

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

- vs -

ROCHESTER GAS AND ELECTRIC CORPORATION,

Defendant.

97-CV-6294T

Entered: June 17, 1998

1998 JUN 17 10 27 AM  
WESTERN DISTRICT OF NEW YORK  
CLERK OF COURT

FILED

CONSENT JUDGMENT

Plaintiff, United States of America, filed its Complaint on June 24, 1997. Plaintiff and defendant, by their respective attorneys, have consented to the entry of this Consent Judgment without trial or final adjudication of any issue of fact or law. This Consent Judgment shall not be evidence against or an admission by any party with respect to any issue of fact or law. Defendant has denied any wrongdoing or violation of law. Therefore, before the taking of any testimony and without trial or final adjudication of any issue of fact or law herein, and upon consent of the parties, it is hereby

ORDERED, ADJUDGED, AND DECREED, as follows:

I.

JURISDICTION

This Court has jurisdiction of the subject matter of this action and of each of the parties consenting hereto.

II.

BACKGROUND

Plaintiff's claims in this action are based primarily upon alleged conduct related to a provision contained in the Individual Service Agreement between The University of Rochester and Rochester Gas and Electric Corporation, dated March 31, 1994, which provision reads:

6.3 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.

III.

DEFINITIONS

As used herein, the term:

(A) "agreement" means any contract, arrangement, or understanding, formal or informal, oral or written, between two or more persons;

(B) "defendant" or "RG&E" means Rochester Gas and Electric Corporation, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, and partnerships, and all directors, officers, employees, agents and representatives of the foregoing; the terms "subsidiary" and "affiliate" refer to any person in which the defendant holds (50 percent or more) ownership or control;

(C) "document" means all "writings and recordings" as that phrase is defined in Rule 1001(1) of the Federal Rules of Evidence;

(D) “including” means including but not limited to;

(E) “joint venture” means a unified or integrated method of doing business in which the parties share substantially in the profits, losses and risks of the enterprise;

(F) “person” means any natural person, corporation, firm, company, sole proprietorship, partnership, association, institution, governmental unit, or other legal entity;

(G) “retail marketing agreement” means an agreement pursuant to which RG&E acts as a retailer of electricity at an unregulated price or of other related products or services on behalf of a national or regional provider of such electricity, products or services, so long as the agreement does not result in the provider or RG&E being the only provider or retailer of electricity at an unregulated price or such other products or services in Monroe County;

(H) “the University” means the University of Rochester in Rochester, NY.

(I) “unregulated price” means a price for the sale of electricity other than (1) a price which is the result of a regulatory proceeding, order or acceptance of tariff filings, setting or approving specific uniform rates applicable to a class or classes of customers; or (2) a price set by negotiation between a supplier and a customer at a minimum floor price dictated by statute, regulation or order.

IV.

APPLICABILITY

This Consent Judgment applies to the defendant and to each of its successors and assigns, and to all other persons in active concert or participation with any of them who shall have received actual notice of the Consent Judgment by personal service or otherwise.

V.

INJUNCTION

RG&E, by this Consent Judgment, shall be enjoined from:

(A) enforcing any clause in any contract with The University of Rochester containing the language quoted in Section II, above, or from including any provision containing that language, without the reference to the University, in any other flexible rate contract (entered into pursuant to RG&E's Service Classification No. 10 or any replacement to Service Classification No. 10) for its retail electric services;

(B) enforcing or attempting to enforce Paragraph 10 of the Memorandum of Understanding, dated October 27, 1993, between RG&E and the University;

(C) entering into or enforcing a covenant or agreement not to compete in the retail sale of electricity with any competitor or potential competitor in the retail sale of electricity; provided, however, that such an agreement not to compete that is reasonably ancillary to the following types of agreements shall not be interpreted as a violation of this Consent Judgment:

- (1) employment contracts;
- (2) personal service contracts;
- (3) agreements regarding the sale or purchase of a business;

- (4) joint ventures or partnerships;
- (5) retail marketing agreements;
- (6) consulting agreements; and
- (7) portfolio management contracts.

VI.

EXCEPTION

Nothing in this Consent Judgment shall prohibit RG&E from engaging in any conduct which is exempt from or immune under the antitrust laws.

VII.

TERM

(A) This Consent Judgment shall expire ten years from the date of initial filing, unless earlier terminated pursuant to this Section.

(B) This Consent Judgment shall terminate upon demonstration by RG&E that less than 50% of the non-residential retail sales of electricity made at unregulated prices in Monroe County, New York, were made by RG&E. The percentage threshold in this Paragraph must be: (1) satisfied in terms of kilowatt-hours of electricity sold; and (2) measured as an average over a consecutive six month period.

(C) The procedure for making the determination described in Paragraph B, above, is as follows:

- (1) Defendant RG&E shall notify the United States in writing when it believes the threshold stated in Paragraph B has been satisfied over the requisite

period, and shall submit to the United States all supporting data and information.

- (2) The United States shall object to the defendant in writing within 60 days of receiving the notice and supporting data and information if the United States concludes that RG&E has not demonstrated that the condition has been satisfied.
- (3) If the United States does not object within 60 days, this Consent Judgment shall terminate without further act of either party or of this Court.
- (4) If the United States does object, the termination will not become effective except by order of this Court.

#### VIII.

#### COMPLIANCE PROGRAM

(A) The defendant is ordered to maintain an antitrust compliance program which shall include designating, within 30 days of entry of this Consent Judgment, an Antitrust Compliance Officer with responsibility for implementing the antitrust compliance program and achieving compliance with this Consent Judgment. The Antitrust Compliance Officer shall, on a continuing basis, supervise the review of the current and proposed activities of the defendant to ensure that they comply with this Consent Judgment.

(B) The Antitrust Compliance Officer shall:

- (1) distribute, within 60 days of the entry of this Consent Judgment, a copy of this Consent Judgment to all officers and employees with responsibility for marketing electric power and planning acquisition of electric power and generating capacity;

- (2) distribute in a timely manner a copy of this Consent Judgment to any officer or employee who succeeds to a position described in Section VIII(B)(1);
- (3) brief annually in writing or orally those persons designated in Section VIII(B)(1) on the meaning and requirements of this Consent Judgment and the antitrust laws and advise them that the defendant's legal advisors are available to confer with them regarding compliance with the Consent Judgment and the antitrust laws;
- (4) obtain from each officer or employee designated in Section VIII(B)(1) a written certification that he or she: (a) has read, understands, and agrees to abide by the terms of this Consent Judgment; and (b) has been advised and understands that his or her failure to comply with this Consent Judgment may constitute contempt of court; and
- (5) maintain a record of recipients to whom the Consent Judgment has been distributed and from whom the certification in Section VIII(B)(4) has been obtained.

(C) At any time, if the defendant's Antitrust Compliance Officer learns of any past or future violations of Section V of this Consent Judgment, the defendant shall, within 45 days after such knowledge is obtained or sooner if feasible, take appropriate action to terminate or modify the activity so as to comply with this Consent Judgment.

IX.

CERTIFICATION

Within 75 days after the entry of this Consent Judgment, the defendant shall certify to the plaintiff whether it has designated an Antitrust Compliance Officer and has distributed the Consent Judgment in accordance with Section VIII above.

X.

PLAINTIFF ACCESS

(A) To determine or secure compliance with this Consent Judgment and for no other purpose, duly authorized representatives of the plaintiff shall, upon written request of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant in accordance with Section XI(C) below, be permitted, subject to any legally recognized privilege:

- (1) reasonable access during the defendant's normal business hours to inspect and copy all non-privileged documents in the possession or under the control of the defendant, who may have counsel present, relating to actions enjoined under Section V, termination under Section VII, and the compliance program under Section VIII of this Consent Judgment; and
- (2) subject to the reasonable convenience of the defendant and without restraint or interference from it, to interview officers, employees or agents of the defendant, who may have counsel present, regarding such matters.



(B) Upon the written request of the Assistant Attorney General in charge of the Antitrust Division made to the defendant's principal office, the defendant shall submit such written reports, under oath if requested, relating to any matters described in Section X(A)(1) as may be reasonably requested, subject to any legally recognized privilege.

(C) No information or documents obtained by the means provided in Section X shall be divulged by the plaintiff to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Consent Judgment, or as otherwise required by law.

(D) If at the time information or documents are furnished by the defendant to the plaintiff, the defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure (relating to trade secret or other confidential research, development or commercial information), and the defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then 10 days' notice shall be given by the plaintiff to the defendant prior to disclosing such material in any legal proceeding (other than a grand jury proceeding).

## XI.

### FURTHER ELEMENTS OF THE CONSENT JUDGMENT

(A) Whenever notice must be provided to a party pursuant to the terms of this Consent Judgment, such notice shall be made by first class mail, return receipt requested, addressed to the following:

to RG&E:

Michael T. Tomaino, Esq.  
Senior Vice President and General Counsel  
Rochester Gas and Electric Corporation  
89 East Avenue  
Rochester, New York 14649

to the United States:


Joel I. Klein  
Assistant Attorney General  
Antitrust Division  
United States Department of Justice  
10<sup>th</sup> Street and Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

or to such other person whom the parties may designate from time to time.

(B) Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Consent Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Consent Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

(C) Entry of this Consent Judgment is in the public interest.

Dated: June 17, 1998

  
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Hon. Michael A. Telesca  
United States District Judge