State of Rhode Island and Providence Plantations

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Patrick C. Lynch, Attorney General

May 24, 2006

Via Electronic and Regular Mail

John Spirito, Hearing Officer
Division of Public Utilities and Carriers
89 Jefferson Boulevard
Warwick, RI 02888

Re: National Grid/Southern Union Acquisition
DPUC Docket No. D-06-13

Dear Mr. Spirito:

I am writing in response to a letter dated May 23, 2006 from Gerald Petros, Esq. on behalf of Southern Union Company ("SUC"). In its letter, SUC contends that the Rhode Island Department of Attorney General ("Attorney General") "is asking you to 'reconsider' your scheduling Order" and contends that the Attorney General is required to establish "good cause" in order to obtain the requested extension of time. SUC further contends that the Attorney General should not be granted the requested enlargement of time because the alleged "delay" was purportedly of his "own making." Lastly, SUC inappropriately argues the merits of the discovery requests themselves, contending that "the discovery propounded to date by the Attorney General . . . is not directed to legitimate subjects delineated in the May 4th intervention order." As will be seen below, SUC's positions grossly mischaracterize what transpired at the May 11th prehearing conference; conflicts with long-accepted practice before the Division; and distorts the nature and spirit of the Division's rulings in this proceeding.

At the May 11th prehearing conference, the Hearing Officer propounded a draft schedule, which, among other dates designated a deadline for propounding discovery of May 19th and established hearing dates of July 5th and 6th. For its part, National Grid proposed a schedule that sanctioned "rolling discovery" but designated Hearings to commence May 31st. Upon review of both schedules, the Attorney General urged the Hearing Officer for additional time to conduct discovery (thirty days beyond May 19)[1]

[1] The Attorney General believed an additional thirty-day time-period would be sufficient, *provided* SUC and National Grid fully responded to all of the Attorney General's data requests.

and questioned the necessity of what he perceived to be a highly expedited hearing schedule.

Despite the Attorney General's advocacy with regard to these deadlines, the Hearing Officer thought it best to attempt to accommodate National Grid's and SUC's desire to meet a purported August 25th deadline due to a purported tax benefit estimated at roughly "$20 million."[2] To that end, the Hearing Officer established the dates that are reflected in his May 11th Memorandum with the clear understanding that if the dates, indeed, proved overly ambitious, the schedule would be adjusted to reasonably accommodate the requesting party or parties.[3]

Contrary to SUC's averments, at no time, did the Hearing Officer ever state or imply that a party had to make a showing of "good cause" in order to obtain enlargement of the deadlines.[4] Nor did the Hearing Officer "reject" the "Attorney General's request for a more drawn-out schedule," or "permit" the Attorney General "to file an appropriate motion when and if circumstances warranted."[5] SUC's averments to this effect in its May 23rd letter are simply untrue.

SUC proceeds to contend that the Attorney General "waited until literally the last hour to file his first data request directed toward Tiverton." According, to SUC, the Attorney General "should not be permitted to invoke his own delay as a basis for an extension." The briefest consideration of the travel of Docket D-06-13 reveals that

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[2] SUC now estimates the amount at "$13 million," assuming a 90% efficiency rate and a discount rate of 8% over 15 years. See SUC Response to DPUC Data Request 5-4. As noted at the procedural conference, the tax benefit to SUC is clearly not a "ratepayer benefit" that should not even remotely determine the pace of review or assessment of the public interest standard in this proceeding.

[3] SUC characterizes the Hearing Officer's "Memorandum" dated May 11, 2006 as an "Order" and suggests that a party request the Hearing Officer to change the deadlines by making a showing of "good cause." The "Memorandum," by law, is not an "Order" of the Division as it is not executed by the Administrator or his Operations Officer. See DPUC Rule 30(a); G.L. § 42-35-1(j)

[4] The Division's practice has been to allow a reasonable enlargement of established deadlines, be they discovery, hearing date, *etc.* upon a written or oral request of counsel in advance of the deadline.

[5] While the requirement of filing a motion to enlarge deadlines contained in the Hearing Officer's schedule was never discussed, National Grid's counsel did observe that the Attorney General could always file a motion to compel if he was dissatisfied with National Grid's data responses. While the Division has considered motions to compel in the past, such motions are unnecessary under the Division's Rule of Practice and Procedure. See DPUC Rule 21(c) (3).

SUC's contention is wholly without merit. The Division granted the Attorney General intervention status as of May 4, 2006. On May 11, 2006, the Division held its first pre-hearing conference at which time the Division established the initial schedule for this proceeding. The Attorney General issued data requests directed to National Grid and SUC on May 12, 2006. Contrary to waiting until "literally the last hour to file his first data request," the record shows that the Attorney General's actions in promulgating discovery were both prompt and timely.[6]

SUC further opines that the Attorney General has propounded discovery that is not "directed to the legitimate subjects delineated in the May 4 intervention order," and on May 23, 2006, largely objected to each of the Attorney General's data requests.[7] Those data requests seek information bearing on the issue of whether SUC has devised a restructure plan or scheme that will enable SUC to avoid a liability (which has been estimated to easily exceed $40 million) 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 such a plan exists, and ultimately proves successful in avoiding liability in the state or federal courts, the citizens of Tiverton, but more probably Rhode Island's taxpayers, will likely bear the cost of the Tiverton clean-up.[8]

In its May 4, 2006 Order, the Division, of course, was ruling on motions to intervene, not on merits of this matter or whether the Attorney General's discovery was proper. However, by stating that "it is both in the public interest and reasonable for these movants to be seeking assurances that the proposed asset sale does not negatively impact SUC's ability to pay for remedial actions in the event it is found liable for any

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[6] The Division has never permitted, nor have parties ever undertaken, discovery, in a Division proceeding prior to the Division's formal grant of intervention status. For obvious reasons, to do so would constitute an utter waste of time and resources, and would denigrate the Division's authority to rule on the party's intervention motion.

[7] While the responses were served electronically late in the day on May 23rd, SUC did not serve the documents on the Attorney General until May 24th – almost five calendar days beyond the deadline prescribed by the Hearing Officer's adopted schedule.

[8] SUC's Massachusetts operating subsidiary will only have about 50,000 customers. Depending upon the subsidiary's financial condition, substantial exposure to a liability like the Tiverton site remediation, could require the subsidiary to declare bankruptcy.

contamination in Tiverton," DPUC Order at 16, the Hearing Officer, *a priori* ruled that the Attorney General and DEM were entitled to investigate whether SUC had created a scheme or plan that might allow the company to avoid potential Tiverton liability. Any other construction of the Order would render the Attorney General's and DEM's participation in this proceeding purposeless.

To date, National Grid has conducted itself candidly and forthrightly with this office. National Grid responded to each of the Attorney General's data requests or will provide all documents (via a data room) that are responsive to the requests. National Grid will allow the parties and their experts to review all of the documents the company produces. If the Attorney General is not satisfied with National Grid's efforts, the company has indicated a willingness to discuss further modifications to the existing schedule. Lastly, National Grid has voluntarily agreed to waive the discovery deadline of May 19, 2006 so that the Attorney General can engage in meaningful discovery in this matter.

The same, however, cannot be said of SUC. That entity has failed to comply with the five-day deadline that the company itself established for providing responses to this office. SUC has objected to most of the Attorney General's data requests bearing on the aforementioned critical issue on grounds of relevancy, privilege, *etc.* or has responded to data requests with vague, incomplete or non-responsive answers. When SUC has provided documents in response to a request, the company has failed to comply with instructions in the set of data requests that requires the company to identify, describe, *etc.* which documents were being withheld on grounds of relevancy, privilege, *etc.* As a result, SUC's document production, to date, is utterly useless. For the reasons stated above, SUC completely misrepresented the nature and spirit of the May 11th pre-hearing conference, and, in the Attorney General's view, grossly distorted the nature of the Hearing Officer's May 4th Order. SUC, further, has refused to waive the May 19th discovery deadline, and by the afore-mentioned conduct, has engaged in obstructive litigation tactics, which the Attorney General believes, are designed to conceal the true impact of its restructuring scheme.

Based on the foregoing, the Attorney General respectfully requests the Hearing Officer to toll the May 19th discovery deadline, and to amend the rest of the existing schedule to afford the Attorney General a meaningful opportunity to conduct and obtain discovery and prepare for hearing. Any revised schedule should incorporate sufficient time so that the Division can address, and the parties comply with, rulings regarding discovery disputes. Most importantly, SUC should understand that whether the revised schedule, itself, remains in place, will largely depend on that entity's willingness to allow

meaningful discovery. Should SUC fail to produce the documents sought by the Attorney General in connection with this proceeding or answer data requests in a candid and forthright manner, the Division should stay the proceedings until such time as SUC fully responds the Attorney General's discovery.

Thank you for your attention to this matter.

Very truly yours,

Paul J. Roberti
Assistant Attorney General
Chief, Regulatory Unit

PJR/rad
cc: Thomas F. Ahern, Administrator
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