



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Patrick C. Lynch, Attorney General*

June 26, 2006

***VIA ELECTRONIC FILING AND HAND DELIVERY***

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

**Re: Joint Petition of Narragansett Electric Company and  
Southern Union Company for Approval of Purchase and  
Sale of Assets; RIDPUC Docket No. D-06-13**

Dear Ms. Massaro:

On behalf of the Department of Attorney General, I enclose for filing an original and nine (9) copies of the Direct Testimony of Philip L. Sussler. Please add Mr. Sussler to the Service List. His address is as follows: 79 Spruce Lane, Glastonbury, CT 06033. His email address is [pls56@aol.com](mailto:pls56@aol.com).

Thank you for your attention to this matter.

Very truly yours,

Paul Roberti  
Assistant Attorney General  
Chief, Regulatory Unit

Enclosures

cc: Service List

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

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        )

PREFILED TESTIMONY  
OF  
PHILIP L. SUSSLER  
ON BEHALF OF  
THE RHODE ISLAND DEPARTMENT  
OF ATTORNEY GENERAL

1    Q. Please state your name, your position and your address.

2    A. My name is Philip L. Sussler. I am an attorney, admitted to practice in Connecticut (1982)  
3    and Massachusetts (1983). My address is 79 Spruce Lane, Glastonbury, Connecticut 06033.

4    Q. Please describe your professional experience and background.

5    A. I have practiced law for more than twenty years. My areas of concentration are the electric  
6    utility and energy industries and environmental law. I have represented large public agencies,  
7    publicly owned commercial entities, private electric and natural gas utilities and private parties  
8    with respect to environmental and regulatory matters. In the environmental area, I have  
9    represented and counseled entities in all forms of environmental siting and permitting matters,  
10   including air emissions, water discharges, and land use, and, specifically, in hazardous  
11   substances investigations, clean-ups, remediation, and cost recovery actions and litigation. I  
12   have also represented clients defending against environmental enforcement matters.

13   Q. Please describe who engaged you to provide this testimony.

1 A. I have been engaged by the Department of the Attorney General of the State of Rhode Island  
2 (“RIAG”) to provide testimony in the proceeding before the Division of Public Utilities and  
3 Carriers (the “Division”), designated as Docket D-06-13 (the “Proceeding”).

4 Q. Please describe the purpose of your testimony.

5 A. The purpose of my testimony is as follows:

6 (1) to describe the rules for assessing and allocating liability for environmental pollution, in  
7 general terms;

8 (2) to summarize, based on publicly available information, the current circumstances  
9 surrounding the environmental contamination existing in and around the Bay Street area in  
10 Tiverton, Rhode Island (the “Bay Street Area Environmental Matter”); and

11 (3) to analyze the transaction proposed by the Southern Union Company (“SUC”), first, to  
12 sell its Rhode Island natural gas distribution company assets to Narragansett Electric  
13 (“Narragansett”), while retaining its natural gas local distribution company (“LDC”) assets and  
14 operations in Massachusetts and subsequently transferring those assets to a Massachusetts  
15 corporate subsidiary and, based on that analysis, to determine whether these transactions, in  
16 whole or in part, will reduce the ability of the State of Rhode Island to enforce and/or collect  
17 recovery for legal liabilities, most notably those arising out of the Bay Street Environmental  
18 Matter, against SUC.

19 (4) to recommend proposed conditions to any regulatory approval of the proposed  
20 Transaction in this Proceeding, which address the problems identified in item (3) above.

21 Q. Please describe, in general terms, the rules for assessing and allocating liability for  
22 environmental pollution.

1 A. Legal liability for historic land-based environmental pollution arose under long-standing,  
2 traditional common law doctrines such as strict liability, trespass, negligence and nuisance.  
3 Claims brought under these doctrines against parties “causing” land-based environmental  
4 pollution, however, met with obstacles to success due to pleading and evidentiary limitations in  
5 establishing and proving liability. These obstacles were especially significant with respect to  
6 long-standing environmental pollution of land or groundwater, typically discovered long after the  
7 activities giving rise to the pollution had ended and/or the property had been transferred once or  
8 several times.<sup>1</sup>

9 In recent years, with increased public awareness of extensive land-based environmental  
10 pollution as an adverse legacy of our country’s industrial development, public policy concerns  
11 have grown regarding the need for more effective legal vehicles for initiating, administering and  
12 completing clean-up and paying for the clean-up of and compensating parties injured by the  
13 pollution. As a result, the federal government and many states enacted laws for investigating and  
14 administering clean-ups of environmental pollution and determining and allocating legal  
15 responsibility for such clean-ups. Specifically, the U.S. Congress enacted the Comprehensive  
16 Environmental Response, Compensation and Liability Act, 42 U.S.C. Sections 9601 *et seq.*  
17 (“CERCLA”). Rhode Island enacted a statute which parallels in many respects the liability  
18 scheme established under CERCLA, the Industrial Property Remediation and Reuse Act, R.I.  
19 G.L., title 23, chapter 19.14 (the “Rhode Island Act”).

20 Under CERCLA, the following parties are, by statute, made liable for those costs of clean-up  
21 and recovery, authorized for recovery under the Act:

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<sup>1</sup> See, e.g., *Hydro-Manufacturing, Inc. v. Kayser-Roth Corp.*, 640 A.2d 950 (R.I. 1994) (R.I. groundwater protection statute does not provide for right of action for polluting activities occurring prior to its date of enactment; under Rhode Island negligence doctrine, former property owner has no duty of care in favor of remote subsequent purchasers; under Rhode Island nuisance law, party can only maintain claims against adjacent property owners but not a former owner). See also, *Wilson Auto Enterprises, Inc. v. Mobil Oil Corp.*, 778 F. Supp. 101 (D.R.I. 1991).

1 (1) the owner and operator of a vessel or a facility,  
2

3 (2) any person who at the time of disposal of any hazardous substance owned or operated any  
4 facility at which such hazardous substances were disposed of,  
5

6 (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or  
7 arranged with a transporter for transport for disposal or treatment, of hazardous substances  
8 owned or possessed by such person, by any other party or entity, at any facility or incineration  
9 vessel owned or operated by another party or entity and containing such hazardous substances,  
10 and  
11

12 (4) any person who accepts or accepted any hazardous substances for transport to disposal or  
13 treatment facilities, incineration vessels or sites selected by such person, from which there is a  
14 release, or a threatened release which causes the incurrence of response costs, of a hazardous  
15 substance.  
16

17 42 U.S.C. Section 9607(a).

18 The Rhode Island Act establishes a similar hierarchy of legally responsible parties. R.I.G.L.

19 Section 23-19.14-7. CERCLA has been construed to provide for a private right of action,

20 authorizing non-governmental persons to bring suit directly under its provisions to recover the

21 costs of clean-up. It is not clear that the Rhode Island Act provides for a similar private right of

22 action. Case law is very extensive under CERCLA construing its various provisions. It is almost

23 entirely absent under the Rhode Island Act. Hence the following discussion addresses the legal

24 rules under CERCLA. While this discussion may be of assistance in construing the Rhode Island

25 Act given the similarity in language with CERCLA, the discussion is not dispositive of the

26 Rhode Island Act, given the relative dearth of case law.

27 Two other aspects of legal liability under CERCLA (and, by implication, the Rhode

28 Island Act, subject to the previously stated qualification) are relevant for present purposes. First,

29 liability is assessed on a joint and several basis – so that, for example, if the government seeks to

30 recover costs from liable parties, it can seek recovery for the entire dollar amount of the liability

31 from a sub-set of the liable parties. Those parties held liable directly to the government may then

1 bring a contribution action against other liable parties, not held liable directly to the government,  
2 to re-allocate the ultimate liability. To the extent that not all the liable parties can be spoken for  
3 (for example, if they declared bankruptcy and discharged their debts (including environmental  
4 claims) as a result or cannot for some reason be identified), the parties held liable on a joint and  
5 several basis potentially are forced to shoulder more than their proportionate share of the  
6 ultimate liability. This is the so-called “orphan share” problem.

7           Second, in a recent trend, gathering strength following the U.S. Supreme Court’s decision  
8 in *United States v. Best Foods, Inc.*, 524 U.S. 51 (1998), the courts, in deciding claims under  
9 CERCLA have respected, although not uniformly, traditional corporate law limitations to the  
10 liability of persons or entities which succeed to the properties of predecessor corporations which  
11 themselves are liable. Thus, a corporation that purchases only the assets of another corporation  
12 and not its stock may be able to avoid liability under CERCLA even though the environmental  
13 contamination occurred prior to the closing of the transaction as the result of activities of the  
14 operating business acquired in the transaction. Prior to the *Best Foods* decision, case law in  
15 many federal circuits construing claims under CERCLA had recognized, on equitable principles,  
16 a fairly broad basis for assessing liability against such successor corporations (under the so-  
17 called “substantial continuity” test). Subsequent decisions following the Supreme Court’s dictum  
18 in *Best Foods*, notably in the Second and First Circuits<sup>2</sup>, have ruled that the issue is decided  
19 under the state corporate law applicable under choice of law principles, and in accordance with  
20 traditional corporate law doctrine. This has the effect of drastically reducing recourse to

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<sup>2</sup> *United States v. Davis*, 261 F.3d 1 (1<sup>st</sup> Cir. 2001); *New York v. National Service Industries, Inc.*, 352 F.3d 682 (2d Cir. 2003). *Best Foods* narrowly dealt with the issue of the standards for imposing derivative liability on a parent corporation for liabilities incurred or borne, at least initially, by its subsidiary. In this respect, it did not directly address the standards for determining corporate successor liability. Both *U.S. v. Davis* and *New York v. National Service Industries, Inc.* address directly the standard for determining successor liability, but rely heavily on the general reasoning of *Best Foods* in reaching their result.

1 successor corporations purchasing assets, rather than stock, for CERCLA liability visited on their  
2 predecessor limited liability companies. It also has given rise to extensive planning efforts by  
3 corporations to structure their transactions for acquiring and disposing of assets and operations  
4 so as to shield themselves from liability for environmental claims.

5 The traditional corporate law doctrine shielding a purchaser of assets from the liability of  
6 predecessor corporations owning such assets is subject to very narrow exceptions. The  
7 evidentiary requirements for establishing these exceptions, however, when confronted with  
8 reasonable transaction planning by the affected corporations, are so high as to be nearly  
9 insurmountable.<sup>3</sup>

10 Q. Please summarize the Bay Street Environmental Matter based on your review of publicly  
11 available documents.

12 A. In 2002, sub-surface excavations were conducted in the Bay Street Area, Tiverton, Rhode  
13 Island, in connection with the construction of the Mount Hope Interceptor Sewer Project. During  
14 the performance of this work, soil was stock-piled at two locations in the Bay Street Area, which  
15 was observed to have a “blue color” indicative of coal gasification waste material (i.e., cyanide).  
16 Rhode Island Department of Environmental Management (“RIDEM”), Notice of Intent to  
17 Enforce, Dated November 23, 2005 (the “RIDEM NOIE”), Para. 3. Extensive petroleum-based  
18 contamination was discovered and a petroleum sheen was observed in groundwater seeping into

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<sup>3</sup> The general criteria for establishing the exception are that: (a) the successor expressly or impliedly agrees to assume the liabilities; (b) the transaction is a de facto merger or consolidation; (c) the successor is a “mere continuation” of the predecessor, namely that (i) there is a single corporation purchasing and owning the assets after their transfer; (ii) there is an identity of stock, shareholders and directors between the successor/buyer and predecessor/seller corporation; and (iii) the transfer is for inadequate consideration; or (d) the transaction is fraudulent (evidenced by inadequate consideration paid for the assets). *See, e.g., Ed Peters Jewelry Co. v. C&J Jewelry Co.*, 124 F. 3d 252, 266 (1<sup>st</sup> Cir. 1997). These criteria are subject to some variation depending on the particular state law considered. *See, e.g., U.S. v. General Battery Corp., Inc.*, 423 F. 3d 294 (3d Cir. 2005) (Third Circuit declines to look to particular state law; but instead, opts to apply federal law; in part, premised on the substantial variation in the application of the criteria depending on the particular state law used to analyze the question).

1 the excavation. *See*, EA Engineering, Science and Technology, Inc., *Site Investigation Report*  
2 *Addendum (2)* (dated January, 2004) (the “EA Report”), p. 4 of 12.

3 In work conducted by EA and described in the EA Report, EA subsequently performed  
4 soil borings at various locations in the Bay Street area which discovered semivolatile organic  
5 compounds (SVOCs), particularly polycyclic aromatic hydrocarbons (PAHs), and cyanide  
6 at levels exceeding both the Rhode Island Department of Environmental Management  
7 (“RIDEM”) Residential and Industrial/Commercial Direct Exposure Criteria (RDEC and  
8 I/CDEC). Additional investigations to try to establish boundaries to the area of  
9 contamination were conducted by EA and uncovered additional areas of soil  
10 contamination, including highly contaminated wood mulch. Ultimately, the area impacted  
11 by the contamination includes approximately 100 residential parcels and several  
12 commercial properties in the northeastern section of Tiverton, along and proximate to Bay  
13 Street and several streets intersecting with Bay Street. RIDEM NOIE, Paras. 1-8.

14 In seeking to establish the source of the contamination in the Bay Street Area, EA  
15 stated as follows in the EA Report:

16 [A]necdotal evidence has been found to link this contamination to historic dumping  
17 of manufactured gas plant waste material by the former Fall River Gas Company.  
18 Chemical profiles of the contaminated soil and organic material are consistent with  
19 this suspected source.  
20 EA Report at p. 4 of 12.  
21

22 The RIDEM NOIE also states as follows:

23 7. ....a former employee of Fall River Gas Company observed that “blue soil” was in  
24 the fill material (1-3 feet in depth) along State and Bay Street and that the disposal  
25 of this fill may have occurred over a ten-year period during the 1960’s and early  
26 1970’s.  
27

1           8. The suspected source of the contaminated fill material was stated to be the  
2           former Fall River Gas Company.  
3

4 Separately, Fall River Gas Company (“FRG”) has reported the operation of two former  
5 manufactured gas plants (“MGP”), one located at Bay Street and Charles Street in Fall River and  
6 a second at Anawan and Pond Street in Fall River.<sup>4</sup> SUC acquired FRG in a merger in 2000 and  
7 operated FRG thereafter as a division of SUC.

8           Based on these findings, RIDEM initiated enforcement action against SUC consistent  
9 with the structure of liability under CERCLA and the Rhode Island Act. RIDEM requested that  
10 SUC undertake the required site investigations and remedial actions required under RIDEM’s  
11 regulations for contaminated site clean-up.

12           While, to date, SUC has maintained in responses to data requests propounded in  
13 this Proceeding that it has not made an estimate of the cost of remediation of the Bay  
14 Street Environmental Matter<sup>5</sup>, the costs could, under reasonable estimates and assumptions,  
15 range into the many \$10s of millions of dollars. I am not supporting or endorsing any  
16 particular cost estimate for the clean-up and remediation of the Bay Street Area; but the  
17 likely range of such estimates (and their upper range) is a critical consideration in  
18 evaluating the incentives, described further below, faced by SUC with respect to its  
19 management of the potential liability of the Bay Street Environmental Matter.

20 Q. Please describe SUC’s response to RIDEM’s determinations regarding its potential liability  
21 for the Bay Street Environmental Matter.

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<sup>4</sup> See Agreement of Merger between Southern Union Company and Fall River Gas Company, dated as of Oct. 4, 1999, Schedule 5.19, FAL Disclosure Schedule.

<sup>5</sup> See, e.g., SUC Response to Division Data Request 4-4.

1 A. Based on publicly available documents, I summarize SUC's actions as follows. RIDEM  
2 issued a notice of responsibility to SUC March 17, 2003. Initially, SUC funded and performed  
3 various investigations of the Bay Street area in response to RIDEM's directives. However, in  
4 2005, SUC refused to pursue the studies and analysis of clean-up proposed by RIDEM. In  
5 response to this refusal, RIDEM issued the NOIE in November, 2005. SUC responded with  
6 correspondence dated December 13, 2005. In that correspondence, SUC contests its legal  
7 liability for the contamination in the Bay Street Area and the scope of the investigations and  
8 remedy proposed by RIDEM. On information and belief, matters are currently at an impasse  
9 between RIDEM and SUC and further investigation of the environmental conditions and clean-  
10 up of the Bay Street Environmental Matter is in abeyance.

11 Q. How do the rules for assessing and allocating legal liability for environmental pollution,  
12 previously described in your testimony, apply to the circumstances of the Bay Street Area  
13 Environmental Matter?

14 A. My conclusions set forth in response to this question are subject to and restricted by the  
15 limited responses to discovery provided by SUC to date in this proceeding. As an initial matter,  
16 assuming the correctness of the findings in the EA Report and the RIDEM NOIE, the source of  
17 contamination was the dumping of contaminated waste generated at FRG's MGPs, but at a  
18 location not owned by FRG. SUC, as the successor in interest to FRG through a full merger of  
19 FRG into SUC, is liable for the contamination. SUC, through FRG, is, in the words of the  
20 CERCLA statute:

21 (3) [A] person who by contract, agreement, or otherwise arranged for disposal or  
22 treatment, or arranged with a transporter for transport for disposal or treatment, of  
23 hazardous substances owned or possessed by such person, by any other party or entity, at  
24 any facility or incineration vessel owned or operated by another party or entity and  
25 containing such hazardous substances  
26 42 U.S.C. Section 9607(a).

1  
2 Moreover, because of the joint and several nature of the liability under CERCLA, assuming FRG  
3 is the source of some of the contamination at the Bay Street Area, SUC can be held liable for the  
4 full amount of liability, even though some of the contamination may have been caused by other  
5 parties. SUC would have the right to bring a contribution action against other parties which, in  
6 addition to FRGC, caused the contamination in order to shift some of the ultimate liability back  
7 to such parties.

8           However, this is not the end of the inquiry. As stated previously, the resurgence of the  
9 application of traditional corporate law doctrines to successor liability for environmental  
10 contamination, provides very important planning and structuring tools to corporations to limit or  
11 seek to limit environmental liability. The importance and significance of these planning tools is  
12 also commensurate with the degree of exposure to environmental liability faced by a particular  
13 corporation. If the exposure is large, as it appears to be with respect to the Bay Street  
14 Environmental Matter, there is a strong incentive for a corporation to employ these tools. A  
15 pattern for accomplishing this is for a parent entity, which initially bears liability under  
16 CERCLA, through a series of transactions to transfer a major portion of its assets to subsidiary or  
17 spun-off corporations. Each such transaction is an asset sale, so that the transfer does not shift the  
18 liabilities held by the parent to the subsidiary or spun-off entity. Also each such sale is carefully  
19 structured so that it does not trigger the previously noted exceptions to the cut-off of successor  
20 liability associated with an asset sale. Ultimately, after a series of such transactions, the majority  
21 of assets are shifted to subsidiaries or spun off with defenses to environmental liability. The well  
22 known restructuring of W.R. Grace Company follows this pattern.

23           The circumstances and incentives exist for SUC to follow a similar path. SUC, as  
24 revealed in its various financial reports, has embarked on a business strategy of extensive

1 acquisition and selling of properties and businesses. This plan apparently includes selling off  
2 many of its natural gas distribution businesses and refocusing on and increasing its business in  
3 pipeline and gathering and storage activities. It also bears potentially large environmental  
4 liabilities associated with its natural gas distribution business operations. Moreover, with the  
5 repeal of the Public Utility Holding Company Act of 1935 (“PUHCA”), accomplished with the  
6 passage of the Energy Policy Act of 2005, SUC no longer has the long-standing regulatory  
7 restriction on reorganizing its business into subsidiaries and holding companies that applied so  
8 long as the PUHCA was in effect. Lastly, by segregating the issue of liability from this  
9 proceeding, and thus leaving the matter for litigation that will invariable take many years, SUC  
10 will have the time necessary to execute a strategy of multiple transfers of assets to subsidiaries  
11 and spun-off limited liability entities so as to reduce and compartmentalize its environmental  
12 liabilities.

13 Q. Does the proposed sale of the Rhode Island assets of SUC and SUC’s plan to create a  
14 Massachusetts subsidiary to own its Massachusetts assets reduce the State of Rhode Island’s  
15 ability to enforce the environmental liability rules applicable to the Bay Street Environmental  
16 Area?

17 A. Yes. The State’s ability to enforce the clean-up of the Bay Street Environmental Area against  
18 SUC is materially diminished if the transaction in this proceeding is approved.

19 First, SUC’s creation of a Massachusetts subsidiary can be a vehicle for freeing the  
20 Massachusetts assets from the liability, when purchased by a subsequent purchaser through an  
21 asset purchase, and which otherwise does not fit within the narrow exceptions to the cut-off to  
22 liability for successor corporations.

1           Second, the SUC sale of the Rhode Island assets, followed by the sale of the  
2 Massachusetts assets may form the beginning of a strategy, as outlined above, for ultimately  
3 compartmentalizing liability and impairing the State's recourse to establish liability and  
4 ultimately recover the costs of remediation.

5           Third, by virtue of the sale of SUC's Rhode Island assets to Narragansett, Narragansett  
6 may be able to shield itself from liability for environmental harms under CERCLA, in all  
7 instances where Narragansett is not a current owner or operator of the contaminated site or  
8 facility (*i.e.*, all circumstances where the contamination was shipped off-site or occurred on  
9 properties previously transferred to third parties). While this may reduce costs incurred by  
10 Narragansett's Rhode Island regulated operations, it could also shift such costs and risks of  
11 environmental clean-up to the Rhode Island taxpayer, to the extent the State of Rhode Island  
12 must conduct the clean-up because of the refusal of private parties, who are otherwise  
13 responsible, to do so.

14           Fourth, the ability to recover the costs of clean-up through rate recovery mechanisms,  
15 recognized in both Massachusetts and Rhode Island, by LDCs can be expected to greatly  
16 facilitate the active pursuit of remediation of the Bay Street Environmental Matter. With the sale  
17 of the Rhode Island assets and retention of liability by SUC, on the one hand, and the possible  
18 ultimate sale of the Massachusetts assets with the same result, natural gas rate recovery  
19 mechanisms will no longer be available (because the purchasers then operating the LDCs will be  
20 shielded from the liability). SUC may have, in effect, decided against active pursuit of a clean-  
21 up facilitated by recovery in rates of the cost of remediation in favor of aggressive defensive  
22 litigation against taking responsibility for the clean-up coupled with an enhanced sale price for  
23 the assets, where the purchaser may be freed from this environmental liability. The Attorney

1 General's discovery in this case is directly targeted towards unveiling SUC's intentions in this  
2 regard as it seeks to acquire the SUC's internal corporate documents relating to these  
3 transactions. In addition, prior to the sale of the Massachusetts assets by "cabining" the liability  
4 away from the Rhode Island LDC assets, SUC has limited the revenue base over which it can  
5 potentially recover the associated remediation costs, thereby further supporting its incentive to  
6 pursue aggressive, defensive litigation. I do not mean to suggest that the costs of clean-up of the  
7 Bay Street Environmental Matter are deserving of any particular rate recovery treatment, if at all;  
8 but rather seek to describe planning criteria which SUC may be utilizing.

9 Finally, the sale creates uncertainty about SUC's amenability to service of process and to  
10 the jurisdiction of the Rhode Island courts, given the possibility of the ending of its jurisdictional  
11 contacts in Rhode Island following the completion of the sale.<sup>6</sup>

12 Q. What is the relevance, in this proceeding, of the issue of the relative ability of the State of  
13 Rhode Island to seek remedies against SUC before and after closing of the transactions subject to  
14 approval in this proceeding and contemplated by SUC with respect to the Massachusetts LDC  
15 assets?

16 A. As noted previously, RIDEM has determined that SUC is the principally responsible party,  
17 with legal liability for the clean-up of the Bay Street Environmental Matter. Both RIDEM's and  
18 EA's assessment supports SUC liability. SUC now, however, vigorously contests this liability.  
19 At the same time, SUC is seeking the Division's approval of a transaction which will result in  
20 SUC ceasing its active business operations within the State. In this context, a searching review

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<sup>6</sup> SUC's departure from Rhode Island may also impact the choice of law utilized in determining successor liability in subsequent litigation. *See, e.g., Chrysler Corp. v. Ford Motor Company*, 972 F. Supp. 1097 (E.D. Mich. 1997)(applying the corporate law of the state of the contaminated site based on an overall analysis of contacts and interests involved in the litigation, rather than that of the state of incorporation of the corporation defending against liability); *AT&T Global Information v. Union Tank Car Co.*, 29 F. Supp. 2d 857 (S.D. Ohio 1998). The substantive impact of this result, assuming it applies, is difficult to predict. But that uncertainty also increases the risk for the State associated with the SUC transaction under review in this proceeding.

1 of the incentives and other circumstances bearing on SUC with respect to its potential  
2 environmental liability following completion of the proposed transaction is a reasonable area of  
3 inquiry in analyzing whether the proposed SUC transaction is, in relevant part “consistent with  
4 the public interest.” R.I.G.L. Section 39-3-25

5 Q. What do you recommend in this proceeding?

6 A. As mentioned previously, the standard guiding the Division in this proceeding provides that  
7 the Division, in granting its approval, must, first, find that the transaction is, in relevant part,  
8 “consistent with the public interest”. R.I.G.L. Section 39-3-25. The Division in its Order on  
9 Interventions ruled as follows:

10 The Division finds that it is both in the public interest and reasonable for these movants [RIDEM  
11 and RIAG] to be seeking assurances that the proposed asset sale does not negatively impact  
12 Southern Union’s ability to pay for remedial actions in the event that it is found liable for any of  
13 the contamination in Tiverton.  
14 Division Order (May 4, 2006), p. 16.

15  
16 In order to establish the consistency of the proposed transaction with the “public interest” as  
17 mandated by the relevant statute, I recommend that the Division’s order, at a minimum,  
18 incorporate various conditions, embodied in an agreement between the RIAG and SUC, which  
19 address and attempt to mitigate the reduced ability of the State of Rhode Island to enforce its  
20 authorities against SUC with respect to the Bay Street Environmental Matters which would  
21 otherwise result from an unconditioned approval of the proposed transaction. Attached as an  
22 exhibit to this testimony is a proposed agreement which incorporates these recommended  
23 conditions. The Division should include in its order conditions which parallel fully those set  
24 forth in the attached exhibit.

25 The proposed conditions are specified further below:

1 1. Reduction in concerns about the amenability of SUC to suit in Rhode Island, by  
2 inclusion of the following condition:

3 Consent to Jurisdiction. SU shall irrevocably agree that any legal action, suit or  
4 proceeding arising out of or relating to this Agreement or the RIDEM Letters may be  
5 brought in the courts of the State of Rhode Island or of the United States of America for  
6 the District of Rhode Island. SU hereby irrevocably submits to the non-exclusive  
7 jurisdiction of any such court in any such action, suit or proceeding and agrees to  
8 designate, appoint and empower \_\_\_\_\_ (the "Process Agent"), with offices at  
9 \_\_\_\_\_, as its authorized agent solely to receive for and on its  
10 behalf service of summons or other legal process in any such action, suit or proceeding in  
11 any such court. Final judgment against SU in any such action, suit or proceeding shall be  
12 conclusive and may be enforced in any other jurisdiction by suit on the judgment.  
13 Nothing herein shall affect the right of the Rhode Island Parties to commence legal  
14 proceedings or otherwise sue SU in any appropriate jurisdiction or to serve process upon  
15 SU in any manner authorized by the applicable law any such jurisdiction. SU further  
16 covenants and agrees that it shall maintain a duly appointed agent for the service of  
17 summons and other legal process in Providence, Rhode Island for purposes of any legal  
18 action, suit or proceeding brought by SU in respect of this Agreement or arising out of  
19 the RIDEM Letters and shall keep the Rhode Island Parties advised of the identity and  
20 location of such agent. SU further irrevocably consents, if for any reason there is no  
21 authorized agent for service of process in Providence, Rhode Island, to the service of  
22 process out of the said courts by mailing copies thereof by registered United States of  
23 America air mail, postage prepaid, to SU at its address specified herein, and in such a  
24 case the Rhode Island Parties shall also send by telex or facsimile, or shall undertake that  
25 there is also sent by telex or facsimile, a copy of such process to SU. The serving of  
26 process in the manner provided in this section in any such action, suit or proceeding shall  
27 be deemed personal service and accepted by the SU as such and shall be valid and  
28 binding upon SU for all the purposes of any such action, suit or proceeding. In addition,  
29 SU irrevocably waives, to the fullest extent permitted by applicable law, any objection  
30 which it may now or hereafter have to the laying of venue of any action, suit or  
31 proceeding arising out of or relating to this Agreement or proceedings arising out of the  
32 RIDEM Letters, brought in the courts of the State of Rhode Island or in the United States  
33 District Court for the District of Rhode Island, and any claim that any such action, suit or  
34 proceeding brought in any such court has been brought in an inconvenient forum.  
35

36 2. Mitigation of concerns about SUC's ability to interpose corporate forms to shut-off or  
37 limit legal liability, by inclusion of the following condition:

38 Waiver of Defenses to Liability. SUC agrees and acknowledges that it shall not assert in  
39 any judicial or administrative or other legal forum and shall waive any defense to its legal  
40 liability, if any, in any such forum arising from the Bay Street Area Environmental  
41 Matter, as asserted in the RIDEM Letters and the Lawsuits and matters arising therefrom,

1 which defense is based in any manner on the form or structure of corporate or business  
2 entity ownership or acquisition or sale of all or a portion of FRGC or its predecessors or  
3 successors or FRGC's assets and/or operations. Such waiver shall include waiver of any  
4 defense based on SUC's status or lack thereof, whether current or former, as an owner or  
5 operator, transporter, arranger or generator as those terms may be defined under any  
6 Environmental Laws, prior to or following any sale or transfer of all or a portion of the  
7 assets or operation of FRGC whether as a result of the Massachusetts Transfer or  
8 otherwise.  
9

10 3. Establishing a more secure form of financial security to any ultimate recovery against

11 SUC, by inclusion of the following conditions:

12 3.1. Financial Assurance. In order to provide financial assurance to the Rhode Island  
13 Parties for the performance of SUC's obligations hereunder, SUC shall execute and  
14 deliver an escrow agreement in a form reasonably satisfactory to the Division and RIAG  
15 in the amount of \_\_\_\_\_. SUC's liability for the Bay Street Area Environmental  
16 Matter, if any, shall not be limited by the amount of any such financial assurance as is  
17 funded through such escrow agreement.  
18

19 3.2. SUC Guarantee. SUC shall irrevocably and unconditionally guarantee the timely  
20 payment when due of any amounts due arising from legal liability determined against  
21 FRGC, or of any affiliated, predecessor and/or successor business entity of FRGC  
22 existing prior to the Effective Date, whether or not currently in existence, or such  
23 successor entity created as a result of the Massachusetts Transfer to hold the FRGC assets  
24 (the "FRGC Entities") for any obligations such FRGC Entities (either singly or severally)  
25 may or did incur for liability, whether on a several or joint and several basis, under and  
26 pursuant to the Environmental Laws relating to the Bay Street Area Environmental  
27 Matters (the "Obligations") and without regard to whether such liability was extinguished  
28 solely as a result of the dissolution, liquidation, winding-up or discharge in bankruptcy of  
29 any one or several of such FRGC Entities. Such Obligations shall include losses, costs  
30 and expenses including costs of environmental remediation as may be required under the  
31 Environmental Laws with respect to the Bay Street Area Environmental Matters. The  
32 foregoing obligation of SU is referred to herein as the "Guarantee". If any such FRGC  
33 Entity(ies) fails to pay any such Obligations or is otherwise incapable of satisfying such  
34 Obligations, SUC shall promptly pay to the State of Rhode Island (the "Guaranteed  
35 Party") no later than the next Business Day, after notification, the amount due in U.S.  
36 Dollars of such liability. "Business Day" shall mean any day except Saturday, Sunday, or  
37 a day on which commercial banks in New York are closed for business. A Business Day  
38 shall open at 8:00 a.m. and close at 5:00 p.m. local time for the relevant party's principal  
39 place of business. SUC hereby waives (a) notice of acceptance of this Agreement and the  
40 guarantee obligation set forth herein; (b) presentment and demand concerning the  
41 liabilities of SUC, except as expressly hereinabove set forth; and (c) any right to require  
42 that any action or proceeding be brought against the FRGC Entities or any other person,  
43 or except as expressly hereinabove set forth, to require that the Guaranteed Party seek

1 enforcement of any performance against one or more of the FRGC Entities or any other  
2 person, prior to any action against SUC under the terms hereof. Except as to applicable  
3 statutes of limitation, no delay of the Guaranteed Party in the exercise of, or failure to  
4 exercise, any rights hereunder shall operate as a waiver of such rights, a waiver of any  
5 other rights or a release of SUC from any obligations hereunder.  
6

7 These proposed conditions do not require that the Division decide the ultimate issue of  
8 liability against SUC; but rather address the important contingencies which will arise if SUC is  
9 determined to be liable for the Bay Street Environmental Matter.

10 Q. Have you been impaired in your ability to prepare your testimony by the failure of SUC to  
11 provide relevant documents in response to data requests filed in this proceeding and does this  
12 affect your recommendations?

13 A. Yes. SUC continues to object to many of the RIAG's data requests. These data requests, to  
14 which SUC continues to interpose objections, seek information regarding, among other matters,  
15 the form of acquisition and disposition of ownership of SUC's interests in the Rhode Island and  
16 Massachusetts assets. As explained above, the form of such transfers is critical to understanding  
17 where liability lies. The data requests also sought information regarding estimates of the cost of  
18 remediation and SUC's own internal due diligence when it purchased FRGC and with regard to  
19 FRGC's connection to contamination found at the Bay Street Area. This information is critical to  
20 giving a dimension to the concerns raised above and the degree of incentive SUC faces for  
21 corporate restructuring to compartmentalize liability. If the clean-up cost estimate is large, then  
22 the incentives for SUC to pursue the planning strategies discussed previously are of greater  
23 importance. SUC has deprived the Division of the ability to make this assessment through its  
24 continuing objection to respond to many of the RIAG's data requests. Moreover, such  
25 information bears directly on the question of whether and to what degree SUC's contesting of

1 liability for the Bay Street area is deserving and meritorious, which directly bears on the  
2 Division's public interest determination in this proceeding.

3 A key matter in shaping appropriate conditions to any order approving the transaction is  
4 the cost estimate of the liability for the Bay Street Environmental Matters, and the potential that  
5 the State of Rhode Island could ultimately inherit the remediation responsibility regardless of the  
6 outcome of RIDEM-initiated litigation. This cost estimate is critical, for example, in determining  
7 the size of the escrow which should be required from SUC. Given this major gap in the  
8 information provided to date by SUC, the Division should consider, at a minimum, not  
9 permitting the transaction to go forward until such time as the Attorney General is able to  
10 complete its investigation and assessment of the issue, which cannot occur until such time as SUC  
11 furnishes all of the documents and/or information requested by the Attorney General. The  
12 absence of such information impairs the ability of the Attorney General to propose appropriate  
13 conditions for adoption by the Division in granting any such approval.

14 Q. Does that complete your testimony?

15 A. Yes, at this time. However, in light of the pending motions to compel with respect to still  
16 incomplete responses by SUC to outstanding RIAG data requests, I reserve the right to file  
17 supplemental testimony based on any subsequent SUC responses.

## Exhibit 1

### Responsibility, Recourse and Financial Assurance Agreement

This Agreement (the "Agreement") made this \_\_\_\_ day of \_\_\_\_, 2006 (the "Effective Date") by and between Southern Union Company ("SU") and the Attorney General of the State of Rhode Island and Providence Plantations ("RIAG"), the Rhode Island Department of Environmental Management ("RIDEM"), \_\_\_\_\_ (collectively, the "Rhode Island Parties")

WHEREAS, SU is a co-petitioner in the proceeding before the Division of Public Utilities and Carriers of the State of Rhode Island and Providence Plantations (the "Division"), docketed as D-06-13 (the "Proceeding"), seeking the approval of a Purchase and Sale Agreement ("PSA") pursuant to which SU shall sell and Narragansett Electric Company ("Narragansett") shall acquire (the "Transaction") the regulated gas distribution business owned and operated by SU in Rhode Island through its New England Gas Company division;

WHEREAS, the Rhode Island Parties are party-intervenors in the above-referenced matter;

WHEREAS, following consummation of and pursuant to the PSA, SU shall retain ownership of the non-Rhode Island operations of New England Gas Company including the operations of the former Fall River Gas Company ("FRGC"), the assets of which SU proposes to transfer in the future into a to-be-created Massachusetts subsidiary (the "Massachusetts Transfer");

WHEREAS, RIDEM has asserted that SU bears liability for environmental issues and the costs of clean-up associated therewith allegedly caused by FRGC in the "Bay Street Area" of Tiverton, Rhode Island (the "Bay Street Area") pursuant to: (a) RIDEM's letter of responsibility to SU dated March 17, 2003; and (b) RIDEM's Notice of Intent to Enforce, correspondence dated Nov. 23, 2005 (collectively, the "RIDEM Letters");

WHEREAS, certain plaintiffs (the "Lawsuit Plaintiffs") have alleged that SU bears liability for environmental issues in and affecting the Bay Street Area, as alleged in Corvello, et al. v. New England Gas Company, C.A. 05-221T and related cases (the "Lawsuits");

WHEREAS, the Rhode Island Parties have asserted in the Proceeding that SU may utilize the Transaction and the Massachusetts Transfer, if consummated in whole or in part, to create, contrary to the public interest, uncertainty regarding or impediments to establishing SU's legal responsibility for the liability for environmental issues and remediation of same relating to the Bay Street Area as asserted in the RIDEM Letters and/or the Lawsuits and matters referred to therein.

NOW, THEREFORE, SU and the Rhode Island Parties agree, for good and valuable consideration the receipt of which is hereby acknowledged, as follows:

1. Definitions. For the purpose of this Agreement, the following terms shall have the following meanings:

“Bay Street Area Environmental Matters” shall mean the costs, expenses and damages (including remediation costs and expenses) resulting from the presence of Materials of Environmental Concern at, under or within the area in and around Bay Street, Tiverton, Rhode Island, known as the Bay Street Area and identified and referred to in the RIDEM Letters and matters related thereto or arising therefrom.

“Environmental Laws” shall mean all applicable federal, state and local laws, statutes, ordinances, rules, regulations, orders, common law standards or rules and judgments relating to the protection or clean-up of the environment, the use, treatment, storage, transportation, generation, manufacture, processing, distribution, handling or disposal of, or preservation or protection of waterways, groundwater, drinking water, air, wildlife, plants or other natural resources, the health and safety of persons or property, or the protection of the health and safety of employees, as the same may be amended, modified or supplemented from time to time, including without limitation: the Clean Air Act, as amended, 42 U.S.C. Section 7401 et seq.; the Federal Water Pollution Control Act, as amended, 33 U.S.C. Section 1251 et seq.; the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. Section 6901 et seq.; the Comprehensive Environment Response, Compensation and Liability Act of 1980, as amended (including the Superfund Amendments and Reauthorization Act of 1986, "CERCLA"), 42 U.S.C. Section 9601 et seq.; the Toxic Substances Control Act, as amended, 15 U.S.C. Section 2601 et seq.; the Occupational Safety and Health Act, as amended, 29 U.S.C. Section 651, the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. Section 11001 et seq.; the Safe Drinking Water Act, as amended, 42 U.S.C. Section 300f et seq.; all comparable state and local laws, laws of other jurisdictions or orders and regulations; and any and all common law requirements, rules and bases of liability regulating, relating to or imposing liability or standards of conduct concerning pollution or protection of human health or the environment, as now or may at any time hereafter be in effect.

“Material of Environmental Concern” shall mean (i) any pollutant, contaminant, chemical, waste and any toxic, carcinogenic, reactive, corrosive, ignitable, flammable or infectious chemical, chemical compound or substance or otherwise hazardous wastes, toxic or contaminated substances or similar materials, including without limitation any quantity of asbestos, urea formaldehyde, PCBs, crude oil or any fraction thereof, all forms of coal, natural gas, petroleum products, by-products or derivatives, radioactive substances or materials, pesticides, waste waters, or sludges that are subject to regulation, control or remediation under any Environmental Laws (as defined above) and (ii) coal, coke, petroleum, petroleum by-products, natural gas, natural gas liquids, liquefied natural gas, synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas), and other wastes associated with the exploration, development or production of crude oil or natural or manufactured gas.

2. Waiver of Defenses to Liability. SU agrees and acknowledges that it shall not assert in any judicial or administrative or other legal forum and shall waive any defense to its legal liability, if any, in any such forum arising from the Bay Street Area Environmental Matters, as asserted in the RIDEM Letters and the Lawsuits and matters arising therefrom, which defense is based in any manner on the form or structure of corporate or business entity ownership or acquisition or sale of all or a portion of FRGC or its predecessors or successors or FRGC’s assets and/or operations. Such waiver shall include waiver of any defense based on SU’s status or lack thereof,

whether current or former, as an owner or operator, transporter, arranger or generator as those terms may be defined under any Environmental Laws, prior to or following any sale or transfer of all or a portion of the assets or operation of FRGC whether as a result of the Massachusetts Transfer or otherwise.

3. Use of Agreement as Evidence. SU hereby irrevocably agrees that, for the benefit of the Rhode Island Parties, this Agreement may be entered as evidence in any legal action, suit or proceeding arising out of or related to the RIDEM Letters or the Lawsuits.

4. Consent to Jurisdiction. SU further irrevocably agrees that any legal action, suit or proceeding arising out of or relating to this Agreement or the RIDEM Letters may be brought in the courts of the State of Rhode Island or of the United States of America for the District of Rhode Island. By the execution and delivery of this Agreement, SU hereby irrevocably submits to the non-exclusive jurisdiction of any such court in any such action, suit or proceeding and agrees to designate, appoint and empower \_\_\_\_\_ (the "Process Agent"), with offices at \_\_\_\_\_, as its authorized agent solely to receive for and on its behalf service of summons or other legal process in any such action, suit or proceeding in any such court. Final judgment against SU in any such action, suit or proceeding shall be conclusive and may be enforced in any other jurisdiction by suit on the judgment. Nothing herein shall affect the right of the Rhode Island Parties to commence legal proceedings or otherwise sue SU in any appropriate jurisdiction or to serve process upon SU in any manner authorized by the applicable law any such jurisdiction. SU further covenants and agrees that it shall maintain a duly appointed agent for the service of summons and other legal process in Providence, Rhode Island for purposes of any legal action, suit or proceeding brought by SU in respect of this Agreement or arising out of the RIDEM Letters and shall keep the Rhode Island Parties advised of the identity and location of such agent. SU further irrevocably consents, if for any reason there is no authorized agent for service of process in Providence, Rhode Island, to the service of process out of the said courts by mailing copies thereof by registered United States of America air mail, postage prepaid, to SU at its address specified herein, and in such a case the Rhode Island Parties shall also send by telex or facsimile, or shall undertake that there is also sent by telex or facsimile, a copy of such process to SU. The serving of process in the manner provided in this section in any such action, suit or proceeding shall be deemed personal service and accepted by the SU as such and shall be valid and binding upon SU for all the purposes of any such action, suit or proceeding. In addition, SU irrevocably waives, to the fullest extent permitted by applicable law, any objection which it may now or hereafter have to the laying of venue of any action, suit or proceeding arising out of or relating to this Agreement or proceedings arising out of the RIDEM Letters, brought in the courts of the State of Rhode Island or in the United States District Court for the District of Rhode Island, and any claim that any such action, suit or proceeding brought in any such court has been brought in an inconvenient forum.

5. SU's Continuing Right to Contribution. Nothing in this Agreement shall affect or alter SU's rights and remedies to seek contribution as otherwise provided by law from any third-parties for any legal liability incurred or assumed by SU pursuant to the RIDEM Letters and the Lawsuits.

6. Financial Assurance. In order to provide financial assurance to the Rhode Island Parties for the performance of SU's obligations hereunder, SU shall execute and deliver the escrow

agreement attached hereto (identified as Exhibit A) [alternate form of security – performance bond] . SU’s liability for the Bay Street Area Environmental Matters, if any, shall not be limited by the amount of any such financial assurance as is provided under this Agreement.

8. SU Guarantee. SU hereby irrevocably and unconditionally guarantees the timely payment when due of any amounts due arising from legal liability determined against FRGC, or of any affiliated, predecessor and/or successor business entity of FRGC existing prior to the Effective Date, whether or not currently in existence, or such successor entity created as a result of the Massachusetts Transfer to hold the FRGC assets (the “FRGC Entities”) for any obligations such FRGC Entities (either singly or severally) may or did incur for liability, whether on a several or joint and several basis, under and pursuant to the Environmental Laws relating to the Bay Street Area Environmental Matters (the “Obligations”) and without regard to whether such liability was extinguished solely as a result of the dissolution, liquidation, winding-up or discharge in bankruptcy of any one or several of such FRGC Entities. Such Obligations shall include losses, costs and expenses including costs of environmental remediation as may be required under the Environmental Laws with respect to the Bay Street Area Environmental Matters. The foregoing obligation of SU is referred to herein as the “Guarantee”. If any such FRGC Entity(ies) fails to pay any such Obligations or is otherwise incapable of satisfying such Obligations, SU shall promptly pay to the State of Rhode Island (the “Guaranteed Party”) no later than the next Business Day, after notification, the amount due in U.S. Dollars of such liability. “Business Day” shall mean any day except Saturday, Sunday, or a day on which commercial banks in New York are closed for business. A Business Day shall open at 8:00 a.m. and close at 5:00 p.m. local time for the relevant party’s principal place of business. SU hereby waives (a) notice of acceptance of this Agreement and the guarantee obligation set forth herein; (b) presentment and demand concerning the liabilities of SU, except as expressly hereinabove set forth; and (c) any right to require that any action or proceeding be brought against the FRGC Entities or any other person, or except as expressly hereinabove set forth, to require that the Guaranteed Party seek enforcement of any performance against one or more of the FRGC Entities or any other person, prior to any action against SU under the terms hereof. Except as to applicable statutes of limitation, no delay of the Guaranteed Party in the exercise of, or failure to exercise, any rights hereunder shall operate as a waiver of such rights, a waiver of any other rights or a release of SU from any obligations hereunder.

9. Representation and Warranties. SU represents and warrants that:

(a) it is a corporation duly organized and validly existing under the laws of \_\_\_\_\_ and has the corporate power and authority to execute, deliver and carry out the terms and provisions of this Agreement;

(b) no authorization, approval, consent or order of, or registration or filing with, any court or other governmental body having jurisdiction over SU is required on the part of SU for the execution and delivery of this Agreement; and

(c) this Agreement constitutes a valid and legally binding agreement of SU enforceable against SU in accordance with its terms.

10. Effect of Bankruptcy. SU's obligations under this Agreement shall not be affected in any way by the institution with respect to any one or more of the FRGC Entities of a bankruptcy, reorganization, moratorium or similar insolvency proceeding or other relief under any bankruptcy or insolvency law affecting creditor's rights or a petition for one or more of the FRGC Entities' winding-up, dissolution or liquidation.

11. Assignment. Neither SU nor the Guaranteed Party shall assign its rights or obligations under this Agreement without the express written consent of the other Party, which consent shall not be unreasonably withheld.

12. Withdrawal of Opposition. In consideration of the foregoing commitments of SU, the Rhode Island Parties hereby withdraw their opposition to the approval of the Joint Petition insofar as premised on the potential impact the Transaction may have on environmental issues related to the Bay Street Area. The Rhode Island Parties agree to provide and execute such reasonable documentation for submittal in the Proceeding as is required to effect the withdrawal of their objection to the Joint Petition as provided and limited hereby.

13. Notices. All notices, demands, requests or other communications which may be or are required to be given, served or sent by either party to the other shall be in writing and shall be deemed to have been properly given or sent:

If intended for SU, by mailing by registered or certified mail with the postage prepaid, by courier or by personal service, if receipted for, or by telecopy (a duplicate of which shall be delivered by any of the other methods of notice delivery specified above) addressed to:

[to be added].

If intended for the Rhode Island Parties, by mailing by registered or certified mail with the postage prepaid, by courier or by personal service, if receipted for, or by telecopy (a duplicate of which shall be delivered by any of the other methods of notice delivery specified above) addressed to:

[to be added].

Each party may designate by notice in writing a new address to which any notice, demand, request or communication may hereafter be so given, served or sent. Each notice, demand, request or communication which shall be mailed by registered or certified mail to SU or the Rhode Island Parties in the manner aforesaid shall be deemed sufficiently given, served or sent for all purposes hereunder on the third day after the mailing thereof at any regularly maintained office of the United States Postal Service or when delivered by courier or personally and receipted for, and when sent (on receipt of a written confirmation to the correct telecopy number) if sent by telecopy.

14. Miscellaneous.

This Agreement shall be interpreted under the laws of the State of Rhode Island, without regard for its conflict of law principles. Any amendment to this Agreement shall be in writing executed by all of the Parties hereto.

## Exhibit A

### ESCROW AGREEMENT

This Escrow Agreement (hereinafter, the "Escrow Agreement") is entered into as of [insert date], by and between Southern Union Company (hereinafter, the "Grantor"); [name of escrow agent] (hereinafter, the "Escrow Agent"); and the Director of the Rhode Island Department of Environmental Management ("RIDEM" or "department") (the "Beneficiary"). This Escrow Agreement is being entered to provide financial assurance in accordance with (hereinafter, the Agreement dated [insert date], for the [remedial action plan ("RAP") OR interim response designed to meet cleanup criteria ("IRDC")] associated with the Bay Street Area

Whereas, the Beneficiary, as a component of the necessary financial assurance required by the [Enforceable Agreement OR Order OR Decree] entered by and between SU, and RIDEM on [date], requires that SU provide, through a financial mechanism acceptable to the department, funding to assure the effectiveness and integrity of the [RAP OR IRDC]; and

Whereas, the Grantor has elected to establish an escrow fund ("Escrow" or "Fund") to provide financial assurance for the response activities identified in the [RAP OR IRDC]; and

Whereas, the Grantor, acting through its duly authorized officers, has proposed an escrow agent under this Escrow Agreement; and

Whereas, RIDEM approves the escrow agent as proposed by the Grantor; and

Whereas, the Escrow Agent is willing to act as the Escrow Agent;

NOW, THEREFORE, the Grantor and Escrow Agent agree as follows:

#### I. DEFINITIONS

All terms in this Escrow Agreement that are defined in the [Enforceable Agreement OR Order OR Decree] shall have the same meaning as defined in the [Enforceable Agreement OR Order OR Decree].

The term "Escrow Agent" means the escrow agent who enters this Escrow Agreement and any successor or assigns of the escrow agent.

The term "Fiduciary" means any person who exercises any power of control, management, or disposition or renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of this Escrow, or has any authority or responsibility to do so, or who has any authority or responsibility in the administration of this Escrow.

The term "Fund" or "Escrow" means the account by which deposits and earnings are maintained.

The term "Grantor" means [PPP], and any successors or assigns of [PPP].

The term "RIDEM" or "department" means the Rhode Island Department of Environmental Management or its designee, or any successor department or agency, or the RIDEM Director's authorized representative.

## II. AMOUNT OF ESCROW FUND

The Grantor shall provide for financial assurance in the form of an Escrow as required by the [Enforceable Agreement OR Order OR Decree]. The Escrow shall be secured in the amount of [*amount in written text*] (\$[*number form*]) and be maintained consistent with the provisions of the [Enforceable Agreement OR Order OR Decree].

## III. NOTICES

All notices, deliveries, or other communications required or permitted hereunder shall be deemed given when sent by facsimile transmission and confirmed by certified or registered mail addressed as follows:

[*ESCROW AGENT NAME*]

ATTN: [*insert contact name*]

[*ADDRESS*]

[*CITY, STATE ZIP CODE*]

Telephone No.: [*TELEPHONE NO.*]

FAX No.: [*FAX NO.*]

For RIDEM, sent to:

- (1) For questions regarding invoice reimbursement:
- (2) For escrow review and/or financial issues:
- (3) For payments to the RIDEM:

For Southern Union Company, sent to:

ATTN: [*insert contact*]

[*ADDRESS*]

[*CITY, STATE ZIP CODE*]  
Telephone No.: [*TELEPHONE NO.*]  
Fax No.: [*FAX NO.*]

The Facility name, [**Enforceable Agreement OR Order OR Decree**] identification number [*insert the number*], and Site Identification No. [*insert the site ID number*] shall be included on the notice.

#### IV. ESTABLISHMENT OF FUND

The Grantor and the Escrow Agent hereby establish the Fund for the use and benefit of RIDEM with the intent to assure the effectiveness and integrity of the [**RAP OR IRDC**] as described in the [**Enforceable Agreement OR Order OR Decree**]. The Fund is established initially as consisting of the cash and securities (hereinafter referred to as "Escrow Assets"), as described in attached Exhibit A, all of which are acceptable to the Escrow Agent. Such Escrow Assets or any other assets subsequently transferred to the Escrow Agent are collectively referred to as the "Fund," together with all earnings and profits thereon, less any payments or distributions made by the Escrow Agent pursuant to this Escrow Agreement. The Fund will be held by the Escrow Agent, as hereinafter provided. The Escrow Agent undertakes no responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments required to be made by the Grantor to the Escrow Agent or for payments required of the Grantor. The Escrow Agent shall notify the Beneficiary in writing of contributions made to the Fund by the Grantor.

#### V. SECURE PERFORMANCE OF [**RAP OR IRDC**]

The Fund so established shall be used solely to pay RIDEM for monitoring, operation and maintenance, oversight, and other costs determined by RIDEM to be necessary to assure the effectiveness and integrity of the [**RAP OR IRDC**] at the [**Facility OR Property**] and to meet its financial assurance obligations as set forth in the [**Enforceable Agreement OR Order OR Decree**] (hereinafter, "Long-term Requirements of the [**RAP OR IRDC**]"). RIDEM shall be reimbursed from the Fund, upon receipt of an invoice from the Beneficiary. Invoices will be sent if SU does not satisfactorily perform the necessary response activities per the [**Enforceable Agreement OR Order OR Decree**] or to reimburse RIDEM's response activity costs. All notices of request for disbursement, except for the Escrow Agent's Fee, which is to be paid to the Escrow Agent directly by the Grantor, are to be made by the Beneficiary to the Escrow Agent with a copy sent to the Grantor. The Escrow Agent shall remit payment to the department within thirty (30) days, unless the Grantor is authorized and chooses to invoke dispute resolution pursuant to the [**Enforceable Agreement OR Order OR Decree**] within fifteen (15) days of receipt of the notice. If disputed, payment shall be made in accordance with the outcome of the dispute resolution process within thirty (30) days of the final decision. Funds disbursed to the department under this Paragraph shall be delivered to the address indicated in Subsection (B)(3) of Section III (Notices).

## **VI. PAYMENTS COMPRISING THE FUND**

The Escrow Assets placed with the Escrow Agent by the Grantor shall consist of cash and/or direct obligations of the United States of America or the State of Rhode Island, or obligations for which the principal and interest are unconditionally guaranteed by the United States of America or the State of Rhode Island, or certificates of deposit of any financial institution to the extent insured by an agency of the United States Government.

## **VII. ESCROW AGENT MANAGEMENT**

The Escrow Agent shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with prudent investment guidelines. In investing, reinvesting, exchanging, selling, and managing the Fund, the Escrow Agent or any other fiduciary will discharge his duties with respect to the Fund solely in the interest of the participants and the Beneficiary and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matter, would use in the conduct of an enterprise of like character and with like aims, except that:

Securities or other obligations of the Grantor or any other owner or operator of the Facility, or any of their affiliates as defined in the Investment Companies and Advisors Act of 1940, as amended, 15 U.S.C. Section 80a-2(a), shall not be acquired or held on behalf of the Fund unless they are securities or other obligations of the United States of America or the State of Rhode Island;

The Escrow Agent is authorized to invest the Fund in time or demand deposits of the Escrow Agent or any other financial institution to the extent such Escrow Assets are insured by an agency of the United States Government and to the extent such time and demand deposits shall mature not later than one (1) year from the date of the investment;

The Escrow Agent is authorized to hold cash while awaiting investment or distribution uninvestment for a reasonable time and without liability for the payment of interest thereon.

## **VIII. COMMINGLING AND INVESTMENTS**

The Escrow Agent is expressly authorized in **[its *OR* his *OR* her]** discretion and in accordance with the investment policies and guidelines transmitted to the Escrow Agent pursuant to this Escrow Agreement to transfer from time to time any or all of the assets of the Fund to any common, commingled or collective fund created by the Escrow Agent in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other escrows participating therein so long as such management does not conflict with the requirements of this Fund. To the extent of the equitable share of the Fund in any such commingled fund, such commingled funds will be part of the Fund.

## **IX. EXPRESS POWERS OF ESCROW AGENT**

Without in any way limiting the powers and discretions conferred upon the Escrow Agent by the other provisions of this Escrow Agreement by law, the Escrow Agent is expressly authorized and empowered:

(A) To make, execute, acknowledge and deliver any and all documents of transfers and conveyances and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(B) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentally thereof, with a Federal Reserve Bank, but the books and records of the Escrow Agent will at all times show that all such securities are part of the Fund;

(C) To deposit any cash in the Fund maintained in interest-bearing accounts or saving certificates issued by the Escrow Agent, in its separate corporate capacity, or in any other banking institution affiliated with the Escrow Agent, to the extent insured by an agency of the United States Government;

(D) To sell, exchange, convey, transfer or otherwise dispose of any other property held on behalf of the Fund, by public or private sale. No person dealing with the Escrow Agent shall be bound to see the application of the purchase money or to inquire onto the validity of expediency of any such sale or other disposition; and

(E) To comprise or otherwise adjust all claims in favor of or against the Fund.

## **X. TAXES AND EXPENSES**

All taxes of any kind that may be assessed or levied against or in respect to the Fund and monthly maintenance fee (such fee shall include any necessary advice of counsel) incurred by the Escrow Agent or Fund will be paid directly by the Grantor. All other expenses incurred by the Escrow Agent in connection with the administration of this Fund, and all other proper charges and disbursements of the Escrow agent will be paid from the Fund.

## **XI. ACCOUNTING FOR THE FUND**

The Escrow Agent shall annually, at least thirty (30) days prior to the anniversary date of the establishment of the Fund, furnish to the Grantor and the Beneficiary a written statement of the current value of the Fund. Any securities in the Fund shall be valued at market value as of no more than sixty (60) days prior to the anniversary date established for the Fund.

The accounting shall show in reasonable detail the following:

1. The total funds deposited into the Fund;
2. Accrued earnings on the funds deposited into the Fund;
3. The amount of the funds that have been paid out of the Fund; and
4. The remaining balance of the Fund.

## **XII. ADVICE OF COUNSEL**

The Escrow Agent may from time to time consult with counsel, who may be counsel to the Beneficiary, with respect to any question arising as to the construction of this Escrow Agreement or any action to be taken hereunder. The Escrow Agent shall be fully protected, to the extent permitted by law, in acting upon the advice of its own counsel.

## **XIII. ESCROW AGENT COMPENSATION**

The Escrow Agent will be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor. Payment shall be made directly by the Grantor and not from the Fund.

## **XIV. SUCCESSOR ESCROW AGENT**

Upon ninety (90) days written notice to the Escrow Agent from the Beneficiary or the Grantor, the Escrow Agent may be replaced. The Escrow Agent may resign after the giving of ninety (90) days written notice to the Grantor and the Beneficiary. In either event, upon written concurrence of the Beneficiary, the Grantor will appoint a successor Escrow Agent who will have the same powers and duties as those conferred upon the Escrow Agent hereunder. Upon acceptance of the appointment by the successor Escrow Agent by RIDEM, the successor Escrow Agent and the Grantor will sign a new Escrow Agreement with identical terms to this Escrow Agreement and forward it to RIDEM for signature. Upon RIDEM signature, the Escrow Agent will assign, transfer and pay over to the successor Escrow Agent, the funds then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Escrow Agent, the Escrow Agent may apply to a court of competent jurisdiction for the appointment of a successor Escrow Agent or for instructions. The successor Escrow Agent shall specify the date on which it assumes administration of the Fund in writing sent to the Beneficiary, the Grantor, and the present Escrow Agent by certified mail ten (10) days before such change becomes effective. Any expenses incurred by the Escrow Agent as a result of any of the acts contemplated by this Section will be paid as provided in Section X (Taxes and Expenses).

## **XV. INSTRUCTIONS TO THE ESCROW AGENT**

All orders, requests, and instructions by Beneficiary to the Escrow Agent will be in writing, signed by the Beneficiary's authorized representative (in accordance with RIDEM delegation authority). The Escrow Agent shall act and, in so acting, will be fully protected if acting in accordance with such orders, requests, and instructions. The Escrow Agent will have no duty to act in the absence of such orders, requests, and instructions from the Beneficiary, except as provided for herein.

## **XVI. AMENDMENT OF THE ESCROW AGREEMENT**

This Escrow Agreement may be amended by an instrument in writing executed by the Escrow Agent, Grantor, and the Beneficiary; or by the Escrow Agent and the Beneficiary if the Grantor ceases to exist.

## **XVII. IRREVOCABILITY AND TERMINATION**

Subject to the right of the parties to amend this Escrow Agreement as provided in Sections XIV (Successor Escrow Agent) and XVI (Amendment of the Escrow Agreement), this Fund will be irrevocable and will continue until terminated by the written notification of the Beneficiary.

If the Escrow Agreement is terminated for any reason, the Escrow Amount less final escrow administrative expenses shall be distributed in accordance with the terms of the **[Enforceable Agreement OR Order OR Decree]**.

The Escrow Account shall be terminated in accordance with the direction of the Beneficiary when the Escrow Agent receives written notice from the Beneficiary that this Escrow Agreement has been replaced by an alternate financial assurance mechanism approved by the RIDEM pursuant to the **[Enforceable Agreement OR Order OR Decree]**, the Long-Term Requirements of the **[RAP OR IRDC]** have been completed to the department's satisfaction, or RIDEM determines that SU is no longer capable of providing additional funding for the Fund as provided for under the **[Enforceable Agreement OR Order OR Decree]**.

## **XVIII. IMMUNITY AND INDEMNIFICATION**

The Escrow Agent will not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Fund, or in carrying out any directions by the RIDEM issued in accordance with this Escrow Agreement.

The Escrow Agent will be indemnified and saved harmless by the Grantor, from and against any personal liability to which the Escrow Agent may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense.

#### **XIX. CHOICE OF LAW**

This Escrow Agreement will be administered, construed, and enforced according to the laws of the State of Rhode Island and Providence Plantations.

#### **XX. INTERPRETATION**

As used in this Escrow Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each section of this Escrow Agreement will not affect the interpretation or the legal efficacy of this Escrow Agreement.

The parties herein enter into and duly execute this Escrow Agreement. Furthermore, the Grantor and Escrow Agent below certify that the wording of this Escrow Agreement is identical to the wording specified by RIDEM as of the date of execution of the Escrow Agreement. This Escrow Agreement shall become effective on the date entered by the last signatory.

**FOR [insert name of Grantor], THE GRANTOR**

By: \_\_\_\_\_  
Signature Date

Name: \_\_\_\_\_  
Print or Type

Title: \_\_\_\_\_  
Print or Type

STATE OF RHODE ISLAND )  
AND PROVIDENCE PLANTATIONS )  
 ) SS  
COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 200\_\_), by [*insert name of Grantor's authorized representative*], the [*insert title of Grantor's authorized representative*] of [*insert name of Grantor*], a [*insert state of incorporation*] corporation, on behalf of the corporation, the Grantor named in the foregoing instrument.

\_\_\_\_\_  
Signature of Notary

Commission Expires: \_\_\_\_\_

**FOR [insert the name of the Escrow Agent], THE ESCROW AGENT**

By: \_\_\_\_\_  
Signature Date

Name: \_\_\_\_\_  
Print or Type

Title: \_\_\_\_\_  
Print or Type

STATE OF \_\_\_\_\_ )  
COUNTY OF \_\_\_\_\_ ) SS

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 200\_\_), by [*insert name of Escrow Agent's authorized representative*], the [*insert title of Escrow Agent's authorized representative*] of [*insert name of Escrow Agent*], a [*insert state of incorporation*] corporation, on behalf of the corporation, the Grantor named in the foregoing instrument.

\_\_\_\_\_  
Signature of Notary

Commission Expires: \_\_\_\_\_

**FOR THE RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,  
THE BENEFICIARY**

By: \_\_\_\_\_  
Signature Date

Name: \_\_\_\_\_  
Print or Type

Title: \_\_\_\_\_  
Print or Type

STATE OF \_\_\_\_\_)

) SS

COUNTY OF \_\_\_\_\_)

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 200\_\_), by [*insert name of RIDEM's authorized representative*], the [*insert title of RIDEM's authorized representative*] on behalf of the Beneficiary named in the foregoing instrument.

\_\_\_\_\_  
Signature of Notary

Commission Expires: \_\_\_\_\_

**EXHIBIT A**

**Escrow Assets**

The Escrow Fund is established initially as consisting of the following:

*[Describe the nature and amount(s) of the Escrow Assets.]*

By their signatures below, the parties agree that this Exhibit A is incorporated into and made a part of the Escrow Agreement dated *[insert date]*.

**FOR *[insert name of Grantor]*, THE GRANTOR**

By: \_\_\_\_\_  
Signature Date

Name: \_\_\_\_\_  
Print or Type

Title: \_\_\_\_\_  
Print or Type

**FOR *[insert name of Escrow Agent]*, THE ESCROW AGENT**

By: \_\_\_\_\_  
Signature Date

Name: \_\_\_\_\_  
Print or Type

Title: \_\_\_\_\_  
Print or Type

**FOR THE THE BENEFICIARY**

By: \_\_\_\_\_  
Signature Date

Name: \_\_\_\_\_  
Print or Type

Title: \_\_\_\_\_