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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

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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 COUNSEL
ADJUDICATIVE DIVISION
Docket Nos. 50-~~222~~ & 50-410 -LT
License Nos. DPR-63 and NPF-69
50-220/410-LT

AMERGEN'S RESPONSE TO ROCHESTER GAS
AND ELECTRIC CORPORATION'S MOTION TO STRIKE

AmerGen Energy Company, LLC ("AmerGen") respectfully submits this Response to the Motion of Rochester Gas and Electric Corporation ("RG&E") to Strike AmerGen's Reply dated January 18, 2000. RG&E contends that AmerGen's Reply should be stricken because (1) it is unauthorized and (2) it allegedly mischaracterizes the Commission's Order and RG&E's Response. RG&E's arguments are flawed, and for the reasons set forth below, RG&E's motion to strike should be denied, and the NRC's suspension of these proceedings should be lifted.

As an initial matter, AmerGen agrees that the Commission's rules at 10 CFR § 2.1315 do not provide a party with an affirmative right to file a Reply to a motion or request. The philosophy underlying this rule is to facilitate the prompt and streamlined resolution of any disputes regarding license transfer requests, and therefore, the rules do not contemplate extensive and prolonged pleading and counter-pleading prior to the rendering of decisions. AmerGen wholeheartedly endorses this streamlined process, and in fact, it has consistently urged that the Commission take prompt action consistent with the philosophy underlying the rules.

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The current circumstances present an anomalous situation where the *status quo* is inaction and delay. Under these circumstances, AmerGen's Reply appropriately sought to assist the Commission by providing information and case law supporting the resumption of the Commission's consideration of the dispute pending before it, and the Commission clearly has the discretion to accept AmerGen's pleading. AmerGen once again urges that the Commission issue its decision regarding RG&E's hearing request, and if a hearing is to be granted over AmerGen's objections, AmerGen urges that an appropriate schedule be established to expedite the resolution of any such hearing consistent with the Streamlined Hearing Process established in Subpart M.

RG&E's second argument in support of its motion to strike is likewise unavailing. RG&E first provides a distorted account of AmerGen's position regarding the Commission's Order, and then describes AmerGen's position as "nonsensical." RG&E Motion at 4. Apparently, this is RG&E's basis for stating that AmerGen's Reply "mischaracterizes the Commission's action." *Id.* Notwithstanding RG&E's accusatory language, a pleading is not inappropriate because another party disagrees with the positions reflected therein. AmerGen has expressed its interpretation of the Commission's Order, and RG&E has articulated a contrary view. In the end, the Commission is in the best position both to assess the underlying intentions of its Suspension Order and to re-assess the advisability of continuing that suspension. AmerGen therefore urges that the Commission do so.

RG&E's protestations that AmerGen has misrepresented RG&E's Response are similarly flawed. For example, RG&E takes exception to AmerGen's assertion that even RG&E has acknowledged that its purported exercise of a right of first refusal is not indisputable, and it accuses AmerGen of providing "materially inaccurate" information. RG&E Motion at 5.

However, at pages 4 and 5 of RG&E's Response, RG&E states that "any contractual issues concerning the effect of RG&E's exercise of its [right of first refusal] need not be considered in the first instance by the NRC." AmerGen is therefore quite correct in pointing out that RG&E has acknowledged that "contractual issues" may exist regarding its purported exercise of the right of first refusal.^{1/} As RG&E implies, these issues will be considered "in the first instance" in other forums, and therefore, it is AmerGen's view that the pending NRC proceeding should not be affected by the schedule for resolving issues that are properly addressed elsewhere.

Finally, RG&E appears to suggest that AmerGen's Reply was incorrect in stating that "the NYPSC is moving forward with its Section 70 proceeding," because the schedule for formal adjudicatory proceedings in New York has been held in abeyance. RG&E Motion at 6.

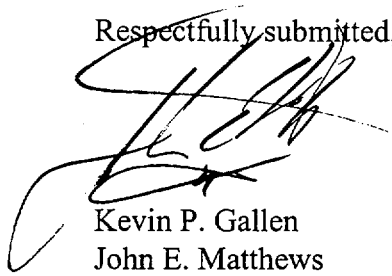
However, the ruling submitted by RG&E itself states that the decision to hold adjudicatory procedures in abeyance was made "in light of the recent action taken by RG&E and the parties' plans to consider a negotiated settlement of the contested issues in these proceedings." NYPSC Order at 3 (emphasis added). It therefore should be made clear that during January, in an effort sanctioned by the NYPSC and *in lieu* of formal proceedings, the parties (including NYPSC Staff) were moving forward with continued activity to resolve the Section 70 proceeding through a settlement, subject to final approval of the NYPSC. As with any negotiations, these discussions may make progress and/or stall from time to time, and the NYPSC may choose to use other procedures. Indeed, due to concern about delay, the administrative law judge recently called for

^{1/} In characterizing the RG&E Response, AmerGen inadvertently included quotation marks at page 6 of its Reply. However, AmerGen's statement regarding RG&E's acknowledgment that contractual issues may exist was and continues to be substantively accurate.

scheduling proposals to restart the hearing process. The NYPSC Staff suggested a schedule for it to file a motion to dismiss, and AmerGen has opposed this approach. (A copy of AmerGen's reply to the NYPSC Staff's proposal is attached.) Whether through settlement discussions or other procedures, AmerGen remains optimistic that, in the end, it will obtain the required approvals and successfully complete its acquisition of Nine Mile Point.

For all of the foregoing reasons, AmerGen respectfully requests that the Commission deny the motion to strike AmerGen's Reply and lift the temporary suspension of this proceeding.

Respectfully submitted,



Kevin P. Gallen
John E. Matthews
Paul J. Zaffuts
Morgan, Lewis & Bockius LLP
1800 M Street, NW
Washington, DC 20036-5869
(202)467-7000
Facsimile: (202)467-7176
E-mail: jemathews@mlb.com

Counsel for AmerGen Energy Company, LLC

Dated: February 1, 2000

CERTIFICATE OF SERVICE

I hereby certify that copies of the AmerGen's Response to the Motion of Rochester Gas and Electric Corporation to Strike AmerGen's Reply were served upon the persons listed below by E-mail with a conforming copy deposited in the U.S. mail, first class, postage prepaid, this 1st day of February, 2000.

Office of the Secretary
U.S. Nuclear Regulatory Commission
Attn: Rulemakings and Adjudications Staff
Washington, D.C. 20555
(E-mail: secy@nrc.gov)

Office of the Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(E-mail: hrb@nrc.gov)

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(E-mail: ogclt@nrc.gov)

Mark J. Wetterhahn, Esq.
Winston & Strawn
1400 L Street, N.W.
Washington, D.C. 20005
(E-mail: mwetterh@winston.com)

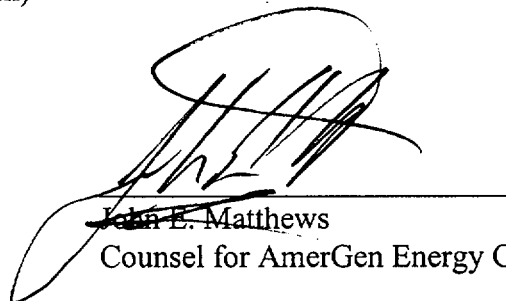
Samuel Behrends IV, Esq.
LeBoeuf, Lamb, Greene & McRae, L.L.P.
1875 Connecticut Avenue, Suite 1200
Washington, D.C. 20009-5728
(E-mail: sbehrend@llgm.com)

Daniel F. Stenger
Hopkins & Sutter
888 16th Street, N.W.
Washington, D.C. 20006
(E-mail: dstenger@hopsut.com)

James M. D'Andrea, Esq.
Keyspan Energy
175 E. Old Country Road
Hicksville, NY 11801
(E-mail: jdandrea@keyspanenergy.com)

Thomas W. Yurik
Rochester Gas and Electric Corp.
89 East Avenue
Rochester, NY 14649
(E-Mail: tom_yurik@rge.com)

Robert J. Glasser, Esq.
Gould & Wilkie, LLP
One Chase Manhattan Plaza
New York, NY 10005
(E-mail: bobglasser@gouldwilkie.com)



John E. Matthews
Counsel for AmerGen Energy Company, LLC

**COHEN, DAX & KOENIG, P.C.
ATTORNEYS**

90 State Street, Suite 1030
Albany, New York 12207
Telephone: (518) 432-1002
Facsimile: (518) 432-1028

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ATTORNEYS

Jeffrey C. Cohen
John W. Dax
Joshua Noah Koenig

90 State Street, Suite 1030
Albany, New York 12207

Telephone: (518) 432-1007
Facsimile: (518) 432-1028
e-mail: cdk@capital.net

Paul C. Rapp
Kimberly A. Johnson
David M. Allen

February 1, 2000

Hon. William L. Bouteiller
Administrative Law Judge
NYS Public Service Commission
3 Empire State Plaza
Albany, New York 12223-1350

Re: Case 99-E-0933

Dear Judge Bouteiller:

This constitutes AmerGen's reply to Staff's procedural proposal dated January 26, 2000. Staff's proposal calls for motions to dismiss the July 1999 joint petition to be served on February 11, responses on February 18 and replies on February 25. Staff apparently would dispense with the filing of testimony and the conduct of hearings, which all parties had expected would be the next step in this already lengthy proceeding.

Staff does not require Your Honor's permission to file a motion. Any party is free to make a motion at any time, pursuant to 16 NYCRR § 3.6. Responses to motions must be served within the time allotted pursuant to Section 3.6(d)(1) – eight, nine or thirteen days, depending on how service is made. Replies to responses are not entertained except in extraordinary circumstances. 16 NYCRR § 3.6(d)(3). The questions posed by Staff's proposal are whether motion practice should take the place of the filing of testimony and the conduct of hearings, and whether special motion procedures should be created. AmerGen believes the answer is no.

Your Honor has called for proposals to reestablish the hearing schedule that was postponed at Staff's request by ruling dated January 7, 2000. AmerGen urges Your Honor to set a schedule for testimony and hearings as previously planned, and to entertain any motions that parties might make pursuant to the procedures provided in the Commission's rules. Staff's proposal to dispense with hearings, to establish in their place a motion schedule, to truncate the time for responses and to afford Staff a reply opportunity would disrupt the course already charted for this proceeding and would

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non-moving party will need only raise a single factual issue to defeat the motion.¹ In short, to the extent that Staff intends to present any facts in support of its motion to dismiss, hearings -- with cross examination and rebuttal opportunities -- would be required to achieve fairness and create a complete record. Indeed, AmerGen is surprised that Staff appears to have prejudged the issues in this case without benefit of any record at all. Staff apparently has formed an opinion on complicated factual and policy matters but has to date not exposed those opinions to public scrutiny in an adjudicatory environment.

To the extent Staff's goal is expedition, AmerGen remains committed to achieving that goal, while simultaneously reaching a constructive end point. Construction of a complete record with all fact and policy positions subjected to cross examination is the best way forward for several reasons. A complete record will allow the Commission: (i) to have all the issues fully developed, (ii) to determine if the sale is in the public interest, and (iii) to explain precisely why it is or is not in the public interest and, if not, what conditions would need to be met to bring it within the public interest. Moreover, providing a schedule for the creation of a complete record is by no means incompatible with reaching a non-litigated outcome. Having a litigation schedule in place would help parties to focus more closely on settlement possibilities.

Respectfully submitted,



John W. Dax

cc: All parties

¹ Staff may be planning to argue that no sale conducted in the absence of an auction can be in the public interest. Although such a policy decision by the Commission could arguably be the basis for an outright dismissal, it would represent an abrupt change in Staff's position and would mean that the parties have been wasting their time since last July. In any event, the Commission could issue such an order tomorrow, without need for any extended argument, responses or replies.