

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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

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**PLAINTIFF UNITED STATES' RULE 56 STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED, IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff United States of America submits this statement of material facts as to which there is no genuine issue to be tried.

1. RG&E generates electricity and sells it at wholesale and retail to customers in New York State. Def. Statement of Facts.

2. In the early 1990's, electricity rates in the standard industrial tariffs (Service Classification 8) had become so high that all over New York State, customers were beginning to look for alternatives to high priced power, either by relocation to other states or by cogenerating electricity. The New York Public Service Commission ("PSC") began to consider allowing utilities to price flexibly, that is at market responsive rates, rather than at traditional uniform rates. The PSC intended to "afford[] utilities the flexibility to compete with their largest customers' other supply options." Pl. Ex. 1, (Def. Ex. B), March 19, 1993 Order Instituting Proceedings at 5.

3. "Cogeneration" is the production of electricity in conjunction with the production of steam for some other purpose. *See, e.g.*, 18 C.F.R. § 292.202(c)-(e) (1997).

4. The University of Rochester ("the University" or "UR"), a customer of Defendant Rochester Gas & Electric ("RG&E"), uses steam to heat and cool its facilities. Pl. Ex. 2, Affidavit of Richard W. Greene ¶ 3.

5. On July 20, 1993, the University's Board of Trustees voted to build a cogeneration plant large enough to supply sufficient steam to meet all of its heating and cooling needs and authorized the expenditure of over one million dollars to begin the project. Greene Aff. ¶ 5.

6. Excess electricity generated by a cogeneration unit as a byproduct of creating steam for another reason (such as the heating and cooling needs of the University) is extremely low cost. March 19, 1993 *Order Instituting Proceeding* at 9.

7. The University's approved plant would have produced more electricity than the University needed for its own use. The University intended to sell up to one-third of the electricity generated by the cogeneration plant. Greene Aff. ¶ 4.

8. State law permits the sale of excess electricity from cogenerators to retail customers in competition with utilities. For instance, state law exempts from PSC jurisdiction cogenerator sales to customers "at or near a project site." PSL §2(13). The PSC is expressly permitted to exempt companies from utility-type regulation that generate electricity that is "incidental" to their main business from standard bookkeeping requirements. PSL §66(13)

9. In its development plans, the University provided for flexibility on different options for the plant's ownership and operational control so that it could make changes in the future if it was to the University's benefit. Pl. Ex. 3, Deposition of William A. Daigneau, Depo. Ex. 6,

Meeting Minutes of the Facilities Committee of the Board of Trustees Joint Meeting with Special Task Group on Cogeneration.

10. On October 27, 1993, the University and RG&E entered into an agreement, a "Memorandum of Understanding" or "MOU". Part of the MOU sets out terms for RG&E to supply the University with electricity. Pl. Ex. 4, (Def. Ex. G), MOU.

11. Paragraph 10 of the MOU bars the University from even studying alternatives to RG&E supply such as cogeneration if the option studied would include supplying electricity to anyone but the University:

During the Term of the Agreement, the University may continue to study such alternative sources of electric power and gas supply as it may deem appropriate. These studies and the activities associated with them shall be confined to the service of the University and RG&E will engage in good faith negotiations that will provide RG&E the opportunity to match the benefits of any alternative source.

MOU ¶ 10.

12. On March 31, 1994, RG&E and the University signed a contract, called the Individual Service Agreement. Pl. Ex. 5, (Def. Ex. H), ISA. The ISA contains some terms concerning RG&E's sale of electricity to the University. ISA § 2. The ISA also contains provisions restricting the University's ability to go forward and replace its aging steam plant with a cogeneration plant. Provision 6.3 of the ISA contains the following commitment:

"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."

ISA § 6.3.

13. The ISA does much more than preclude the University from acquiring electricity from a supplier other than RG&E. The purpose of Paragraph 6.3 is to guarantee that no one will use the University's thermal energy to electricity that could provide an alternative for RG&E customers. Pl. Ex. 6, Deposition of Thomas S. Richards at 252, 270-273.

14. The University's planned cogeneration plant was not built. Its preexisting steam plant continues to burn coal and produce steam, but that thermal energy cannot produce electricity for sale to RG&E's customers.

Dated October 31, 1997

DEPARTMENT OF JUSTICE  
ANTITRUST DIVISION

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