen asserts that “[d]espite RG&E’s suggestion to the contrary, the NYPSC [New York Public Service Commission] is moving forward with its Section 70 proceeding for the transfer of NMP 1 and 2 to AmerGen.” (Reply at 5.) The attached order of the presiding Administrative Law Judge in the NYPSC case shows, however, that the adjudicatory proceedings concerning the application for approval of the transfer to AmerGen were ordered held in abeyance. (Order of Judge Bouteiller, dated January 7, 2000.) Furthermore, by letter dated January 26, 2000, the NYPSC Staff indicated its intent to file a motion to dismiss the Section 70 proceedings on the ground that the transfer to AmerGen could not be shown to be in the public interest.

IV. CONCLUSION

AmerGen’s Reply is not authorized by the NRC’s procedures governing this proceeding, and no good cause has been shown for departure from those procedures. Further, AmerGen’s unauthorized Reply contains material misstatements concerning RG&E’s position and mischaracterizes the Commission’s action. For these reasons, RG&E respectfully requests that the Commission strike AmerGen’s Reply from the record of this proceeding.

⁴ AmerGen also incorrectly asserts that “RG&E implies that the NRC staff has suspended their review of the pending Application.” (Reply at 10 n. 4.) RG&E never made such an assertion. Rather, RG&E simply recommended that, in light of RG&E’s exercise of its ROFR, “any further NRC Staff action on the pending application *should* be halted.” (RG&E Response at 6 (emphasis added).)

Respectfully submitted,

A handwritten signature in cursive script that reads "Daniel F. Stenger". The signature is written in black ink and is positioned above a horizontal line.

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DATED: January 28, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Niagara Mohawk Power Corporation,
New York State Electric & Gas
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Docket Nos. 50-220 & 50-410
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OFFICE OF THE GENERAL COUNSEL
RULEMAKING AND ADJUDICATION
ADJUDICATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing MOTION OF ROCHESTER GAS AND ELECTRIC CORPORATION TO STRIKE THE UNAUTHORIZED REPLY OF AMERGEN ENERGY COMPANY, LLC were served upon the following persons by e-mail in accordance with the requirements of 10 C.F.R. § 2.1313 this 28th day of January 2000, with a hard copy provided pursuant to the Commission's Memorandum and Order (CLI-99-30) by U.S. mail, first class postage prepaid where indicated by an asterisk (*):

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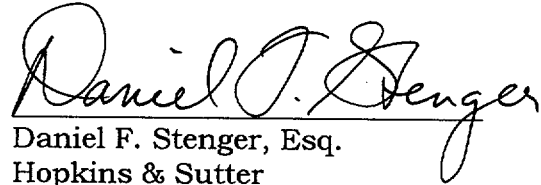
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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

- CASE 99-E-0933 - Joint Petition of Niagara Mohawk Power Corporation, New York State Electric & Gas Corporation and AmerGen Energy Company, L.L.C. for Authority Under Public Service Law Section 70 to Transfer Certain Generating and Related Assets and for Related Approvals.
- CASE 99-E-0935 - Petition of AmerGen Energy Company, L.L.C. for a Declaratory Ruling Granting Lightened Regulation in Connection with its Purchase of Interests in Nine Mile Point Nuclear Generating Facilities.

RULING HOLDING CASE SCHEDULE IN
ABEYANCE PENDING SETTLEMENT NEGOTIATIONS

(Issued January 7, 2000)

WILLIAM BOUTEILLER, Administrative Law Judge:

By letter dated December 23, 1999, Department of Public Service Staff (Staff) has proposed that the schedule in this case be held in abeyance pending settlement discussions among the parties. Staff has served a *Notice of Conference* on the parties calling for initial settlement negotiations on January 10, 2000. And Administrative Law Judge Robert Garlin has been assigned to serve as the Settlement Judge in these proceedings.

Responses to Staff's proposal were filed on or about January 5, 2000 by Rochester Gas & Electric Corporation (RG&E); AmerGen Energy Company, LLC (AmerGen); Niagara Mohawk Power Corporation (Niagara Mohawk); the State Department of Law (DOL); Local 97, International Brotherhood of Electric Workers and Local 1-2, Utility Workers Union of America (the Unions); Multiple Intervenors (MI); Oswego County and the Oswego City School District (Oswego County & Schools); and, the City of Oswego (the City).

RG&E and Niagara Mohawk agree with Staff that the current litigation schedule should be suspended indefinitely. DOL and the Unions also support Staff's motion. MI and Oswego County & Schools agree that an extension in the current schedule is necessary for the parties to consider RG&E's proposal

concerning the Nine Mile 1 and 2 generating facilities and to address it in the testimony they submit. Similarly, the City concurs that time should be provided to consider RG&E's proposal and for settlement negotiations.

AmerGen says it understands the reasons for the proposed postponement; nonetheless, it urges Staff, and the other parties, to disclose their positions on the contested issues sooner rather than later.

* * *

Staff's motion is uncontested and it is eminently reasonable in light of the recent action taken by RG&E and the parties' plans to consider a negotiated settlement of the contested issues in these proceedings. Accordingly, the schedule adopted in these proceedings on October 25, 1999¹ will be held in abeyance pending the results of the parties' settlement discussions.

(SIGNED)

WILLIAM BOUTEILLER

¹ Cases 99-E-0933 and 99-E-0935, Ruling Modifying Schedule (issued October 25, 1999).