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comments

September 25, 2001

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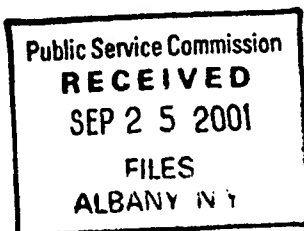
Hon. Janet Hand Deixler
Secretary
Department of Public Service
Three Empire State Plaza
Albany, NY 1223-1350

RE: CASE 01-E-0011 -- Joint Petition of Niagara Mohawk Power Corporation, New York State Electric & Gas Corporation, Rochester Gas and Electric Corporation, Central Hudson Gas & Electric Corporation, Constellation Nuclear, LLC and Nine Mile Point Nuclear Station, LLC for Authority Under Public Service Law Section 70 to Transfer Certain Generating and Related Assets and for Related Approvals

Dear Secretary Deixler:

Pursuant to the Notice Inviting Comments issued September 18, 2001 in the above-referenced proceeding, enclosed for filing with the Commission please find the original and twenty-five (25) copies of the Initial Comments of Rochester Gas and Electric Corporation on the Joint Proposal entered into between Niagara Mohawk Power Corporation and the Staff of the New York State Department of Public Service dated May 7, 2001.

Copies of these Initial Comments have been served via first class and electronic mail on all parties on the attached Service List and have been hand delivered and sent by electronic mail to Judge Bouteiller and Judge Garlin, the Settlement Judge. Please date stamp the additional three copies of the filing and return them to the messenger.



Respectfully submitted,

Robert L. Daileader, Jr.
Robert L. Daileader, Jr.
Attorney for Rochester Gas and Electric Corporation

cc: Service List (by electronic and regular mail)
Hon. William Bouteiller (by hand delivery and electronic mail)
Hon. Robert Garlin (by hand delivery and electronic mail)

**CASE 01-E-0011
PROPOSED SALE OF THE NINE MILE
NUCLEAR GENERATION UNITS TO CONSTELLATION
ACTIVE PARTY LIST
(As of June 22, 2001)**

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STATE OF NEW YORK
BEFORE THE
PUBLIC SERVICE COMMISSION

ORIGINAL

Joint Petition of Niagara Mohawk Power)
Corporation, New York State Electric & Gas)
Corporation, Rochester Gas and Electric)
Corporation, Central Hudson Gas & Electric)
Corporation, Constellation Nuclear, LLC and)
Nine Mile Point Nuclear Station, LLC for)
Authority Under Public Service Law Section)
70 To Transfer Certain Generating and)
Related Assets And For Related Approvals)
_____)

Case No. 01-E-0011

**INITIAL COMMENTS OF
ROCHESTER GAS AND ELECTRIC CORPORATION
ON JOINT PROPOSAL AMONG
NIAGARA MOHAWK POWER CORPORATION,
THE STAFF OF THE NEW YORK DEPARTMENT OF PUBLIC SERVICE
AND MULTIPLE INTERVENORS ON BEHALF OF ITS MEMBERS
IN THE NIAGARA MOHAWK SERVICE TERRITORY**

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Dated: September 25, 2001

STATE OF NEW YORK
BEFORE THE
PUBLIC SERVICE COMMISSION

)
Joint Petition of Niagara Mohawk Power)
Corporation, New York State Electric & Gas)
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**INITIAL COMMENTS OF
ROCHESTER GAS AND ELECTRIC CORPORATION
ON JOINT PROPOSAL AMONG
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THE STAFF OF THE NEW YORK DEPARTMENT OF PUBLIC SERVICE
AND MULTIPLE INTERVENORS ON BEHALF OF ITS MEMBERS
IN THE NIAGARA MOHAWK SERVICE TERRITORY**

In accordance with the Notice Inviting Comments on the Joint Proposals Concerning Niagara Mohawk Power Corporation, Rochester Gas and Electric Corporation and Central Hudson Gas & Electric Corporation issued September 18, 2001 in the above-captioned proceeding, Rochester Gas and Electric Corporation ("RG&E") submits these Initial Comments on the Joint Proposal dated May 7, 2001 ("Joint Proposal") among Niagara Mohawk Power Corporation ("Niagara Mohawk"), the Staff of the New York Department of Public Service ("Staff") and Multiple Intervenors on behalf of its members in the Niagara Mohawk service territory ("Multiple Intervenors").

RG&E believes the Commission's adoption of the Joint Proposal in connection with the proposed transfer of the Nine Mile facilities to Constellation Nuclear, LLC and Nine Mile Point Nuclear Station, LLC ("Constellation"), with one exception, will allow for a timely completion of the sale of the Selling Co-Tenants' interests in the Nine Mile facilities. That single exception relates to the following provision:

RG&E and Niagara Mohawk entered into an Exit Agreement dated June 8, 1998 regarding transmission facilities. If a dispute between RG&E and Niagara Mohawk arises regarding the Exit Agreement, Niagara Mohawk consents to have DPS Staff mediate the dispute. If mediation does not result in a resolution of the open issues, Niagara Mohawk agrees to undertake actions to protect its interests, which are consistent with the interests of its customers. In that regard, Niagara Mohawk agrees to consult with DPS Staff regarding the course(s) of action to take to resolve the dispute. Any loss of revenues to Niagara Mohawk resulting from resolution of the dispute shall be recoverable from customers.

Joint Proposal, Section V(A). Despite the conditional language of the Joint Proposal, there is most definitely a dispute between RG&E and Niagara Mohawk with respect to RG&E's obligation to make continuing payments to Niagara Mohawk and the retention of rights to collect or obligation to pay "congestion rents" pertaining to Transmission Congestion Contracts under the Exit Agreement. It is RG&E's position that, following the sale of NMP-2 to Constellation, RG&E's payments to Niagara Mohawk cease and the Transmission Congestion Contracts, along with their associated benefits and obligations, are returned to Niagara Mohawk. Indeed, that dispute is now pending before Monroe County Supreme Court with the filing by RG&E of a Complaint for Declaratory Judgment on August 13, 2001. Rochester Gas and Electric Corporation v. Niagara Mohawk Power Corporation, Index No. 2001-9621 (Monroe Cty. Sup. Ct.). Accordingly, the above-quoted provision of the Joint Proposal is unnecessary, as the

dispute will be resolved by the New York courts. Moreover, the provision is ultra vires since it seeks to confer on the Commission's Staff jurisdiction to resolve a dispute involving the interpretation of an agreement within the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC").¹ For both reasons, at least the second and third sentences of Section V(A) of the Joint Proposal, to the extent each addresses Staff mediation of the dispute, should not be approved by the Commission.

Prior to the filing of this lawsuit, RG&E attempted repeatedly to discuss with Niagara Mohawk the resolution of the dispute over the Exit Agreement short of litigation. Throughout that process, RG&E solicited the participation of the Staff in seeking to reach a final resolution. Unfortunately, a mutually-acceptable resolution was not achieved so that RG&E has sought a final resolution in New York State Supreme Court.

Finally, the Commission should understand that RG&E is pursuing this issue solely to protect the interests of its customers and not its shareholders. Under its Joint Proposal entered into with Staff, RG&E is entitled to recover from its customers any continuing payments made to Niagara Mohawk pursuant to the Exit Agreement. See RG&E/Staff Joint Proposal, Sections II(a) and IV(K). The Niagara Mohawk/Staff/Multiple Intervenors Joint Proposal provides similar assurances in Section V(A). Thus, the dispute involves a matter of contract interpretation as to whether RG&E's customers should continue making payments to Niagara Mohawk for the benefit of its customers. The dispute does not implicate the regulatory policies of this

¹ The Exit Agreement involves the providing of wholesale transmission services within the exclusive jurisdiction of the FERC. The Agreement was filed by Niagara Mohawk with the FERC on July 9, 1999 in Docket No. ER99-3539-000 and was accepted for filing by letter order issued November 3, 1999.

Commission and should be resolved, absent a settlement, in due course by the New York State courts.²

For the foregoing reasons, RG&E respectfully requests that the Commission approve the Niagara Mohawk/Staff/Multiple Intervenors Joint Proposal with the exception of the second and third sentences of Section V(A). Those sentences should be deleted to the extent that they contemplate Staff mediation of the dispute.

Respectfully submitted,

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Dated: September 25, 2001

² RG&E continues to be willing to meet with Niagara Mohawk to attempt to resolve this matter.