UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Civil Action No.
	)	
v.	)	COMPLAINT FOR EQUITABLE
	)	RELIEF FOR VIOLATIONS
ROCHESTER GAS & ELECTRIC	)	OF 15 U.S.C. § 1
CORPORATION,	)	(SHERMAN ANTITRUST ACT)
	)	
Defendant.	)	

The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil antitrust action to obtain equitable relief against defendant ROCHESTER GAS & ELECTRIC CORPORATION ("RG&E"), alleging as follows:

I.

NATURE OF THE ACTION

1. RG&E is a regulated utility that sells natural gas and electric power to retail customers in the Rochester area.

2. Although RG&E is at present virtually the sole provider of electricity to retail customers in the Rochester area, RG&E faces competition from its customers and others who can build cogeneration plants. Cogeneration is a process by which fuel is used to produce two products simultaneously -- electricity and steam -- and is, under certain circumstances, an exceptionally efficient and low cost way to generate electricity. State regulation in New York permits cogenerators to sell electricity to retail customers in competition with RG&E without becoming subject to rate regulation by the state.

3. The University of Rochester ("the University" or "UR") , an RG&E customer, uses steam to heat and cool its facilities. In July 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. The approved plant would also have produced, as a by-product at a negligible additional cost, more electricity than the University needed for its own use. The University could have sold the excess electricity to retail customers in competition with RG&E.

4. The plant was never built. Instead, less than three months after the Trustees' vote, RG&E induced the University to enter an agreement by which RG&E would give the University an exceptionally low electric rate plus other financial benefits not related to the University's electric usage, in consideration for which the University agreed not to take steps to sell electricity to others in competition with RG&E.

5. The agreement reduced competition in the generation and sale of electricity in RG&E's service territory and resulted in higher electric rates for some RG&E customers.

II.

DEFENDANT

6. RG&E is a corporation organized and existing under the laws of the State of New York, with its principal place of business at Rochester, New York. It supplies electricity to more than 330,000 homes and businesses in a defined service territory that encompasses Monroe County, New York, and vicinity.

III.

JURISDICTION AND VENUE

7. The United States files this complaint and institutes these proceedings under Section 4 of the Sherman Act (15 U.S.C. §4), to prevent and restrain RG&E from continuing to violate Section 1 of the Sherman Act (15 U.S.C. §1), as amended.

8. Venue is proper in this judicial district under 15 U.S.C. §§22 and 28 U.S.C. §1391 because RG&E maintains offices, transacts business, and is found here.

9. RG&E's annual revenues from the sale of electricity are $675,000,000. Many of RG&E's customers are engaged in interstate commerce. RG&E's electric generating units in New York are interconnected with generating units outside the State, such that electricity regularly and continuously flows into and out of New York through the interconnected system. Electricity sold by RG&E is generated, or commingled with electricity generated, outside of New York. RG&E purchases electricity generated outside of the state for resale to its customers. Defendant is accordingly engaged in, and its activities substantially affect, interstate commerce.

IV.

THE UNIVERSITY OF ROCHESTER'S PLANS
TO GENERATE ELECTRICITY

10. During the 1980s, the New York legislature encouraged development of cogeneration by passing laws that permitted the New York State Public Service Commission ("NYPSC") to allow utilities to transmit electricity from cogenerators to other industrial customers and to exempt cogenerators making such sales from state utility regulation. In 1993, the NYPSC adopted a general policy that allowed utilities to deviate from their regulated rate schedules and to negotiate individual contract rates to compete with cogenerators and other

unregulated suppliers. The policy makes retail price competition for electricity customers possible where supply alternatives are available.

11. Like a small municipal electric system, the University of Rochester distributes the electricity it buys from RG&E on a distribution grid that the University maintains on its River Campus. All campus buildings are individually metered and billed by the University for electric usage. In addition, UR operates a coal-burning utility plant that produces steam for heating and cooling its campus buildings. The University has one of the highest demands for steam heating and cooling in the Rochester area, and is, therefore, a prime candidate for a cogeneration plant. In the early 1990s, the UR decided to replace its aging coal-burning steam plant with a new, cleaner and more efficient gas-fired cogeneration plant that would simultaneously produce steam and generate electricity. The new plant could have been developed economically by the University itself, in conjunction with an independent developer, or by a group of steam and electricity users. Such a cogeneration plant, even if not owned by the University, could provide steam to the University and electricity and/or steam to others.

12. In spring of 1993, the University issued a request for proposals to build the cogeneration plant and retained a financial consultant to help it evaluate the proposals received. RG&E submitted a proposal for a small plant (14 megawatts) that would not have produced any excess electricity and also would not have produced enough steam for the University. All of the other proposals were for larger plants that would have met the University's steam needs and would have produced excess electricity that the University could have sold. After failing to persuade the University that it should accept its proposal to build an undersized steam plant that would produce no excess electricity, RG&E acknowledged to UR that a plant large enough to meet the University's steam needs (23 megawatts) would be economically viable.

13. In July 1993, the Board of Trustees approved the larger plant, which would have produced excess electricity that UR could have sold in competition with RG&E. The Trustees appropriated more than one million dollars to begin the project. The University staff went forward, engaged a cogeneration developer and approached other nearby academic institutions then served by RG&E, including the Rochester Institute of Technology, as potential customers for UR's excess electricity.

14. Shortly after the cogeneration project began in earnest, RG&E and the University entered into an agreement that precluded development of this competitive electricity source and that otherwise prohibits UR from competing with RG&E in the generation and sale of electricity to customers in RG&E's retail service area. The cogeneration plant has not been built, and the University's steam is still being produced by the old coal-burning plant.

V.

VIOLATION ALLEGED

15. UR is a potential competitor of RG&E in the generation and sale of electricity to retail customers in RG&E's service territory. RG&E entered into an agreement with UR pursuant to which RG&E agreed to give UR exceptionally low electricity prices and other financial benefits, and in consideration for which UR committed to not compete with RG&E in the generation and sale of electricity to other customers in RG&E's retail service territory. This agreement not to compete is not related to any of RG&E's legitimate interests in contracting for the sale of electricity to UR. The agreement not to compete has injured and, if not enjoined, will continue to injure consumers of electricity in RG&E's service area. The agreement not to compete is per se illegal and unreasonably restrains interstate

trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. §1), as amended.

16. In order to secure the agreement not to compete, RG&E did the following:

a. threatened the University that, if a cogeneration plant were built, RG&E would terminate a longstanding research and development grant to the University amounting to hundreds of thousands of dollars annually; and

b. committed that if a cogeneration plant were *not* built, RG&E would:

(1) pay the University hundreds of thousands of dollars per year, ostensibly to reimburse the University for energy conservation projects, even if those projects were never undertaken;

(2) and charge the University an exceptionally low rate for electricity.

17. In furtherance of the agreement not to compete, RG&E induced the University:

a. to enter a Memorandum of Understanding dated and signed on October 27, 1993, that included the following provision:

> 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. (emphasis added).

b. to enter an Individual Service Agreement dated March 31, 1994, that included the following provision:

During the Term of the Agreement the University may continue to study such alternative source 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's own needs.* (emphasis added).

18. In furtherance of the agreement not compete, RG&E extracted specific commitments that the University:

a. would not acquire alternative sources of electric power, including cogeneration, in excess of its own needs;

b. would not solicit other RG&E customers to leave RG&E's electric system;

c. would not participate with other RG&E customers in any plan designed to provide electric power to UR or any other RG&E customer;

d. would not participate with other RG&E customers in any plan designed to provide steam or any other thermal energy to UR or any other RG&E customer;

e. would not study any plan that would generate more electricity than the University itself would consume;

f. would negotiate with RG&E before agreeing to generate or receive electric power from any other source; and

g. would negotiate with RG&E before receiving steam or any other thermal energy from any source not wholly-owned or exclusively controlled by UR.

VI.

INJURY TO COMPETITION

19. The generation and retail sale of electricity to consumers is a relevant market and RG&E's service area is a relevant geographic market. RG&E currently is virtually the sole provider of retail electricity in its service area.

20. RG&E's agreement with UR has injured consumers of retail electricity in RG&E's service area by depriving them of a competing low-cost alternative to RG&E. Some consumers who purchase electricity in Monroe County, New York, have been forced to pay artificially inflated prices for electricity. If not enjoined, the agreement will continue to injure competition in the retail sale of electricity in RG&E's service area.

VII.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays:

1. That the Court adjudge and decree that the above alleged agreement not to compete constitutes an illegal restraint in the generation and sale of electricity in violation of Section 1 of the Sherman Act.

2. That RG&E, its officers, directors, agents, employees, subsidiaries and successors, and all other persons acting or claiming to act on its behalf, be permanently

enjoined, restrained, and prohibited from, in any manner, directly or indirectly, continuing, enforcing, or renewing this agreement, or from engaging in any other combination, conspiracy, agreement, understanding, plan, program, or other arrangement with an RG&E customer limiting competition in the sale of electricity to other RG&E customers and the generation of electricity for that purpose.

3. That RG&E, its officers, directors, agents, employees, subsidiaries and successors, and all other persons acting or claiming to act on its behalf, be permanently enjoined, restrained, and prohibited from, in any manner, directly or indirectly, offering anything of value, including discounts or other valuable grants to a competitor, to induce that competitor not to compete with RG&E in the generation and sale of electricity to other customers.

4. That the Plaintiff have such other relief as the Court may deem just and proper to prevent recurrence of the alleged violation and to dissipate the anticompetitive effects of RG&E's past violation.

5. That the Plaintiff recover the costs of this action.

Dated:

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