UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	
Niagara Mohawk Power Corporation,	
New York State Electric & Gas Corporation,	**Docket Nos. 50-222 & 50-410**
and	**License Nos. DPR-63 and NPF-69**
AmerGen Energy Company, LLC	
(Nine Mile Point, Units 1 & 2)	

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' 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.

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

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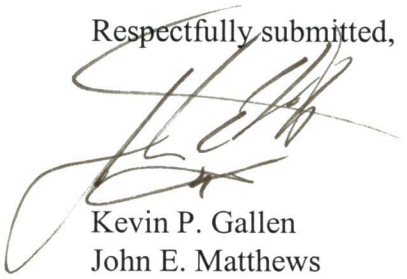
1/ In characterizing the RG&E Response, AmerGen inadvertently included quotation marks at page 6 of its Reply. However, AmerGen's statement regarding RG&E's acknowledgment that contractual issues may exist was and continues to be substantively accurate.

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,



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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.

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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

ignore the Commission's own rules of procedure. Staff has provided no reason why, in particular, motions should be entertained in lieu of the filing of testimony and the conduct of hearings.

In devising procedures for conducting the remainder of this proceeding three objectives should be met: (i) achieving a speedy resolution; (ii) arriving at a certain and dispositive resolution concerning who will run, operate and decommission the Nine Mile Point units; and (iii) obtaining clear guidance from the Commission itself concerning the public interest imperatives.

Staff's procedural proposal will not meet these objectives. While it might provide the means for disposing of one proposal, it would do so only by pre-judging the outcome of the Section 70 process without the benefit of a complete record. The end result of Staff's proposed procedure would be the elimination of the only fully developed proposal for the disposition of the Nine Mile Point units. Staff's approach will not provide an affirmative way forward and it is unlikely to provide a vehicle for the Commission to address in specific its view of what is in the public interest.

In contrast, conducting hearings to explore the only proposal now on the table (one which has been fully examined in six months of discovery) will provide for the creation of a complete evidentiary record which will allow the Commission to determine whether or not the proposed sale to AmerGen under the filed Asset Purchase Agreements is in the public interest and, if not, the reasons why not, and thus the changes or conditions, if any, required to bring the sale within the public interest.

Even when examined on its own merits, it is clear that Staff's proposed procedure could not lead to the result that Staff seeks (i.e., dismissal), let alone any informative outcome. Motions to dismiss are granted only when, as a matter of law, a cause of action cannot be sustained even if all contested facts are resolved in the non-moving party's favor. Here Staff appears to be seeking dismissal based on a claim that the purchase price is too low to be in the public interest. The accuracy of Staff's claim can only be tested by analyzing Staff's assumptions and models. Staff's claim presents mixed questions of fact and policy, but no issues of law. It is difficult to understand how Your Honor or the Commission could possibly grant such a motion, in light of the fact that a

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.