State of Rhode Island and Providence Plantations

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Patrick C. Lynch, Attorney General

November 22, 2005

Via First Class Mail And Electronically

Luly Massaro
Clerk
Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

Re: Filings By New England Gas Company – Distribution Adjustment Clause Filing (Docket No. 3690)

Dear Ms. Massaro:

Enclosed for filing please find two originals (one for each of the referenced dockets) and nine (9) copies of the Motion to Compel of Patrick C. Lynch, Attorney General, for filing in the above-referenced proceedings.

Thank you for your attention to this matter.

Sincerely,

William K. Lueker (R.I. Bar # 6334)
Special Assistant Attorney General
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Encl.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PUBLIC UTILITIES COMMISSION

IN RE:	**NEW ENGLAND GAS COMPANY DISTRIBUTION ADJUSTMENT CLAUSE**	)))	**DOCKET NO. 3690**

MOTION TO COMPEL
THE NEW ENGLAND GAS COMPANY'S RESPONSES TO
THE ATTORNEY GENERAL'S FIRST SET OF DATA REQUESTS

Patrick C. Lynch, Attorney General of the State of Rhode Island, hereby moves to compel New England Gas Company's Responses (the "Company") to the Attorney General's First Set of Data Requests. The Company objected to data requests 1-1, 1-2, 1-3, 1-4, 1-5, and 1-6 claiming that the "information sought in these Requests pertains to matters beyond the scope of the pending investigation into the Company's Distribution Adjustment Clause (the "DAC"), Docket No. 3690, and release of these materials in this forum could have a detrimental and adverse effect on the Company in litigation in other, more appropriate jurisdictions."[1, 2]

[1] It is worth noting that the Company's Objection does not state that the Company is actually involved in any litigation currently regarding the subject matter of the requests. It does not say that the material sought in our data requests "will" have an adverse and detrimental effect on the Company's litigation position, only that it "could" have such an effect if the Company should be in litigation concerning this issue, an assertion that could be made about virtually any information requested of any party to any litigation. Nor does the Company suggest what jurisdiction might be more "appropriate" than the Rhode Island Public Utilities Commission for deciding utility rate issues – which are the sole object of our data requests.

[2] During the hearing on October 25, 2005, the Company did assure the Commission that it would provide the Attorney General with some additional information concerning the Tidewater site mercury release incident in the form of a data response. It has not done so to date.

Environmental Response Costs (ERC) Factor

As has been long established, the DAC includes a number of factors, including an Environmental Response Cost (the "ERC") factor. *See e.g., In Re New England Gas Company's Distribution Adjustment Clause,* Public Utilities Commission Report and Order Number 17971 of August 23, 2004, in Docket No. 3548 at p. 1. As Mr. Peter C. Czekanski, Director of Pricing for the Company, stated in his pre-filed testimony of August 1, 2005, at p. 8, "the ERC Factor includes recovery of environmental costs for removing and replacing mercury regulators and addressing meter disposal issues." His testimony in the hearing established that the ERC Factor has been collected by both the Company and its predecessor for a decade or longer. Put another way, the Company has been charging ratepayers, in the form of the ERC Factor included in the DAC (which is the subject of this docket), some amount of money intended to cover the recovery of environmental costs for removing, replacing, and properly disposing of regulators and meters containing mercury. The Company, through the testimony of Mr. Robert J. Riccitelli pre-filed on August 1, 2005, at page 6, has conceded that there was a mercury release incident. (The Company's witnesses and counsel referred to this in testimony during the hearing as the "Tidewater incident.")

The obvious – and relevant – question is whether the mercury that was released in the "Tidewater incident" came from old mercury regulators and meters? That question is relevant in this proceeding because ratepayers have been paying, though the ERC Factor of the DAC, for removing, replacing, *and properly disposing of* old mercury regulators and meters for years. If the Company was collecting money from ratepayers for the purpose of properly disposing of old mercury regulators and meters, but was not doing so, then the Company experienced a windfall during those years and the DAC should be adjusted accordingly to restore to ratepayers the funds collected but not properly used. *See Valley Gas Company v. Burke,* 406 A.2d 366, 371 (R.I.

1979) (the Court affirmed the Commission's decision to return $200,000 which the utility received as refund from its gas supplier on gas purchased by contract customers and which the utility was not required to refund directly to customers by reducing the operating expenses of the utility over three years).

The Company clearly does not want the Commission or the other parties to this proceeding to delve further into the ERC Factor[3]. Yet the law in this state is clear that the

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[3] In recent years, the Company has consistently failed to provide evidence to justify the ERC factor. In 2003, one of the Division's witnesses, Mr. Oliver, testified that the Company had not provided sufficient information to support a determination regarding the reasonableness and prudence of the insurance settlements that the Company had credited against the costs it had incurred under the ERC factor. *In Re New England Gas Company's Distribution Adjustment Clause,* Public Utilities Commission Report and Order Number 17971 of August 23, 2004, in Docket No. 3548 at p. 6. The Commission apparently agreed with the Division, specifically finding that the "environmental response costs incurred through June 30, 2003 and incorporated into the factor have not been reviewed for prudence or reasonableness. As a result, the Commission approves the decrease in the ERC factor as being in the public interest but expressly reserves the right to review the prudence and reasonableness of these costs." *Id.* .at p. 15.

This problem persisted in 2004. Mr. Oliver, on behalf of the Division, again challenged the Company's filing with respect to the ERC factor. After testifying that the Company's proposed ERC factor improperly included a $660,242 cost for a "general enviro issues" that was neither newly incurred environmental cost nor a cost for which the Company required further compensation, he testified that the Company had again failed to provide sufficient information to support a determination regarding the reasonableness and prudence of the insurance settlements that the Company had credited against the costs it had incurred. In addition, he testified that the Company should be required to demonstrate that $263,263 in mercury-related environmental expenditures from the former Valley Gas had not already been recovered by Valley Gas prior to its being subsumed by the Company. The Division recommended this time that the Company be required to file a mid-year environmental report indicating the environmental costs and credits incurred and anticipated. *In Re New England Gas Company's Distribution Adjustment Clause,* Public Utilities Commission Report and Order Number 18365 of September 13, 2005, in Docket No. 3548 at p. 7.

Once again, the Commission agreed with the Division with respect to that portion of the Company's filing that pertained to the ERC factor. It specifically noted that (once again) the "environmental response costs incurred through June 30, 2004 and incorporated into the factor have not been reviewed for prudence or reasonableness." In order to try to cure this persisting deficiency in the Company's DAC filing, and "to ensure a more timely and thorough review of the ERC," the Commission imposed a semi-annual reporting requirement on the Company with respect to its ERC factor expenditures. *Id.* at 15.

Now, after three years, the Company continues to resist all efforts to require it to meet its burden of proof with respect to its filing on the ERC factor. Clearly, a detailed review for

Company "has the statutory burden of proof with respect to the component elements of its request....Section 39-3-12." *Valley Gas Company* at 370. To date, the Company has steadfastly refused to provide any evidence to support its position that the ERC levels are, and have been, appropriate and that the funds charged for the ERC Factor were in fact appropriately used. If we failed to explore this line of questioning, we would not be exercising the due diligence required of us by the public. If the Commission approves the ERC Factor without requiring the Company to provide sufficient evidence, "the commission's acceptance of the company's request would be based upon speculation." *Valley Gas Company* at 370. Where the Company fails to introduce any competent evidence to support its ERC request, the Commission's acceptance of the proposal becomes arbitrary and capricious. *Valley Gas Company* at 373 (the Court overruled the Commission's approval of the company's attrition allowance where there was no competent evidence of record to support it). In the absence of any substantive response to the Attorney General's data requests 1-1, 1-2, and 1-3 (not to mention various of the Division's second set of data requests), there is no evidence in the record that would allow the Commission to find that the ERC Factor of the DAC has been used for one of the purposes for which the Company and its predecessor has collected it, nor does the Commission have sufficient evidence (particularly with respect to removing, replacing, *and properly disposing of* old mercury regulators and meters) to conclude that the costs incurred by the Company have been reasonable and prudent.

Earnings Sharing Mechanism (ESM)

That inquiries concerning the disposition of the expenses associated with the Tidewater site mercury release incident are relevant to these proceedings is clear from the Company's own

"prudence and reasonableness" is overdue. If not in this forum in this docket, then perhaps, to use the Company's words, in some other "more appropriate jurisdiction."

filings in this matter. In his discussion of the components of the Earnings Sharing Mechanism, Mr. Riccitelli, at page 6 of his pre-filed testimony of September 1, 2005, does specifically claim that "the Company booked all expenses relating to the mercury-release incident below the line. Therefore, these expenses are excluded from Operating Expenses for the purpose of calculating the earnings sharing." His willingness to make such a claim does not, however, mean that the claim must be accepted at face value, either by the other parties or by the Commission. It does serve as an admission that the appropriate forum for investigating how the expenses associated with the mercury release incident have been treated is the ESM portion of this docket.[4]

Further, even assuming it is true that the Company did book *its* expenses associated with the Tidewater incident "below the line," it does not necessarily follow that those expenses are not being passed back to the ratepayers indirectly in a manner that is not readily apparent. The Company has already indicated that its parent, Southern Union, took over handling the expenses for this incident in an account managed by Southern Union, not the Company. However, the Settlement Agreement approved by the Commission that actually established the DAC and ESM explicitly provided as follows:

> The Settling Parties agree that a portion of Southern Union's joint and common costs may be allocated to the Company and may be requested for recovery in the cost of service in future base-rate proceedings. Such costs will be allocated to the Company on terms that are no less favorable than those terms applied in other jurisdictions wherein Southern Union operates. The Settling parties agree that, in any base-rate proceeding, the Company will have the burden of proving the reasonableness of any allocated or assigned cost to the Company from any affiliate, division or subsidiary of Southern Union, including all cost allocations. The Settling Parties further agree that the Commission has the authority to assess

[4] In fact, Company representatives had extensive discussions outside the context of this docket with the Attorney General concerning this issue following the mercury release incident, and assured the Attorney General that none of the expenses associated with the resultant clean-up would be billed to Rhode Island ratepayers. We believe those assurances were made in good faith and that the Company has made, and will continue to make, every effort to make good on them. However, that does not relieve the Attorney General – or the Commission – of a duty to exercise due diligence in this docket on behalf of the rate payers and verify for the public record that none of the expenses are being passed on to Rhode Island rate payers.

> the reasonableness of such costs and the allocation thereof as part of its determination of the revenue requirement in that proceeding.

Settlement Agreement at 20, approved *In Re New England Gas Company's Rate Consolidation Filing,* Public Utilities Commission Report and Order Number 17381 dated February 28, 2003, in Docket Number 3401. For financial accounting purposes, the Company and its parent, Southern Union, are indistinguishable. *Id* at 11. Has Southern Union charged some or all of the Tidewater mercury release incident's expenses back to the Company against accounts that are included in calculating the ESM? The Company, under this Settlement Agreement, has the burden of proving the reasonableness of any such allocated or assigned cost (or, conversely, of proving that no such allocated or assigned cost was made). The Commission, under this Settlement Agreement, clearly has the authority to explore these issues. The data requests posed by the Attorney General are, by the terms of the Settlement Agreement which established the DAC and ESM, clearly relevant in this proceeding.

In its letter of November 10, 2005, the Company bases its refusal to answer the Attorney General's data requests 1-4, 1-5, and 1-6[5], on the *conclusion* that because it has *said* that it has excluded the expenses relating to the Tidewater site mercury release incident from its calculations of the ESM that no one, not the Division of Public Utilities and Carriers, not the intervenors, not even the Commission, has a right to the data necessary to verify the Company's unsupported and unsubstantiated claims on this point. This position is clearly inconsistent with the terms of the Settlement Agreement that established the DAC and ESM. The Company may not be permitted to rely on its own conclusory statements when it has already agreed that it has the burden of proving the claims it makes in its ESM filings and has already agreed that the Commission has the authority to assess that proof.

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[5] This is essentially the same position the Company took when it refused to respond to some of the Division's second set of data requests.

Finally, the Company's refusal to provide a substantive response to the Attorney General's data requests is patently inconsistent with the fact that the Company "has the statutory burden of proof with respect to the component elements of its request....Section 39-3-12." *Valley Gas Company* at 370. The Commission must require the Company to meet its burden of proof. It should not be hard for the Company to provide answers to these data requests that will establish, once and for all, to which accounts the expenses associated with the Tidewater incident were allocated. It should not be hard for the Company to show that the ratepayers in Rhode Island are not being asked to cover these expenses. The Company should be ordered to respond to the Attorney General's data requests 1-4, 1-5, and 1-6.

Failure To Comply With Commission Order On Data Request

Under the Commission's procedural rules, the "failure of a party to comply with a data request or a Commission order relating thereto shall be grounds for striking any testimony related to such request." Rhode Island Public Utilities Commission *Rules of Practice and Procedure,* Rule 1.18(c)(4). If the Company fails to comply with this Commission's order to answer the Attorney General's data request, the Company would be subject to sanctions under the Commission's Procedural Rule 1.18(c)(4). Since that would mean that the Company would have no evidence of record at all to suggest that it did not include the expenses associated with the Tidewater site mercury release incident in its calculations of the ESM, the Commission would be justified in assuming that the Company did include those expenses in its ESM filing and the Commission would be justified in adjusting the Company's filing to exclude those expenses. The Attorney General expressly reserves his right to request this, or any other appropriate, sanction should the Company continue to refuse to provide meaningful responses to the Attorney General's data requests.

Conclusion

WHEREFORE, for the reasons set forth herein, the Attorney General requests that the Commission grant his motion to compel the New England Gas Company's responses to the questions posed by the Attorney General in the Attorney General's first set of data requests.

PATRICK C. LYNCH
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By his attorney,

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November 22, 2005

CERTIFICATE OF SERVICE

I certify that a copy of the within motion to compel was served by regular mail, postage prepaid, and by electronic mail, to all persons listed this date on the service list for PUC Docket No. 3690 on the 22nd day of November, 2005.