STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF PUBLIC UTILITIES AND CARRIERS

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

RHODE ISLAND ATTORNEY GENERAL'S MOTION TO COMPEL DOCUMENT PRODUCTION TO HIS SECOND SET OF DATA REQUESTS, AND TO AMEND HEARING SCHEDULE

I. INTRODUCTION

The Rhode Island Department of Attorney General ("Attorney General") moves to compel Southern Union Company ("SUC") to produce all documents that are responsive to the Attorney General's Data Requests 2-4, 2-6, 2-7, 2-8, 2-10 and 2-11. In support of his motion, the Attorney General restates and incorporates herein the general grounds asserted in support in his first motion to compel document production and/or more responsive answers and to amend hearing schedule. Some or all of the data responses that SUC forwarded to the Attorney General by letter dated May 30, 2006 regarding these requests: (i) fail to comply with the instructions contained in the data requests by compiling a "privilege log" and therefore, are utterly useless, (ii) are incomplete and/or (iii) are non-responsive. Further, all of SUC's responses and

objections, again, were untimely, and therefore, waived.[1]

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 and/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.

II. SPECIFIC GROUNDS IN SUPPORT OF MOTION TO COMPEL AND TO AMEND

ATTORNEY GENERAL DATA REQUEST 2-4

State the reasons for excluding SUC's Massachusetts assets from the proposed sale to Narragansett Electric Company ("NEC"). Provide all documents and correspondence related to this decision and action and a time-line for the sales process conducted by SUC for its Northeast U.S. assets prior to execution of the acquisition documents with NEC for the sale of the Rhode Island assets.

RESPONSE

[SUC] objects to the Attorney General's Data Request 2-4 on the basis that it requests information that is not relevant to the issues properly under consideration by the Division, is overly broad, and is not reasonably calculated to lead to the discovery of

[1] The Attorney General's data requests were forwarded to SUC on May 19, 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 then 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 30, 2006, 6 days after the 5-day period had expired. Plainly, SUC's objections were untimely, and therefore, waived.

evidence relevant to the issues in this proceeding. Subject to and without waiving such objections, [SUC] responds as follows:

As discussed in response to Division Data Request 5-1, [SUC]'s decision to divest certain of the local distribution operations occurred over a very short time period as a result of the acquisition of Sid Richardson Energy Services, Ltd and related entities (together "SRES"). On December 15, 2005, [SUC] entered into a Purchase and Sale Agreement to acquire the SRES operations at a price of $1.6 billion. [SUC] made a decision in January 2006 to explore the potential sale of LDC assets to raise cash to reduce the level of borrowing that would be required to fund the SRES acquisition. In addition, with the simultaneous acquisition and divestiture of assets, [SUC] recognized the potential to obtain like-kind exchange treatment for the SRES transaction under Section 1031 of the Internal Revenue Code (explained in response to Data Request DIV 5-4). However, to maximize the Company's ability to qualify for such treatment, the closing for the Rhode Island transaction had to occur within the 180-day "safe harbor" period that would commence on the closing date for the SRES transaction, or March 1, 2006.

Therefore, in considering the sale of the New England Gas Company assets, [SUC]'s priority was to structure the sale in a way that would produce the maximum level of value to offset the SRES acquisition combined with the greatest potential to meet the Company's timing requirements. The Company had efforts underway to develop a base-rate filing and rate plan for the Massachusetts operations (which would increase the value of the business and therefore argued against the immediate sale of the assets) and, in addition, the sale of the Massachusetts assets would have required regulatory approval from the MDTE. This would have required [SUC] to pursue simultaneous regulatory approvals in three states (i.e., Pennsylvania, Rhode Island and Massachusetts). Given the size of the Massachusetts operations, the value produced by the sale of those assets would not have outweighed the incremental difficulty and risk involved in obtaining regulatory approval in a third jurisdiction. Accordingly, [SUC] decided to move ahead with the sale of the Rhode Island assets and to exclude the Massachusetts assets from the sale process.

ARGUMENT

The Attorney General restates and incorporates as grounds in support of his motion to compel the arguments contained Section I of this Memorandum of Law. SUC's response, further, is non-responsive to the data request. SUC provides a response to Data Request No. 2-4 but has not provided any supporting documents as requested. The Attorney General is concerned that SUC's "carve-out" of the company's New England Gas division Massachusetts operations is motivated, in part, by a desire to limit

SUC's environmental liability. The Attorney General's concern is real and substantial. History is littered with examples where corporations attempt to utilize the corporate form in a "restructuring" or "reorganization" to avoid substantial environmental or other liabilities.

For example, between 1935 and 1971, a Monsanto chemical business produced PCBs as a by-product of its manufacturing process. In 1997, Monsanto "spun-off" its chemical business as "Solutia." In 2003, Solutia filed for bankruptcy. Both after the spin-off and bankruptcy, Monsanto consistently contended that Solutia was responsible for liabilities associated with the production of PCBs. While the estimates are approximate, Solutia's liability has been estimated at about $2.3 billion. Through bankruptcy proceedings Solutia proposes to pay about 25% of this amount.

In 1963, W.R. Grace acquired Zonolite Co., vermiculite operation. Over the next 25 years it became apparent that W.R. Grace had purchased a substantial liability—vermiculate which causes asbestosis in exposed miners. Starting in 1988, through a series of corporate restructurings, W.R. Grace transferred its asbestos liability into a Connecticut subsidiary, which did not exist at the time that the victims were injured. Thereafter, W.R. Grace repeatedly contended that its Connecticut subsidiary was responsible for the asbestos related liability.

In 2001, W.R. Grace filed for bankruptcy as a result of its potential liability arising from asbestos related tort claims. However, W.R. Grace's legally independent international subsidiaries and affiliates were not included in the Chapter 11 filing. The end-result: creditors have received about 20 cents on the dollar, and W.R. Grace has

been able to successfully shield the bulk of its assets from claimants via asset divestitures.

As stated above, the Attorney General's concerns in the pending docket are both real and substantial. The Attorney General engages in discovery for the very important purpose of assessing the underlying motives and the effect of the transactions vis-à-vis the FRG-related liabilities, with the ultimate aim of determining whether the transaction is consistent with the public interest.

SUC's Response to Data Request No. 2-4 is of little aid in answering these questions. SUC opines that the "value produced" by its Massachusetts assets "would not have outweighed the incremental difficulty and risk involved in obtaining regulatory [MDTE] approval in a third jurisdiction [Massachusetts]." Accordingly, SUC "decided to move ahead with the sale of the Rhode Island assets and to exclude the Massachusetts assets from the sale process."

This response implies that SUC could not obtain the price (the "value") it desired for New England Gas as a whole because those operations are saddled with a substantial environmental liability and the MDTE might not grant complete rate relief (in whole or in part) to clean up the entire mess. If this is true, what better way for SUC to obtain the appropriate "value" in Rhode Island and Massachusetts than to, segregate assets and associated liabilities into a directly or indirectly owned subsidiary; sell the "clean" Rhode Island assets to a willing purchaser; and then obtain whatever rate relief, if any, the MDTE will approve to improve the ultimate marketability of the subsidiary, all the while utilizing the corporate form and associated CERCLA defenses to avoid SUC responsibility for the liability.

Pursuant to this reasonable hypothesis, SUC's "carve-out" decision is the direct product of the FRG-related environmental liability, not the apparent burdensome nature of pursuing "simultaneous regulatory approvals in three states."[2] Data Request 2-4 seeks all documents and correspondence related to the "carve-out" decision and action and a time-line for the sales process that SUC conducted for its Northeast U.S. assets prior to execution of the acquisition documents with National Grid. The data request, then, seeks relevant information or information that is reasonably calculated to lead to the discovery of relevant information.

The Division must compel SUC to provide the Attorney General with a complete response to Data Request 2-4. 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 2-6

Provide all documents related to any due diligence with respect to environmental matters conducted by SUC with respect to or related to its acquisition of Fall River Gas Co. ("FRG").

SUC'S RESPONSE

Southern Union objects to the Attorney General's Data Request 2-6 on the basis that it requests information that is not relevant to the issues properly under consideration by the Division, is overly broad, and is not reasonably calculated to lead to the discovery of evidence relevant to the issues in this proceeding. Subject to and without waiving such objections, [SUC] responds as follows:

ARGUMENT

The Attorney General restates and incorporates as grounds in support of his motion to compel the arguments contained Section I of this Memorandum of Law.

[2] SUC had no difficulty in seeking a rate increase for its Pennsylvania distribution operations while simultaneously pursuing a sale of those assets.

Moreover, SUC has refused to make an estimate of the cost of the Tiverton remediation and contests its liability. See SUC Letter to RIDEM, dated December 13, 2006, submitted in this proceeding. An understanding of the potential remediation cost, however, is pivotal if the Division is to weigh the benefits and burdens of the proposed transaction to assess whether the transaction is "consistent with the public interest." If the cost of remediation is in excess of the nominal ratepayer benefits ($1 to $3 million per year after the expenditure of two years of integration costs), then the Division could conclude that the transaction, not only does not produce any public benefit but also, results in a public detriment.

SUC due diligence documents of the company's FRG purchase may provide a basis for a cost estimate to clean up the Tiverton site, and therefore, are directly relevant, or, are likely to lead to the production of relevant information in this matter. SUC due diligence documents regarding the contamination in this area may also show whether SUC's averment that FRG did not cause the contamination possesses a substantial factual underpinning or is merely pretextual in nature. If, after careful review, those documents reveal that SUC's averment of non-culpability is pretextual, then it follows that SUC is more likely using its reorganization to avoid responsibility for the Tiverton liability. It follows the Division must compel SUC to provide the Attorney General with a complete response to Data Request 2-6.

ATTORNEY GENERAL DATA REQUEST 2-7

With respect to SUC's response to the Division's discovery request 4-4, please describe in detail the "essential information" and "agreement . . . on fundamental aspects of a remediation plan" which SUC asserts are lacking in order for SUC to provide or undertake an estimate of the costs of remediation of the Bay Street area site. This request inquires beyond the discussion set forth in correspondence from David Black, New

England Gas Company, to Leo Hellested, Rhode Island Department of Environmental Management ("RIDEM"), dated December 13, 2005 (included as an attachment to *Response and Objection of Southern Union to Petitions to Intervene* (April 21, 2006) ("Black Letter"). Provide all documents related to any estimation or assessment of remediation costs related to the Bay Street Neighborhood Area site.

RESPONSE

[SUC] objects to the Attorney General's Data Request 2-6 on the basis that it requests information that is not relevant to the issues properly under consideration by the Division, is overly broad, and is not reasonably calculated to lead to the discovery of evidence relevant to the issues in this proceeding. Subject to and without waiving such objections, [SUC] responds as follows:

[SUC] has not developed an estimate of the cost of remediating the environmental issues associated with the Bay Street Area.

ARGUMENT

The Attorney General restates and incorporates as grounds in support of his motion to compel the arguments contained Section I of this Memorandum of Law. SUC's response, moreover, is largely non-responsive and not credible. Attorney General Data Request 2-7, does not simply seek the document which reflects the final remediation estimate, but rather, seeks a detailed assessment of information that SUC contends is lacking in order to estimate remediation costs and "all documents to any estimation or assessment of remediation costs related to the Bay Street Neighborhood Area site."

SUC's response (including its repeated denial of liability) is simply not credible, and, most probably is asserted as a means to avoid compliance with key accounting principles and its corporate fiduciary obligations. Statements of Financial Accounting Standards ("SFAS") No. 5, for example, requires that a liability should be recognized in the financial statements if the loss is probable and the amount is estimable. By stating that the company is not responsible and "has not developed an estimate of the cost of

remediating the environmental issues associated with the Bay Street Area, SUC can opine that the loss is not "probable" or "estimable." As a result, SUC is only required to describe the contingency in its footnotes, rather than place the loss on its balance sheet.

As contended above in connection to SUC's response to Attorney General Data Request 2-6, the issue of remediation cost is central to determining whether the instant transaction is "consistent with the public interest." SUC must be compelled to identify in detail the "essential information" which SUC asserts is lacking in order for the company to undertake an estimate of remediation costs. Moreover, SUC must produce all documents that relate to any estimation or assessment of the Bay Street Area remediation costs. This will enable the Attorney General to supplement those inputs to develop such an estimate. The analysis contained in the Black Letter shows that SUC performed substantial additional analysis, relying on substantial subordinate documentation, to assess the basis of the company's liability and to determine its remediation costs. The Attorney General is entitled to these documents.

ATTORNEY GENERAL DATA REQUEST 2-8

Provide all documents, correspondence and memoranda referred to or relied on in the preparation of the Black Letter. Provide all correspondence between SUC/NEG and its consultants and/or RIDEM or third parties following the Black Letter to the present with respect to the Bay Street Neighborhood Area site.

RESPONSE

[SUC] objects to the Attorney General Data Request 2-8 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.

ARGUMENT

The Attorney General restates and incorporates as grounds in support of his motion to compel the arguments contained Section I of this Memorandum of Law. Further, for the reasons stated in the Attorney General's argument relating to SUC's response to Data Request 2-7, the documents, correspondence and memoranda referred to or relied on in preparation of the Black Letter will provide the Attorney General with analyses and data so that he may determine the amount of the potential liability as well as the nature of the potential recourse against SUC and/or its subsidiaries. SUC's response to Data Request 2-8 is completely non-responsive.

In its response, SUC also contends that the discovery of the requested documents is "privileged." SUC's assertion of privilege, without producing the requisite "privilege log," is contrary to universally accepted discovery practice, and the Instructions contained in the second set of data request themselves. The Division must not condone this type of obstructionist litigation tactic, and should compel SUC to produce all documents in its possession, custody or control that respond to Data Request 2-8.

ATTORNEY GENERAL DATA REQUEST 2-9

Provide all correspondence or documents related to correspondence with the insurance carriers (to and from), if any, related to the Bay Street Neighborhood Area site referenced in Response to Division Data Request 4-2.

RESPONSE

[SUC] objects to the Attorney General Data Request 2-9 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.

ARGUMENT

The Attorney General restates and incorporates as grounds in support of his motion to compel the arguments contained Section I of this Memorandum of Law. SUC's response, moreover, is utterly non-responsive to the Attorney General's data request. Insurance recovery is an obvious, potential source of funding for SUC's liability—an issue that the Hearing Officer expressly held constitutes a legitimate area for inquiry by the parties. SUC's correspondence with insurance carriers is critical for establishing the availability of such funding, and therefore, seeks relevant documents, or documents that are likely to lead to the discovery of relevant information.

In its response, SUC also contends that the discovery of the requested documents is "privileged." SUC's assertion of privilege, without producing the requisite "privilege log," is contrary to universally accepted discovery practice, and the Instructions contained in the second set of data request themselves. Again, the Division must not condone this type of obstructionist litigation tactic and should compel SUC to produce all correspondence and documents related to correspondence with the insurance carriers (to and from), if any, related to the Bay Street Neighborhood Area site referenced in Response to Division Data Request 4-2.

ATTORNEY GENERAL DATA REQUEST 2-10

Provide all pleadings, filings and other documents related to the following litigation matters and investigations: (a) Angel Arriaga et al v. New England Gas Company et al.; (b) Bay Street, Tiverton site; and (c) Cory's Lane, Tiverton, site. Each referenced in Schedules A and B of the Litigation Support Agreement, Exhibit 8.1(d) to the Purchase and Sale Agreement, dated February 15, 2006.

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 responds as follows:

All pleadings and related filings are publicly available to the Attorney General and are unreasonable to produce in this proceeding because of the volume of documents. However, if the Attorney General specifies a particular pleading or filing that he would like to review, [SUC] will provide the Attorney General with a copy.

ARGUMENT

The Attorney General restates and incorporates as grounds in support of his motion to compel the arguments contained Section I of this Memorandum of Law. SUC's response, moreover, is non-responsive to the data request. Bay Street and Cory's Lane both emanate from FRG operations and may reflect a common nucleus of operations (*e.g.,* past manufactured gas soil dumping operations). If SUC devised strategies for shielding or limiting liability in connection with these matters, or if another agency (such as the Massachusetts DEP), found SUC liable for the contamination at these sites, then those strategies and findings will be relevant in the pending matter.

SUC's claim that production of the requested documents is "unreasonable," because they are either "available to the Attorney General" or too voluminous is utterly without merit. The Attorney General does not have easy access to the requested documents, many of which are reside in the files of Massachusetts DEP or Rhode Island DEM or the federal district court. Invariably, however, documents of the type requested are stored and maintained by SUC on computer software. It is a simple matter for SUC to produce the requested documents via computer disc, at literally no cost to the

company. By contrast, the Attorney General could spend countless hours and incur great cost to obtain a fraction of the same documents that already reside in SUC's possession, custody and control.

Under universally accepted discovery practices, even if the documents have not been stored on compute software (which is highly doubtful), at a minimum, SUC is required to provide the Attorney General a "table of contents" designating all documents that are responsive to the requests, provide a "reasonable" number of responsive "critical" documents, and provide an estimate of the cost to obtain the hard or soft copies of the remaining voluminous documents.[3] SUC's response—to place the burden on the Attorney General—to specify a particular document is outrageous. The Division must compel SUC to produce all pleadings, filings and other documents related to the following litigation matters and investigations: (a) Angel Arriaga *et al.* v. New England Gas Company *et al.*; (b) Bay Street, Tiverton site; and (c) Cory's Lane, Tiverton, site.

ATTORNEY GENERAL DATA REQUEST 2-11

Provide the Settlement Agreement, Allocation Agreement and BV&GE Settlement Fund Agreement, referenced in Schedule 5.12, Section VI to the Purchase and Sale Agreement, dated February 15, 2006.

RESPONSE

[SUC] objects to the Attorney General Data Request 2-11 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.

[3] Apparently, only National Grid, (but not SUC) is familiar with these practices. National Grid afforded the Attorney General and the Division's Advocacy Section with a detailed "Table of Contents" of all documents the company maintained in a computer data base, and the option to review or obtain hard copies of "key" confidential documents upon the execution of a mutually agreeable protective order.

ARGUMENT

SUC refuses to produce a Settlement Agreement that is expressly referred to in the Purchase and Sale Agreement dated March 16, 2006 between SUC and National Grid. SUC's refusal to produce this document must not be tolerated by the Division. The requested Settlement Agreement may provide insight into SUC's or its corporate predecessors' strategies for shielding or limiting liability through corporate structures. Therefore, the document is reasonably calculated to lead to the discovery of relevant information and must be produced.

III. CONCLUSION

In its Responses to the Attorney General's Second Set of Data Requests, SUC exhibits a callous disregard for the Attorney General's efforts to conduct due diligence in this proceeding, as well as a callous disregard for normally accepted practices for responding to discovery. Aside from the reasons set forth above, this conduct, in and of itself, should prompt immediate Division inquiry into the bases and motives underpinning SUC's ongoing corporate reorganization.

For all of the foregoing reasons, then, the Division should require that SUC produce 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 appropriate. Since SUC has failed to engage in discovery in a timely fashion, the Attorney General reiterates its request that the Division amend the current Hearing Schedule in such a manner so that hearings do not commence until SUC has made the

appropriate document production and/or responses to the Attorney General's discovery; the Attorney General has had sufficient time to analyze SUC's document production and/or responses; and the Attorney General has had sufficient time to prepare for hearing.

The pending schedule in this matter simply does not, and will not, provide the Attorney General with the aforementioned opportunities, and as of the instant date, 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.

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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 7th day of June, 2006 to the individuals designated on the service list of Docket D-06-13.