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

In Re: Joint Petition for Purchase and Sale of Assets by The Narragansett Electric Company and Southern Union Company	Docket No. D-06-13

RESPONSE AND OBJECTION OF SOUTHERN UNION COMPANY TO PETITIONS TO INTERVENE

Southern Union Company ("Southern Union") hereby objects and responds to the petitions to intervene in the above captioned matter brought by: (1) "land owners [and] residents" of Tiverton, Rhode Island, who are also plaintiffs in an action against Southern Union that is currently pending in the District Court for the District of Rhode Island ("plaintiffs"); (2) the Rhode Island Department of Environmental Management ("RIDEM"); (3) the Town of Tiverton ("Tiverton"); (4) the City of Providence ("Providence"); (5) United Steel Workers, Local 13421 (the "Union"); (6) The Energy Council of Rhode Island ("TEC-RI"); and (7) The George Wiley Center ("Wiley Center").[1]

Preliminary Statement

This Division proceeding seeking the approval of the purchase and sale of utility assets must, by statute, focus on whether the facilities for furnishing service to the public will be diminished, and whether the transaction is consistent with the interests of the rate-paying public as a whole. The Attorney General and seven other petitioners seek to intervene in this

[1] Although Southern Union is participating in this proceeding as a "Joint Petitioner," by virtue of its joint request with the Narragansett Electric Company ("Narragansett") for Division approval of the proposed transaction, it is not representing or acting on behalf of Narragansett or its parent company, National Grid USA, in this filing. See Petition of The Narragansett Electric Company and Southern Union Company for Approval of Purchase and Sale of Assets ("Joint Petition").

proceeding, each asserting standing to represent a claimed interest not adequately represented by any other party or intervenor. Southern Union does not oppose the Attorney General's petition, as the Attorney General will adequately represent the public interest in this proceeding. The remaining seven petitioners have no standing to intervene, and indisputably represent private interests or interests that are the subject of pending regulatory or judicial proceedings unrelated to the adequacy of the delivery of utility service to the public. Permitting these parties to intervene will sidetrack, complicate, and prolong this proceeding, and will result in the litigation of collateral environmental, homeowner, town and union issues that are being or will be addressed by other bodies uniquely situated to address such matters.

Plaintiffs,[2] RIDEM and Tiverton[3] have no standing to litigate in this proceeding the very environmental issues that are already the subject of pending regulatory proceedings before RIDEM, nor do they have standing to litigate the liability issues now before the federal district court for district of Rhode Island.[4]

Providence and the Union raise hypothetical, parochial issues that are not the proper subject of this proceeding and threaten to sidetrack this matter for narrow concerns that do not relate to the merits of the transaction. TEC-RI and the Wiley Center likewise have no standing

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[2] Through its New England Gas Company ("NEGasCo") division, Southern Union serves approximately 250,000 Rhode Island residents. None of the 129 plaintiffs is a NEGasCo (or Narragansett) gas customer.

[3] Among the facts omitted from Tiverton's petition is that Tiverton itself (as well as Starwood Tiverton LLC) received a Letter of Responsibility from RIDEM in 2002 for the alleged Bay Street Area contamination. Tiverton has yet to propose any plan for, or accomplish any, remediation of the area.

[4] To the extent such petitioners seek to investigate Southern Union's contractual obligation and wherewithal to satisfy any potential environmental liability, they need look no further than the February 15, 2006 Purchase and Sale Agreement ("Purchase and Sale Agreement" at pp. 10, 14-15), attached to the Joint Petition, which confirms Southern Union's retention of such "liabilities" and to Southern Union's multi billion dollar capitalization as reported in its latest Annual Report (see www.sec.gov/edgar). The proposed transaction will not diminish Southern Union's net worth, will not impact its status as a defendant in pending litigation with plaintiffs or pending matters before RIDEM, and will not affect Southern Union's ability to satisfy any judgment that may be entered relating to such matters. In any event, the Division itself has already issued Data Requests concerning such issues and the Division is fully capable of addressing same. (See the Division's Third Set of Data Requests at ¶ 3-2).

to intervene and to the extent their concerns relate to rates and service, are more than adequately represented by the Division and the Attorney General.

Accordingly, each of the intervention petitions should be denied with the exception of the Attorney General's petition which should be limited in scope to the issues identified in paragraph three thereof. (See Motion to Intervene of the Attorney General ("Attorney General Petition") at ¶ III).

ARGUMENT

The Legal Standard

Under Rhode Island General Law § 39-3-25, a transaction between two utilities should be approved if the Division is satisfied that "the facilities for furnishing service to the public will not thereby be diminished, and that the purchase, sale, or lease and the terms thereof are consistent with the public interest . . ." R.I. Gen. Law § 39-3-25. The Division has explained that its role when applying § 39-3-25 is to: (i) examine the record evidence for confirmation that ratepayers will not be harmed; and (ii) look for substantiation that ratepayers would actually benefit from the transaction. See In re: Petition of Valley Gas Company, et al., Docket No. D-00-02; In re: Petition of Providence Gas Energy Corp., et al., Docket No. D-00-03 (2000). This proceeding must, therefore, focus on the transaction's impact, if any, on ratepayers as a whole.

To intervene in a proceeding brought under R.I. Gen Law § 39-3-25, a party must establish that its right to intervene is either conferred by statute (Rule 17(b)(1) of the Division Rules of Practice and Procedure), or that it either has:

> (2) An interest which may be directly affected and which is not adequately represented by existing parties and as to which movants may be bound by the Division's action in the proceeding. The following may have such an interest: consumers served by the applicant, defendant, or respondent and holders of securities of the applicant, defendant, or respondent.

(3) Any other interest of such a nature that movant's participation may be in the public interest.

See Rule 17(b) (2) and (3). Here, the Attorney General has the right to intervene. As for the remaining would-be intervenors, none of their purported "interests" serve as proper ground for intervention, and, in any event, the Attorney General and the Division can adequately represent any valid ratepayer concerns.

A. The Plaintiffs Suing Southern Union Do Not Have Standing To Intervene.

The 129 separate "land owners [and] residents" of Tiverton, Rhode Island, who have moved to intervene are all plaintiffs in Corvello et al. v. New England Gas Co., C.A. No. 05-221T, which is currently pending before Chief Judge Ernest C. Torres of the United States District Court for the District of Rhode Island. In that case, plaintiffs seek to recover money damages and injunctive relief as a result of alleged contamination of the soil on property that they either currently own or reside upon within the Town of Tiverton, Rhode Island. Plaintiffs allege that their properties are contaminated by waste allegedly generated by former manufactured gas plant ("MGP") facilities owned by Fall River Gas Company ("FRGC"). The alleged conduct of FRGC occurred decades before Southern Union acquired FRGC and consolidated it into NEGasCo.[5] Plaintiffs allege that FRGC failed to properly dispose of the MGP residuals that were generated, and that NEGasCo, as FRGC's successor, is responsible for the alleged contamination of plaintiffs' properties and for any ensuing damages.

One of the central questions in that lawsuit -- whether the contamination identified on plaintiffs' properties is the responsibility of FRGC -- has not been determined. Southern Union vigorously disputes plaintiffs' allegations and contends that the extensive investigation conducted

[5] In 2000, Southern Union acquired Providence Gas, Fall River Gas Company and Valley Gas Company, and combined them to create the New England Gas Company, an unincorporated division of Southern Union.

to date demonstrates that most of the contamination identified on plaintiffs' properties has no connection with MGP residuals, much less FRGC.

The alleged contamination is also the subject of extensive administrative action pending before RIDEM. On March 17, 2003, RIDEM issued a Letter of Responsibility ("LOR") to Southern Union suggesting -- based on "anecdotal" evidence -- that the source of alleged contamination in plaintiffs' neighborhood is MGP residuals. For more than three years, Southern Union has acted responsibly to help RIDEM investigate this claim and in the process has expended millions of dollars testing the soil in plaintiffs' neighborhood and completing an extensive site investigation. On November 23, 2005, RIDEM issued to Southern Union a Notice of Intent to Enforce ("NOI") concerning the Tiverton site.[6] More recently, RIDEM announced that it may soon initiate enforcement proceedings, either in court or in an administrative proceeding. Though such action is both unfortunate and regrettable this proceeding is not the appropriate forum to address those issues.

This Division proceeding concerns utility service to ratepayers, not the responsibility for an environmental cleanup. The Division cannot determine in this proceeding whether the contamination was caused by FRGC in whole or in part, or whether it was caused by, for example, a former town dump, a private landfill, an auto body repair shop, a hat manufacturer, other industrial activity, or background soil conditions. Nor can the Division permit the plaintiffs or RIDEM to use this proceeding to bypass the requirements under the law for establishing liability. They must present those claims in the appropriate forums, and Southern Union must have a full and fair opportunity to defend those claims.

[6] The NOI and Southern Union's response are attached as Exhibit 1. Prior to its receipt of the LOR in March 2003, Southern Union had no notice or knowledge of the alleged contamination (or potential for related claims), concerning the Bay Street Area.

In addition to these defects in plaintiffs' petition, plaintiffs fail to meet the standing requirements necessary for intervention. The remediation of any contamination on plaintiffs' private property and proceeds of any potential judgment are private "interests," not "public interests." Therefore, plaintiffs' grounds for intervention cannot be premised upon Rule 17(b)(3). Nor is there any dispute that plaintiffs do not have a right to intervene that is "conferred by statute." Thus, Rule 17(b)(1) cannot serve as a basis for conferring plaintiffs' standing to intervene.

Plaintiffs, therefore, must rely on Rule 17(b)(2). The plain language of Rule 17(b)(2), however, provides standing to intervene to "consumers served by the applicant, defendant, or respondent and holders of securities of the applicant, defendant, or respondent." Here, plaintiffs are not gas customers of Southern Union or Narragansett, and therefore have no standing under that subsection.

Further, plaintiffs' private interests have no relationship to the Division's stated purpose of ensuring that the "facilities for furnishing service to the public will not . . . be diminished" by the utility transaction, and that the "purchase, sale, or lease and the terms thereof are consistent with the public interest." R.I. Gen. Law § 39-3-25. Rather, as plaintiffs well know, RIDEM, an independent State regulatory body, is charged with the "protection of public health, safety and welfare and the environment" of the State of Rhode Island and its citizens. See § 2(a) of RIDEM Rules and Regulations for Assessment of Administrative Penalties ("RIDEM Administrative Penalties"). Thus, it is RIDEM -- not the Division -- that has the option to "pursue any combination of . . . administrative and judicial enforcement actions," if it determines that sufficient evidence exists to compel Southern Union, or any other potentially responsible party, to remediate any alleged contamination of plaintiffs' private property. See RIDEM

Administrative Penalties § 7. Indeed, where, as here, the petitioner has access to a regulatory mechanism that is established for the purpose of achieving the objectives identified by the petitioners, intervention should be denied. See In re: Application for a Compliance Order Certificate by CoxCom., Order 16402, at 2.

Similarly, plaintiffs' purported "interest" in ensuring that the proposed asset sale does not impede their ability to "collect a judgment relating to" their federal lawsuit is an inappropriate ground for intervention. By seeking to intervene in this proceeding, plaintiffs are attempting to place their interests above those of the citizens of the State of Rhode Island, who will benefit greatly from the proposed transaction.[7] As the Division has held, "[i]n litigation involving the administration of regulatory statutes designed to promote the public interest . . . interests of private litigants must give way to the realization of public purposes." See In re: Petition of Valley Gas Company, et al., Docket No. D-00-02; In re: Petition of Providence Gas Energy Corp., et al., Docket No. D-00-03, citing Virginia Petroleum Jobbers Ass'n v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958).

In addition, plaintiffs claim that Division approval of the Joint Petition may "negatively affect" plaintiffs' ability to collect a possible judgment in a federal lawsuit is precisely the type of speculative interest that is insufficient to confer standing upon a petitioner. See Public Service Co. of New Hampshire v. Patch, 136 F.3d 197, 205-206 (1st Cir. 1998) (denying intervention where basis for intervention was "an as yet unrealized" economic benefit).

Finally, if plaintiffs have an interest that is relevant to the Division proceeding, that interest is adequately represented by the Attorney General as a "representative of the public,

[7] See Joint Petition at ¶ 8, for a list of the many benefits that will inure to the citizens of Rhode Island upon approval of this asset sale, including among others, "efficiencies and cost savings from increasing [Narragansett's] customer base" and the improved "ability of the gas and electric distribution utilities to provide reliable service to the public." Moreover, approval of the Joint Petition will guarantee that future remediation costs incurred by Southern Union will not be borne by Rhode Island ratepayers as they will no longer be Southern Union customers.

empowered to bring actions to redress grievances suffered by the public as a whole." (See Attorney General Petition at ¶ 1). Indeed, where, as here, a government agency is a party to a proceeding, there exists "a presumption that members of [that] government body [will] adequately represent the interests of its constituents." Tutein v. Daley, 43 F. Supp. 2d 113, 129 (D. Mass. 1999); see Public Service Company of New Hampshire v. Patch, 136 F.3d at 207 (recognizing presumption and requiring "strong affirmative showing" by prospective intervenor) (citation omitted). Here, other than the conclusory statement that their interests are "not adequately represented by existing parties" (Plaintiffs' Petition for Intervention at ¶ 7), plaintiffs have done nothing to satisfy this heavy burden. Therefore, plaintiffs' interests, if any, are "adequately represented" by the Attorney General.

B. RIDEM Does Not Have Standing To Intervene.

RIDEM's unprecedented motion to intervene in a Division proceeding that concerns the merits of a utility transaction should be denied. RIDEM is the state regulatory agency charged with protecting the "public health, safety and welfare and the environment" and is armed with a "combination of . . . administrative and judicial enforcement options" to ensure that it achieves its mandate. See RIDEM Administrative Penalties at §§ 2(a), 7. RIDEM must deal with environmental matters directly and within its own regulatory framework, not by attempting to hold a utility transaction hostage to its demands. To put it simply, the General Assembly has given RIDEM the authority it needs, in proper cases, to compel a cleanup. It is improper for RIDEM to intervene in this proceeding and ask the Division to compel a cleanup.

Further, to the extent that RIDEM has an interest in ensuring that this utility transaction will not negatively impact Southern Union's responsibility for, or financial ability to respond to,

the LOR, that interest is adequately represented by the Division. Accordingly, RIDEM has no valid standing to intervene in this proceeding and its motion should be denied.

C. The Town of Tiverton Does Not Have Standing To Intervene.

On October 8, 2002, RIDEM issued a Letter of Responsibility to Tiverton relating to the alleged contamination. Now, like plaintiffs and RIDEM, Tiverton petitions to intervene, seeking to litigate its environmental issues in this forum.[8] Tiverton's petition covers the same ground as that covered by plaintiffs and RIDEM, and should be denied for the same reasons.

In essence, Tiverton contends that it has standing to intervene because Southern Union has allegedly violated a "lawful order" of RIDEM relating to the alleged contamination, and that Tiverton's intervention is warranted so that the Division can "hear the arguments and protests of Tiverton." (Petition for Intervention by the Town of Tiverton at ¶ 8). Neither contention provides a valid basis for Tiverton's intervention in this proceeding. First, this is not the forum to determine whether Southern Union has violated a "lawful order" by RIDEM. Second, to the extent that Tiverton wants to "protest" to the Division, Rule 18 provides Tiverton with the opportunity to "Protest" and "object to the approval of . . . [a] petition . . .under consideration by the Division." See Rule 18. Party status is not necessary for a protest or to have Tiverton's concerns addressed by the Division.

In any event, similar to the purported interests of the plaintiffs and RIDEM, Tiverton's interest in the Division proceeding will be adequately represented by the Attorney General and the Division. Therefore, Tiverton's petition should be denied.

D. The City of Providence Does Not Have Standing To Intervene.

As provided in their petition, Providence contends that it played an active role in proceedings before the Federal Energy Regulatory Commission ("FERC") that ultimately

[8] See footnote 3, supra.

resulted in FERC denying KeySpan LNG, L.P.'s ("KLNG's") effort to obtain authorization to make changes necessary to permit the facility to accept deliveries of liquefied natural gas ("LNG") via ships traveling through Narragansett Bay.[9] (City of Providence Petition for Intervention "Providence Petition" at ¶ 2).[10]

Now, based solely on an unidentified article in the *Providence Journal*, Providence contends that it is "concerned" that the Joint Petition of Southern Union and Narragansett "is the first step in a stratagem by National Grid to gain control of the properties abutting Key Span, to acquire KeySpan's assets, and eventually petition FERC to permit the construction of" an LNG facility at the same location. (Providence Petition at ¶ 3). Providence thus bases its petition on a speculative "possibility" of the construction at some unknown point in the future of an LNG facility. Such speculation cannot and should not form a valid basis for intervention.

This proceeding has absolutely no relationship to Providence's speculative "concern." Accordingly, Providence's petition to intervene should be denied.[11]

E. The United Steel Workers, Local 13421 Has No Standing To Intervene In This Proceeding.

The United Steel Workers' petition to intervene is also without merit, and should be denied. The Union claims that it should be allowed to intervene because "action of the Division on the pending docket will invariably affect the rights and responsibilities of the Union and [Southern Union] under the existing collective bargaining agreements (Motion of United Steel

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[9] Southern Union has been advised that the City of East Providence ("East Providence") has filed a petition to intervene. As Southern Union has not been served with nor reviewed such petition, it reserves the right to respond to same. To the extent East Providence raises the same issues raised by Providence, Southern Union relies on its objection herein to Providence's petition for intervention.

[10] KeySpan LNG, L.P., 112 FERC ¶ 61,028 (July 5, 2005)(denying authorization and dismissing petition); KeySpan LNG, L.P., 114 FERC ¶ 61,054 (January 20, 2006) (dismissing and denying request for rehearing). As noted by Providence, KLNG has also filed a petition for review in the Court of Appeals for the District of Columbia, which is currently pending.

[11] To the extent that Providence's speculative "concern" is an interest that provides a basis for standing in this proceeding, that interest can be adequately represented by the Attorney General.

Workers, Local 13421, For Leave To Intervene). In addition, the Union claims that its status as the representative of those "frontline employees who deal with safety and customers services issues on a day to day basis places it in a unique position to bring evidence relative to the Division's attention." Neither of these contentions form a valid basis for the Union's intervention here.

First, no action undertaken by the Division in this proceeding could or would affect the existing collective bargaining agreements between the Union and Southern Union, which were executed in May 2002 for five-year terms and therefore do not expire until 2007. Further, the agreements are expressly assumed by National Grid under Section 2.2 of the Employee Agreement.

Second, the wages, hours and working conditions to which the Union refers are not issues subject to determination in this proceeding. The Division's approval will not define, expand, or limit the rights or responsibilities of the utility managers or the Union under any current or future collective-bargaining agreement. Rather, such rights and responsibilities will, as usual, be determined through the collective-bargaining process, and the agreement that is ultimately reached will be a function of the discretion that is exercised by the utility managers and the Union, on behalf of its members, in establishing mutually agreeable "wages, hours and working conditions." In that regard, it is well established that the ability and authority of utility management to negotiate terms of employment with their employees falls squarely within management prerogative. See Providence Water Supply Board v. PUC, 708 A.2d 537, 543 (R.I. 1998) ("broad regulatory powers of the [Public Utility Commission] ordinarily do not include authority to dictate managerial policy.) As the Union has no interest that will be directly, or even indirectly, affected by the outcome of the Division's proceeding. The Division should deny the

Union's petition.

F. TEC-RI Has No Standing To Intervene In This Proceeding.

TEC-RI bases its purported "interest" in this proceeding on its assertion that its members will be "specifically affected" by the Division's proceeding because of the potential impact on service levels, cost structures, marketplace dynamics and customer offerings. (Petition To Intervene By The Energy Council Of Rhode Island at ¶2). This bare, conclusory assertion is not sufficient to demonstrate an interest that will be "directly affected" by the proposed transaction. See Rule 17(b)(2). Nor does this assertion explain how those interests, if any, cannot be adequately represented by the Attorney General, who has indicated that he will seek to ensure that Narragansett's acquisition of Southern Union's utility assets "does not negatively impact service quality, provides benefits to customers in terms of rate impacts, and does not otherwise conflict with the public interest" (Attorney General Petition at § III). Indeed, as the precise concern raised by TEC-RI will be adequately addressed by the Attorney General, TEC-RI's petition to intervene should be denied.

G. The Wiley Center Has No Standing To Intervene In This Proceeding.

The Wiley Center's one sentence petition to intervene does not articulate any interest its members have in this proceeding nor any reason why their interest will not be adequately represented by the Division or any other party. In any event, to the extent the Wiley Center's interest concerns utility rates and service, that interest will be adequately represented by the Division and the Attorney General.

WHEREFORE, for all of the above reasons, Southern Union respectfully requests that the Division deny the Petitions to Intervene submitted by: (1) "land owners [and] residents" of Tiverton, Rhode Island, who are also plaintiffs in an action against Southern Union that is currently pending in the District Court for the District of Rhode Island; (2) the Rhode Island Department of Environmental Management; (3) the Town of Tiverton; (4) the City of Providence; (5) the United Steel Workers, Local 13421; (6) The Energy Council of Rhode Island; and (7) The George Wiley Center. The Attorney General's petition should be limited to those issues in paragraph III thereof.

SOUTHERN UNION COMPANY

By its Attorneys,

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CERTIFICATION

I hereby certify that I e-mailed and mailed via U.S. Mail the within Response and Objection to counsel of record as set forth on the attached Service List on this 21st day of April, 2006.

National Grid & Southern Union - Docket D-06-13
Updated Service List as of 04/21/06

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File an original & five (4) copies w/: Luly E. Massaro, Division Clerk Division of Public Utilities & Carriers 89 Jefferson Blvd. Warwick, RI 02888	Lmassaro@puc.state.ri.us	401-780-2107 401-941-1691

EXHIBIT

1

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
OFFICE OF WASTE MANAGEMENT
Site Remediation and Restoration Program

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RE: Bay Street Neighborhood Study Area
Tiverton, Rhode Island
Case #2002-065(a)
OWM SR 2005-09

Subject: Failure to Comply with the Letter of Responsibility issued to Southern Union Company/New England Gas Company dated March 17, 2003.

NOTICE OF INTENT TO ENFORCE

A. **Introduction**

You are hereby notified that, as a result of the release of hazardous materials and/or petroleum products as identified herein, the Director of the Department of Environmental Management (the "Director") has reasonable grounds to believe that the following Parties have violated certain provisions of the R.I. Rules and Regulations for the Investigation and Remediation of Hazardous Material Releases (the "Remediation Regulations").

Prompt, complete and continuing compliance with this Notice of Intent to Enforce ("NOIE") is required if you wish to stay the commencement of administrative-legal action and/or the assessment of administrative penalties. If you have any questions regarding this NOIE, please contact Jeffrey Crawford at (401) 222-2797 extension 7102.

B. **Facts**

1. The Bay Street Neighborhood Study Area is located in the Northwestern corner of the Town of Tiverton ("Tiverton") encompassing approximately 100 residential and a few commercial private properties along with the abutting public roads and rights of way; otherwise identified as Tiverton Assessors Plats 8-6 Blocks 3, 5 (portion), 7(Lot 3,4) and 8; Plat 8-7, Blocks 13 (Lot 3), 14 (Lot 4,5), Blocks15, 16,17,21,22 and Block 41 (Lot 35)(i.e. "the Site").

2. The following Parties are responsible, in whole or in part, for the violations identified in this Notice:

   (a) Southern Union Company -d.b.a. New England Gas Company (NEGAS)

3. The property became listed with the Department of Environmental Management ("RIDEM") on or about August 2002 as a result of receiving complaints from residents in the neighborhood community off of Bay Street in Tiverton. The complaints stated that soil material that was possibly contaminated was being stockpiled along Bay Street as part of a sewer main installation, the Mount Hope Bay Sewer Interceptor Project for North Tiverton, Rhode Island. Complaints filed at RIDEM initiated an investigation by a member of the RIDEM hazardous materials response team at the corner of Judson and Bay Street and at the bottom of Last Street in Tiverton. The RIDEM field investigator observed stockpiled soils at both locations that the sewer contractor had placed there and that the stockpiled soil had a "blue" color associated with it, indicative of historic coal gasification waste material (i.e. cyanide).

4. On September 6, 2002, RIDEM's Office of Compliance & Inspection (John Leo) received laboratory analyses from ESS Laboratory of the soil material . The analysis revealed the presence of cyanide and other hazardous substances including Semi-Volatile Organic Compounds (SVOC's) and more specifically Polycyclic Aromatic Hydrocarbon's (PAHs) and Total Petroleum Hydrocarbons (TPH) in the stockpiled soils were found which are jurisdictional under the RIDEM's Remediation Regulations.

5. In November 2002, EA Engineering on behalf of Tiverton and Starwood Tiverton, LLC ("Starwood") conducted a subsurface investigation beneath the portions of the public roads/streets inclusive of Bay, Judson, Hooper, Hilton, Canonicus, Chase, Foote as far north as State Avenue. Subsequent results reported by EA Engineering confirmed that soil contamination was more wide spread beneath the road/street areas of the neighborhood. The EA investigation also revealed the presence of Total Petroleum Hydrocarbons (TPH), Semi-Volatile Organic Compounds (SVOCs), total metals including Lead and Arsenic as well as total Cyanide.

6. On March 13, 2003, a public meeting was held at the Tiverton Town Hall at which approximately 125 residents expressed their concerns about the situation and provided information to RIDEM concerning historical activities in the Bay Street community.

7. At that meeting, documentation from a Town of Tiverton Planning Meeting (dated February 10, 1987) was presented and indicates that a former employee of Fall River Gas Company observed that "blue soil" was in the fill material (1-3 feet in depth) along State and Bay Street and that the disposal of this fill may have occurred over a ten-year period during the 1960's and early 1970's.

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

9. The former Fall River Gas Company is now owned by the Southern Union Company d.b.a New England Gas Company.

10. Additional information found in Individual Septic Design System (ISDS) records at RIDEM for a residential dwelling at the intersection of Hooper and Bay Street also identifies that there is approximately two (2) feet of fill material in the area.

11. On March 17, 2003, RIDEM issued a Letter of Responsibility ("LOR") to Southern Union Company (Alan Fish) and New England Gas Company (Robert Young).

12. On March 19, 2003, New England Gas Company responded to the RIDEM's LOR and contracted Vanesse Hagen and Brustlin Inc. ("VHB") to prepare a Site Investigation Work Plan ("SIWP"), pursuant to the Remediation Regulations, for investigating 68 private properties thought to be abutting contamination discovered in the public road areas as part of the Tiverton's investigation.

13. VHB, on behalf of NEGAS, began their investigation in June 2003 and the number of properties being investigated increased to 75 properties.

14. Also on or about March 19, 2003, the Town of Tiverton initiated a second round of field investigation, at the request of RIDEM, on the remaining public road/street areas not previously tested, to attempt to determine the extent of soil contamination beneath the public roads/streets and right of ways.

15. On or about October 31, 2003, NEGAS submitted the first Site Investigation Report ("SIR") with attachments for sixty-seven 67 properties. VHB indicated to the Department that seven (7) property owners of the original 75 properties did not provide access.

16. On December 5, 2003, NEGAS submitted four individual Site Investigation Reports ("SIR") with attachments for nine (9) properties (of the 67 properties investigated as part of the Site Investigation) that NEGAS segregated due to their belief that past owners and operators had caused the identified contamination.

17. On January 27, 2004, RIDEM issued formal comments to NEGAS, including copies of the public comments received on the first phase of the Site Investigation.

18. On February 17, 2004, NEGAS responded to RIDEM with an outline of their plan and a schedule for responding to RIDEM's comments and conducting additional fieldwork.

19. As of the mailing of this NOIE, no formal response to RIDEM or public comments has been submitted by NEGAS.

20. On or about July 19, 2004, NEGAS submitted a proposed Supplemental and Phase II SIWP to further investigate the original properties investigated in 2003 and to investigate for the first time approximately 17 additional properties. These 17 additional properties to be investigated for the first time increased to approximately 25 between July 2004 and August 2005.

21. RIDEM concurred with the Supplemental and Phase II SIWP on or about August 25,

2004. VHB initiated obtaining access agreements with residents shortly thereafter.

22. Supplemental and Phase II Site Investigation activities commenced in early September 2004.

23. On July 6, 2005, RIDEM corresponded to D. Tomka, Project Manager for NEGAS concerning NEGAS's request for an extension (dated June 21, 2005) for the SIR submission until September 30, 2005. In the correspondence, NEGAS was informed that the complete SIR with remedial alternatives must be submitted by August 15, 2005.

24. On July 19, 2005, RIDEM corresponded to NEGAS concerning analytical data that had been provided to the Department by legal counsel to the owners that indicated that soil contamination existed on a specific private property on Judson Street. RIDEM further requested that the information and property be included in the Site investigation submission and proposed remedial alternatives for remediating the neighborhood contamination.

25. On August 15, 2005, RIDEM received the Supplemental and Phase II SIR with attachments for review and approval. In the submission and cover letter from NEGAS, the company claims that the SIR is incomplete due to lack of time to complete listed items and that submission of remedial alternatives for remediating the Site is premature.

26. At this time, Respondent NEGAS has failed to respond to the requirements in the RIDEM LOR issued to them on March 17, 2003, and the Site remains out of compliance with the Remediation Regulations

C. Potential Violations

Based on the circumstances set forth above, the release of hazardous materials at the site and your inadequate response thereto potentially constitute violations of the following statutes and/or regulations:

(1) R.I. Gen. Laws Sections 46-12-5(a) and (b) and 46-12-28, prohibiting the discharge of pollutants to surface waters and groundwater's of the State;

(2) R.I. Gen. Laws Sections 23-19.1, from which the Remediation Regulations were promulgated prohibiting the unpermitted release of hazardous materials.

D. Required Actions

The following actions are required in order for you to comply with the above- mentioned statutes and/or regulations:

1. Submit a minimum of three (3) Remedial Alternatives for remediating all soil contamination in the Bay Street Neighborhood Study Area to meet RIDEM's Method 1 Residential Direct Exposure Criteria as outlined in the

Remediation Regulations on or before January 4, 2006;

2. Submit any outstanding site investigation sampling results and laboratory analysis, completed after the August 15, 2005 SIR submittal, for the remaining properties by January 4, 2006;

3. Conduct Public Notice to all residents of the Bay Street Neighborhood Study Area within 14 days of receipt of the RIDEM's Program Letter.

E. Assessment of Penalty

This NOIE constitutes a notice of intent to assess an administrative penalty pursuant to R.I. Gen. Laws Chapter 42-17.6, in the event that you fail to comply with this NOIE in a timely and satisfactory manner. If the Parties promptly and satisfactorily comply with the requirements of this NOIE, RIDEM may not assess an administrative penalty. However, continued noncompliance will result in the issuance of a Notice of Violation and Order, which will include the assessment of an administrative penalty that may be as high as $25,000 per violation for each and every day that violation continues to exist.

Within seven (7) days of receipt of this NOIE, you must notify this office in writing of your intent to comply with the above-required actions in the time frame indicated.

FOR THE DIRECTOR:

Leo Hellested, P.E., Chief
Office of Waste Management

Dated this 23rd day of November 2005.

New England Gas Company

December 13, 2005

Leo Hellested, P.E. Chief
Office of Waste Management
Department of Environmental Management
235 Promenade Street
Providence, RI 02908

Re: Bay Street Neighborhood Study Area
Tiverton, Rhode Island
NOTICE OF INTENT TO ENFORCE

Dear Mr. Hellested:

New England Gas Company ("NEGC") writes in response to your Notice of Intent to Enforce ("NOI") dated November 23, 2005.

For more than two years, NEGC has acted responsibly to help the State investigate the "Bay Street Suspected Fill Area" located in Tiverton, Rhode Island (the "Study Area"). Contrary to your contentions in the NOI, NEGC has not violated "certain provisions" of the Remediation Regulations. Indeed, NEGC has complied and remains in compliance with the Remediation Regulations and has acted in a manner consistent with those regulations. NEGC will continue to work with RIDEM on Study Area issues as long as we both work cooperatively and reasonably. NEGC will not, however, yield to unreasonable demands or accept responsibility that clearly lies elsewhere. RIDEM has no authority (1) to impose liability on NEGC for residuals from other sources or (2) to disregard the Remediation Regulations and dictate a site investigation approach that is inconsistent with those regulations and with virtually every current regulatory approach for cleaning up contaminated sites.

Your NOI is improper because it fails to deal with at least three critical facts:

(1) There is no evidence to support RIDEM's suggestion that all or most of the lots in the Study Area are impacted by Manufactured Gas Plant residuals ("MGP residuals");

(2) RIDEM cannot disregard the provisions of the Remediation Regulations which plainly permit a Performing Party to perform a risk assessment before selecting and screening remedial alternatives; and

(3) RIDEM has not provided NEGC with either the time or the approvals necessary to develop remedial alternatives.

100 Weybosset Street
Providence, RI 02903

1595 Mendon Road
PO Box 7900
Cumberland, RI 02864

155 North Main Street
PO Box 911
Fall River, MA 02722

1. **There is no evidence to support RIDEM's suggestion that all or most of the lots in the Study Area are impacted by MGP residuals.**

The NOI, the Letter of Responsibility ("LOR") issued to NEGC on March 17, 2003, and the "Potential Violations" referred to in Section C of the NOI are all premised on the assumption that NEGC is in some way "responsible" for the contamination discovered in the Study Area. RIDEM suggests that the source of this contamination is MPG residuals generated by the Fall River Gas Company ("FRGC"). The significant data generated from the site investigation demonstrates that this assumption is wrong. That data indicates instead that:

- The Study Area is surrounded by a variety of industrial uses. Over the past 100 years, the Study Area has hosted many industrial activities, including chemical companies, manufacturing plants, hat companies, auto repair shops, junkyards, landfills, town dump sites, fuel storage terminals and sewer plants.

- There are multiple sources of the contamination found within the Study Area, including manufacturing operations, petroleum operations, agricultural uses and landfill activities. There are also many domestic uses of materials that have potentially contributed hazardous substances to the Study Area, including coal, fuel oil, lead paint, gasoline, pesticides, herbicides, and treated wood materials used for decks and fencing.

- Much of the contamination identified in the Study Area is similar to urban background concentrations found in this region of the country, and has nothing to do with MGP residuals or with NEGC. Many of the arsenic and PAH accidences are prime examples.

- Many lots do not have any Method 1 exceedances.

- The lots in the Study Area do not contain the typical markers associated with MGP residuals, and there is very little evidence of MGP residuals within the Study Area

- The "anecdotal" evidence does not establish any clear or definite connection between FRGC and the contamination in the Study Area.

A detailed review of the data is beyond the scope of this response, but even RIDEM's past activities within the Study Area support many of these conclusions. In 1988, RIDEM sent Jeff Crawford, the Project Manager for the Study Area, to the Study Area to investigate a specific complaint about the possible presence of MGP residuals from FRGC on a group of empty lots slated for development. The complaint described the lots as "an old dump site with Solid Waste and Old Fall River Gas Company" and referred to "coke deposits." Mr. Crawford went on to describe the site as "Allegedly Town Dump 1928 – 1930." After walking the site and completing his investigation, Mr. Crawford found no reason to stop or delay the impending development due to concerns about MGP residuals. Mr. Crawford concluded that "The land appears to be wetland and that material has been filled to construct new homes on. There was no visual sign of any old coal slag however a slight odor similar to sulfur was detected when walking on the vacant lot." Mr. Crawford walked the entire 12-acre site. Mr. Crawford did not detect any evidence

of MGP residuals on these lots. The Town allowed the development of the lots in that part of the Study Area. Eleven homes were eventually constructed there.

As Mr. Crawford's 1988 report states, and as minutes of town council meetings support, this area was a notorious old dumpsite that was developed after it was filled with material. Even in an undeveloped state, RIDEM did not find any indication of MGP residuals and found no reason to delay development. RIDEM therefore did not interfere with the green light from the Town allowing development of this land.

In short, the data generated by the Site Investigation does not support RIDEM's assumption that all, or even many, of the lots in the Study Area are impacted with MGP residuals.

2. **RIDEM does not have the right to disregard the provisions of the Remediation Regulations which plainly permit a PRP to perform a risk assessment before evaluating remedial alternatives.**

The Remediation Regulations relied upon by RIDEM in the NOI plainly permit a Performing Party to perform a risk assessment before evaluating remedial alternatives. This principle is embedded throughout the Remediation Regulations.

Rule 7.04 directs Performing Parties to develop two remedial alternatives other than a "no action/natural attenuation" alternative as part of the site investigation process. Rule 7.04 directs the Performing Party to select remedial alternatives that are consistent with Section 8 of the Remediation Regulations (Risk Management).

Section 8 provides Performing Parties with three methods for developing remedial objectives for a contaminated site. These methods include:

* Method 1 –not site specific and simply employs general Soil Objectives set forth in several tables in the Remediation Regulations.

* Method 2 –utilizes the Method 1 algorithms but modifies some of the Soil Objectives using site-specific data.

* Method 3 –utilizes US EPA guidance to develop site specific Remedial Objectives.

Performing Parties who utilize Method 3 require significant RIDEM input and must perform several additional tasks before they can derive and screen the appropriate remedial objectives. For example, a Performing Party developing Soil Objectives pursuant to Method 3 must complete a site-specific risk assessment. The Performing Party must first submit a Risk Assessment Work Plan to RIDEM that details the methods and assumptions proposed for use by the risk assessor for use at the specific site. After RIDEM approves the work plan, the Performing Party must perform the risk assessment and submit an appropriate report to RIDEM for review and approval.

The Remediation Regulations plainly provide Performing Parties with the option to follow a Method 2 and/or a Method 3 approach in establishing remedial objectives. For example, Rule 2.02 states that "the Division has facilitated the remedial process by establishing three methods for determining remedial

objectives for the hazardous substances found to exist in soil and/or groundwater at any given contaminated site." Similarly, Rule 8.02A(iii) provides:

> If a Method 1 soil objective has been promulgated for one or more hazardous substances in soil at a contaminated site, then the following options are available:
> 1. The performing party may only propose Method 2 to develop leachability criteria as described in Rule 8.02.C; or
> 2. Method 3 may be used to develop soil objectives for the contaminated site as described in Rule 8.04 (Method 3 remedial objectives).

Finally, Rule 8.04 provides that "Method 3 Remedial Objectives allow for a site specific risk assessment to be conducted by the performing party on either a voluntary basis or as required by the Director. . . . ."

In short, the Remediation Regulations unmistakably provide a Performing Party with the right to develop Method 3 remedial objectives to aid in the screening and selection of remedial alternatives.

This is the process being followed by NEGC. Indeed, in August, 2005, NEGC submitted a Risk Assessment Work Plan to RIDEM for review. RIDEM has neither reviewed nor commented on that work plan. Completion of the risk assessment is critical in establishing Method 3 remedial objectives. RIDEM's failure to review that work plan has prevented NEGC from moving forward with the process established under the Remediation Regulations that leads to the screening and presentation of remedial alternatives.

NEGC has selected this option, and RIDEM has inappropriately attempted to override the specific rights provided under the Remediation Regulations.

RIDEM's decision to oppose the preparation of a Risk Assessment for the Study Area is puzzling. Risk Assessments are a typical step in investigating impacted sites similar to the Study Area. Not only are Risk Assessments permitted under the Remediation Regulations, but they are a common and often mandated feature of cleanups conducted under various federal programs, including CERCLA, and most State regulatory programs, including Massachusetts. For more than a decade, considerations of "risk" have determined the necessity and parameters for cleanups in the United States.

RIDEM's opposition to a Risk Assessment is also troubling because there is evidence that many of the lots in the Study Area are safe for ordinary, residential use without the need for any cleanup or remedial measures. RIDEM's delay in permitting NEGC to complete this Risk Assessment work could impact the owners of many of the properties in the Study Area.

Further, the Method 3 approach proposed by NEGC will ensure that specific and up-to-date objectives based on the best available science are used to select appropriate remedial measures. The Method 1 Remedial Objectives are now 10 years old and are based largely on science that is even older. RIDEM recognizes that many of the Soil Objectives set forth in the Method 1 table are "outdated" and modifies these objectives on a site-specific basis.

Finally, RIDEM's objection to a Risk Assessment because many of the property owners – perhaps with the Department's encouragement – would not want such a remedy is flawed and inconsistent with the Remediation Regulations. RIDEM has an obligation to manage site investigations pursuant to the Remediation Regulations to ensure that an appropriate remedy is selected and implemented. RIDEM does not have the authority to disregard the Remediation Regulations and select and implement the remedy preferred or chosen by the property owner. Indeed, over the years there have been many sites where an owner "preferred" more remediation than RIDEM selected or mandated. The Risk Assessment is a critical tool in evaluating, selecting and implementing an appropriate remedy. It is improper for RIDEM to predict, in advance, that the residents will not be in favor of the selection of a remedy that might flow from that Risk Assessment. .

3. **RIDEM has not provided NEGC with either the time or the approvals necessary to develop remedial alternatives.**

RIDEM, NEGC, and the other parties involved with the Study Area must investigate and resolve a number of outstanding issues prior to screening remedial alternatives. On behalf of NEGC, Vanesse Hangen Brustlin, Inc. ("VHB") has conveyed this conclusion to RIDEM in several letters. Indeed, most recently, Fuss & O'Neil, the engineering firm representing ENACT, reached the same conclusion in their comments on the SIR submitted to Jeff Crawford by letter dated November 14, 2005. Here are some of the outstanding issues that could have a direct impact on the remedy selected for the site:

- For the reasons described above, a risk assessment must be completed.
- A background study concerning soil conditions must be completed, particularly with respect to arsenic, beryllium, polycyclic aromatic hydrocarbons, pesticides, and herbicides. Potential sources of contamination in the Study Area must be fully investigated.
- Nine properties in the Study Area still have not been investigated.
- Several properties within the Study Area require further investigation to gather additional data regarding the extent of contamination.
- Data collected from the Simpson property south of Judson Street should be analyzed relative to the NEGC data set.
- Due to the ubiquitous nature of the impacts, identifying and mapping Method 1 exceedances is insufficient to determine sources.

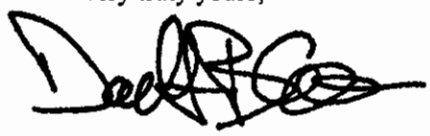
In addition to exploring these items, NEGC is still waiting for RIDEM to comment on and approve the Risk Assessment Work Plan. As confirmed by Fuss & O'Neil in their November 14, 2005 letter, these issues and other issues must be resolved before remedial objectives and remedial measures can be determined, screened, and selected.

For all of these reasons, it would be inappropriate and premature for NECG to submit three Remedial Alternatives for the Study Area on or before January 4, 2006. Important work remains to be done before remedial alternatives can be screened, developed and selected. As evidenced by the SIR, NEGC has

already completed a significant amount of work in the Study Area that contains a heterogeneous mix of conditions. With RIDEM's help, cooperation and approvals, NEGC is prepared to move forward and complete the necessary risk assessment and additional site investigation work. In the meantime, NEGC has already addressed several properties that required more immediate attention, and is currently addressing several other properties in the same category. NEGC is prepared to meet with RIDEM to discuss methods to expedite work at the Study Area and accelerate the preparation of remedial alternatives. NEGC will not, however, improvidently forego preparation of a Risk Assessment, particularly at this complex site when the information captured by the Risk Assessment is so critically important.

Please call me if you want to meet to discuss these issues.

Very truly yours,



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