



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Patrick C. Lynch, Attorney General*

May 31, 2006

***VIA ELECTRONIC FILING AND REGULAR MAIL***

Luly Massaro, Clerk  
Division of Public Utilities and Carriers  
89 Jefferson Blvd.  
Warwick, RI 02888

**Re: Joint Petition of National Grid and Southern Union Company  
For Approval of Purchase and Sale of Assets  
DPUC Docket No. D-06-13**

Dear Ms. Massaro:

Enclosed for filing in connection with the above-referenced matter is an original and nine (9) copies of the Attorney General's Motion To Compel More Responsive Answers And/OR Document Production, And To Amend Hearing Schedule.

Thank you for your attention to this matter.

Very truly yours,

Paul Roberti  
Assistant Attorney General  
Chief, Regulatory Unit

Enclosures

cc: Service List  
Thomas F. Ahern, DPUC Administrator  
John Spirito, Hearing Officer

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**  
**BEFORE THE DIVISION OF PUBLIC UTILITIES AND CARRIERS**

**IN RE:           JOINT PETITION OF THE NARRAGANSETT )**  
**ELECTRIC COMPANY AND SOUTHERN        ) Docket D-06-13**  
**UNION COMPANY FOR APPROVAL OF     )**  
**PURCHASE AND SALE OF ASSETS         )**

**RHODE ISLAND ATTORNEY GENERAL’S MOTION TO COMPEL**  
**MORE RESPONSIVE ANSWERS AND/OR DOCUMENT PRODUCTION, AND**  
**TO AMEND HEARING SCHEDULE**

The Rhode Island Department of Attorney General (“Attorney General”) moves to compel Southern Union Company (“SUC”) to file more responsive answers and/or produce all documents that are responsive to the Attorney General’s Data Request Nos. 1-2, 1-14 through 1-18. The data responses that SUC forwarded to the Attorney General by letter dated May 23, 2006 regarding these requests: (i) fail to comply with the instructions contained in the data requests and therefore, are useless, (ii) are incomplete and/or (iii) are non-responsive. Further, all of SUC’s responses and objections were untimely, and therefore, waived.

For the foregoing reasons, the Division of Public Utilities and Carriers (“Division”) should require that SUC provide all documents that are responsive to each of the aforementioned data requests or produce a “privilege log” where documents are withheld on the ground of privilege. The Hearing Officer must then hold another discovery conference to determine whether each SUC assertion of privilege is legitimate. Lastly, since SUC has failed to engage in discovery in a timely fashion, the Division must

further amend the current Hearing Schedule in such a manner as to afford the Attorney General with a meaningful opportunity to be heard.

A. **GENERAL GROUNDS IN SUPPORT OF THE ATTORNEY GENERAL'S MOTION TO COMPEL**

1. **SUC'S RESPONSES AND OBJECTIONS WERE UNTIMELY.**

The Attorney General's data requests were forwarded to SUC on May 12, 2006. Division Rule 21 provides that an "objection to a data request in whole or in part on the ground that the request unreasonable and/or the material is not relevant or not permitted or required by law shall be made by motion filed as soon a practicable and *in no event later than ten (10) days after service of the request.*" (Emphasis added.) In the instant docket, the 10-day period was shortened to five days agreement of the parties. SUC did not forward its putative responses and objections to the Attorney General until May 24, 2006,<sup>1</sup> 7 days after the 5-day period had expired. Plainly, SUC's objections were untimely, and therefore, waived.

2. **SUC HAS FAILED TO COMPILE A LOG IDENTIFYING ALL DOCUMENTS THAT ARE RESPONSIVE TO THE ATTORNEY GENERAL'S DATA REQUESTS BUT WHICH SUC CHOOSES TO WITHHOLD.**

It is uniformly acknowledged practice that when a party possesses documents in its custody or control, and withholds the documents on the ground of "privilege," the party must compile a log that identifies the document in such a fashion as to enable the party seeking discovery to determine whether the document is discoverable. See e.g., In Re: Schick, 1997 WL 465217 (Bankr. S.D.N.Y. ) (a party should provide a "privilege

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<sup>1</sup> The responses arrived by e-mail at 4:24 p.m. on May 23.

log,” and “object” in order to preserve his objection made to discovery the ground of privilege). SUC further received notice in the Attorney General’s data requests, themselves, that the Attorney General expected SUC to comport with this universal discovery practice. See Attorney General’s Data Requests (1<sup>st</sup> Set), Instructions.

SUC, however, failed to compile the requisite log that would enable the Attorney General to determine: (i) what documents SUC has withheld, (ii) the location of the documents (iii) the nature of the documents withheld, and (iv) the specific basis that SUC asserts for withholding particular documents. As a result of SUC’s failure to compile such a log, SUC’s data responses are utterly useless, and are equivalent, to SUC as having made no discovery at all.

3. **SUC’S OBJECTION TO PRODUCING DOCUMENTS ON THE GROUNDS THAT THE REQUESTS ARE UNDULY “VAGUE,” “BROAD,” “IRRELEVANT,” “BURDENSOME,” OR ARE NOT REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF RELEVANT INFORMATION, IS COMPLETELY WITHOUT MERIT.**

SUC repeatedly attempts to justify its refusal to comply with discovery in this matter by claiming that the Attorney General’s data requests are overly “vague,” “broad,” “irrelevant,” burdensome or “information that is not reasonably calculated to lead to discovery of evidence relevant to the issues in this proceeding.” In detailed “settlement discussions”<sup>2</sup> between SUC, National Grid executives and representatives of this office occurring over the past few months, the Attorney General has repeatedly identified his concerns to SUC regarding the pending transaction.

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<sup>2</sup> These discussions have been so detailed that the parties have reduced their efforts to a 12-page draft document, with 25 pages of attachments, entitled “Tiverton Remediation Agreement.” In the Attorney General’s view, these discussions may not bear fruit due to multiple contingencies that must be satisfied.

To reiterate, the Attorney General is deeply concerned whether SUC's corporate restructuring initiatives could result in SUC to avoiding a liability (which has been estimated at \$40 million or more) by establishing a separate corporate subsidiary in Massachusetts to receive SUC operating assets and liabilities (including the Tiverton liability) while simultaneously selling its Rhode Island operating assets to avoid a DEM enforcement action in Rhode Island. If this occurs, then the residents of Tiverton and/or Rhode Island taxpayers will, in all likelihood, bear the clean-up costs associated with the Tiverton site—a result, clearly that is not consistent with “the public interest.” Opposition to the Attorney General's data requests on grounds of that they are over broad, unduly burdensome, seek irrelevant information or seek information that is not reasonably calculated to lead to the discovery of relevant information, is without merit.

**B. SPECIFIC GROUNDS IN SUPPORT OF THE ATTORNEY GENERAL'S MOTION TO COMPEL**

**ATTORNEY GENERAL DATA REQUEST 1-2**

Provide all documents that discuss, reflect or relate to the purchase by National Grid of Southern Union's Rhode Island assets.

**SUC'S RESPONSE**

[SUC] objects to the Attorney General's Data Request 1-2 on the basis that it is overly broad and vague, is unduly burdensome, is no reasonably calculated to lead to discovery of evidence relevant to issue in this proceeding and seeks the discovery of privileged information. Subject to and without waiving these objections, [SUC] is providing the following information in response to Attorney General Data Request 1-2.

Please see Attachments AG-1-2 (a) through (f).

[FORM 10-K of SUC for year ending 12/31/05  
FORM 10-Q of SUC for period ending 3/31/06  
Transcript of SUC Earnings Conference Call of 3/14/06  
Transcript of SUC Earnings Conference Call of 5/10/06  
Script of Annual Meeting of SUC Stockholders of 5/2/06]

Also, documents reviewed as part of the Joint Petitioners' due diligence activities may be responsive to this request. These documents are being made available to the Attorney General for viewing through arrangement with National Grid.

### ARGUMENT

The Attorney General restates and incorporates as grounds in support of his motion to compel the arguments contained Section A of this Memorandum of Law. SUC's response is non-responsive to the data request. The Attorney General is seeking all documents, e-mails, notes, memoranda, presentations, plans, correspondence, *etc.* that discuss, reflect or relate to the purchase of National Grid of Southern Union's Rhode Island assets. As SUC has known for many months, the Attorney General is particularly interested documents that discuss, reflect or relate to the impact that the Rhode Island asset sale will have on a potential corporate liability that may be in excess of \$40 million, along with the company's ability to evade DEM enforcement proceedings by consummating the transaction. If this occurs, then the residents of Tiverton and/or Rhode Island taxpayers will, in all likelihood, bear the clean-up costs associated with the Tiverton site—a result, clearly that is not consistent with “the public interest.”

In the ordinary course of its business operations, a multi-billion dollar company of SUC's size will possess a concrete understanding (and documents that reflect that understanding) of how transactions such as the SUC-National Grid asset sale and transfer will impact these items. SUC, however, has only provided the Attorney General with the most basic publicly available information, such as SEC filings, conference call

transcripts, *etc.* This material does not come close to providing the Attorney General with the type of document production sought by Data Request No. 1-2.

The Division should compel SUC to provide the Attorney General with a complete response to Data Request No. 1-2, as filed. Failure to do so will result in administrative proceedings that are arbitrary and capricious, contrary to law and deny the people of Rhode Island due process of law.

### **ATTORNEY GENERAL DATA REQUEST 1-14**

Describe in detail all steps that Southern Union has taken and will take to transfer New England Gas' Massachusetts operations (including but not limited to the transfer of all assets and liabilities) to a direct or indirect, wholly owned subsidiary of Southern Union and provide a timetable for each step identified.

### **SUC'S RESPONSE**

Southern Union objects to the Attorney General's Data Request 1-14 on the basis that it is not relevant to the issues properly under consideration by the Division, is not reasonably calculated to lead to discovery of evidence relevant to issues in this proceeding and seeks the discovery of privileged documents. Subject to and without waiving these objections, Southern Union is providing the following information in response to Attorney General's Data Request 1-14.

Southern Union has received approval for the transfer from its Board of Directors and its shareholders. The transfer also requires the approval of the Massachusetts Department of Telecommunications and Energy ("MDTE"). As such time that Southern Union obtains the approval of the MDTE, Southern Union will determine the steps necessary to effect the transfer.

### **ARGUMENT**

The Attorney General restates and incorporates as grounds in support of his motion to compel the arguments contained Section A of this Memorandum of Law. SUC's response is also utterly non-responsive to the data request. The Attorney General is entitled know "all steps" that the SUC "has taken and will take" to transfer New

England Gas' Massachusetts operations "to a direct or indirect wholly owned subsidiary of Southern Union." By establishing a subsidiary for its New England Gas Massachusetts operations, along with the concomitant sale of New England Gas's Rhode Island operations to National Grid, SUC may be able to reduce and/or avoid its liability for Tiverton site remediation and avoid DEM enforcement proceedings. If this occurs, then the residents of Tiverton and/or Rhode Island taxpayers will, in all likelihood, bear the clean-up costs associated with the Tiverton site—a result, clearly that is not consistent with "the public interest."

In its response, SUC does not provide any detailed information regarding the proposed transfer of its Massachusetts operations to a direct or indirect wholly owned subsidiary. For example, how will SUC control the new entity? What will constitute the new entity's legal structure? What assets and liabilities will the new entity receive and assume? What will the *pro forma* financial statements of the new entity look like? When will the new entity be established? The Attorney General is entitled to answers regarding these critical issues, and all other steps that SUC has taken and will take to transfer New England Gas' Massachusetts operations (including but not limited to the transfer of all assets and liabilities) to a direct or indirect, wholly owned subsidiary of SUC, along with a timetable for each step identified.

The Division should compel SUC to provide the Attorney General with a complete response to Data Request No. 1-14, as filed. Failure to do so will result in administrative proceedings that are arbitrary and capricious, contrary to law and deny the people of Rhode Island due process of law.



**ATTORNEY GENERAL DATA REQUEST 1-15**

Provide all documents that discuss, reflect or relate to the transfer of New England Gas' Massachusetts operations to a direct or indirect, wholly owned subsidiary of Southern Union.

**RESPONSE**

Southern Union objects to the Attorney General Data Request 1-15 on the basis that it requests information that is not relevant to the issues properly under consideration by the Division, is not reasonably calculated to lead to discovery of evidence relevant to the issues in this proceeding and seeks the discovery of privileged documents. Subject to and without waiving these objections, Southern Union is providing the following information in response to Attorney General Data Request 1-15:

Please see attachment AG-1-7 [Proxy Materials to Shareholders approved 3/15/2006].

**ARGUMENT**

The Attorney General restates and incorporates as grounds in support of his motion to compel the arguments contained Section A of this Memorandum of Law. SUC's response, moreover, is utterly non-responsive to the Attorney General's data request. Through Data Request No. 1-15, the Attorney General has requested that SUC produce all documents that discuss, reflect or relate to the transfer of New England Gas' Massachusetts operations to a directly or indirectly, owned subsidiary of Southern Union. However, in its data response, SUC has only provided the Attorney General with Proxy Materials that restate the relevant shareholder proposal, among other irrelevant materials.

As SUC has known for many months, the Attorney General believes the sale of New England Gas' Rhode Island operations, and the concomitant transfer of the split entity's Massachusetts operations to a separate subsidiary, will enable SUC to avoid a potential corporate liability in excess of \$40 million, along with DEM enforcement proceedings in Rhode Island. If the Attorney General is correct in his belief, then the

residents of Tiverton and/or Rhode Island taxpayers, in all likelihood, will bear the clean-up costs associated with the Tiverton site—a result, clearly that is not consistent with “the public interest.”

The Division must compel SUC to produce each and every document in the company’s possession, custody control that discusses, reflects or relates to the transfer of New England Gas’ Massachusetts operations to a direct or indirect, wholly owned subsidiary of Southern Union. Failure to do so will result in administrative proceedings that are arbitrary and capricious, contrary to law and deny the people of Rhode Island due process of law.

#### **ATTORNEY GENERAL DATA REQUEST 1-16**

Provide the articles of incorporation, by-laws, minutes, consents and all other documents that discuss, reflect or relate to the formation of the entity to which Southern Union will transfer its New England Gas’ Massachusetts operations.

#### **RESPONSE**

Southern Union objects to the Attorney General Data Request 1-16 on the basis that it requests information that is not relevant to the issues properly under consideration by the Division, is not reasonably calculated to lead to discovery of evidence relevant to the issues in this proceeding and seeks the discovery of privileged documents. Subject to and without waiving these objections, Southern Union is providing the following information in response to Attorney General Data Request 1-16:

Please see the response to Attorney General 1-14 and attachment AG-1-7

#### **ARGUMENT**

The Attorney General restates and incorporates as grounds in support of his motion to compel the arguments contained Section A of this Memorandum of Law. SUC’s response, moreover, is utterly non-responsive to the Attorney General’s data

request. Through Data Request No. 1-16, the Attorney General has requested that SUC produce all documents that discuss, reflect or relate to the formation of the entity to which SUC will transfer its New England Gas' Massachusetts operations. This data request is different from Data Request No. 1-15 in that it requests materials that relate to the *formation* of the corporate entity that will be the recipient of New England Gas' assets and liabilities. In its data response, however, SUC has only provided the Attorney General with Proxy Materials that state the relevant shareholder proposal, among other irrelevant materials.

As SUC has known for many months, the Attorney General believes the sale of New England Gas' Rhode Island operations, and the concomitant transfer of the split entity's Massachusetts operations to "directly" or "indirectly" owned subsidiary, will enable SUC to avoid a potential corporate liability in excess of \$40 million, along with DEM enforcement proceedings in Rhode Island. If the Attorney General is correct in his belief, then the residents of Tiverton and/or Rhode Island taxpayers will, in all likelihood, bear the clean-up costs associated with the Tiverton site—a result, clearly that is not consistent with "the public interest."

The Division must compel SUC to produce each and every document in the company's possession, custody control that discuss, reflect or relate to the formation of the entity to which Southern Union will transfer its New England Gas' Massachusetts operations. Failure to do so will result in administrative proceedings that are arbitrary and capricious, contrary to law, made on unlawful procedure and deny the people of Rhode Island due process of law.

## ATTORNEY GENERAL DATA REQUEST 1-17

Provide the articles of incorporation, by-laws, minutes, consents and all other documents that discuss, reflect or relate to the formation all intermediary entities between Southern Union and the entity to which Southern Union will transfer its New England Gas' Massachusetts operations.

### RESPONSE

Southern Union objects to the Attorney General Data Request 1-17 on the basis that it requests information that is not relevant to the issues properly under consideration by the Division, is not reasonably calculated to lead to discovery of evidence relevant to the issues in this proceeding and seeks the discovery of privileged documents. Subject to and without waiving these objections, Southern Union is providing the following information in response to Attorney General Data Request 1-17:

Please see the response to Attorney General Data Request 1-14.

### ARGUMENT

The Attorney General restates and incorporates as grounds in support of his motion to compel the arguments contained Section A of this Memorandum of Law. SUC's response, moreover, is utterly non-responsive to the Attorney General's data request. Through Data Request No. 1-17, the Attorney General requests that SUC produce all documents that discuss, reflect or relate to the formation all intermediary entities between SUC and the entity to which SUC will transfer its New England Gas' Massachusetts operations.

This data request seeks is different from Data Request No. 1-16 in that it requests the production of materials relating to the formation of all "intermediary entities" between SUC and the entity that will receive New England Gas' Massachusetts operations. In its data response, however, SUC has only provided the Attorney General with Proxy Materials that state the relevant shareholder proposal, among other irrelevant materials.

As SUC has known for many months, the Attorney General believes the sale of New England Gas' Rhode Island operations, and the concomitant transfer of the split entity's Massachusetts operations to a "directly" or "indirectly" owned subsidiary, will enable SUC to avoid a potential corporate liability in excess of \$40 million, along with DEM enforcement proceedings in Rhode Island. If the Attorney General is correct in his belief, then the residents of Tiverton and/or Rhode Island taxpayers, in all likelihood, will bear the clean-up costs associated with the Tiverton site—a result, clearly that is not consistent with "the public interest."

The Division must compel SUC to produce each and every document in the company's possession, custody control that discuss, reflect or relate to the formation all intermediary entities between Southern Union and the entity to which Southern Union will transfer its New England Gas' Massachusetts operations. Failure to do so will result in administrative proceedings that are arbitrary and capricious, contrary to law, made on unlawful procedure and deny the people of Rhode Island due process of law.

#### **ATTORNEY GENERAL DATA REQUEST 1-18**

Provide all documents requested by the DPUC in DPUC Data Request 3-5.

#### **RESPONSE**

Southern Union objects to the Attorney General Data Request 1-18 on the basis that it requests information that is not relevant to the issues properly under consideration by the Division, is not reasonably calculated to lead to discovery of evidence relevant to the issues in this proceeding and seeks the discovery of privileged documents. Subject to and without waiving these objections, Southern Union is providing the following information in response to Attorney General Data Request 1-18:

Southern Union has no responsive, non-privileged documents.

## ARGUMENT

The Attorney General restates and incorporates as grounds in support of his motion to compel the arguments contained Section A of this Memorandum of Law. Just as importantly, this is the same request that the Division's Advocacy Section asked SUC.<sup>3</sup> SUC did not object to the Division's request. Accordingly, SUC has waived its right to object to the Attorney General Data Request No. 1-18.

The company's response, moreover, is patently non-responsive and constitutes obstructive discovery tactics that the Division must not condone. For the reasons previously stated, SUC is not entitled to assert objections and then respond that it has "no responsive, non-privileged" documents, without producing a "privilege log" as instructed by the instructions contained in the Attorney General's data responses and required by universally accepted discovery practices. To permit a party to make such a response is equivalent to allowing the party to make no discovery at all.

At a minimum, the Division must compel SUC to provide a "privilege log" in accordance the instructions contained in the Attorney General's data requests. In the "privilege log," SUC must provide the following information regarding all documents that the company decides to withhold on account of privilege:

- (1) Its title;
- (2) The heading or caption of such document(s);
- (3) Its date. If no date appears on the document, provide the approximate date on which such document was prepared;

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<sup>3</sup> The Advocacy Section asked SUC to provide all documents that reflect and/or explain why the propose structure to transfer New England Gas' Massachusetts operations to a direct or indirect, wholly owned subsidiary of the Company was "preferable" and "strategically advantageous." See Division Data Request 3-5.

- (4) Number of pages;
- (5) Number and title of attachments;
- (6) Name(s) of person(s) who signed document; if it was not signed, then the name(s) of person(s) who prepared the document;
- (7) Identify the person(s) to whom such document was addressed and the person(s) who should have received or are known to have received any copies of the document(s).

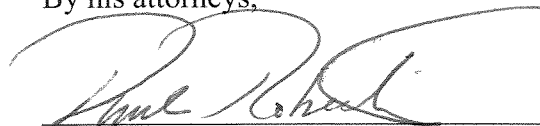
After SUC compiles and produces the “privilege log,” the Hearing Officer should hold another discovery conference to determine whether SUC’s assertion of privilege with respect to each document identified is legitimate. Failure to proceed in the manner suggested will result in administrative proceedings that are arbitrary and capricious, contrary to law, made on unlawful procedure and deny the people of Rhode Island due process of law.

### **C. CONCLUSION**

For the foregoing reasons, the Division should require that SUC provide all documents that are responsive to each of the aforementioned data requests and/or compile and produce of a “privilege log.” The Hearing Officer must then hold another discovery conference to determine whether each SUC assertion of privilege is legitimate. Lastly, since SUC has failed to engage in discovery in a timely fashion, the Division must further amend the current Hearing Schedule in such a manner as to afford the Attorney General with a meaningful opportunity to be heard.

PATRICK C. LYNCH,  
ATTORNEY GENERAL

By his attorneys,



Paul Roberti  
Assistant Attorney General  
150 South Main Street  
Providence, RI 02903  
401-274-4400, ext. 2231

**CERTIFICATE OF SERVICE**

I certify that a copy of the within motion was forwarded by electronic mail and by regular mail, postage prepaid, on the 31<sup>st</sup> day of May, 2006 to the individuals designated on the service list of Docket D-06-13.

