**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**
**DIVISION OF PUBLIC UTILITIES AND CARRIERS**
**89 JEFFERSON BOULEVARD**
**WARWICK, RHODE ISLAND 02888**

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| IN RE: Joint Petition for Purchase and Sale of Assets By The Narragansett Electric Company and the Southern Union Company | : : : : | Docket No. D-06-13 |

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# REPORT AND ORDER

## 1. Introduction

On March 16, 2006, National Grid USA, through the Narragansett Electric Company[1] ("Narragansett"), and the Southern Union Company ("Southern Union") (together, the "Petitioners") filed a joint petition with the Rhode Island Division of Public Utilities and Carriers ("Division") seeking approval of the Division for the purchase by Narragansett of the assets associated with the regulated gas distribution business owned and operated by Southern Union Company in Rhode Island as the New England Gas Company. In anticipation of an August 25, 2006 closing date, and based upon a legally established 30-day deadline for appeal and time needed to prepare for and complete the closing, the Petitioners requested a ruling by the Division by June 30, 2006. The Petitioners filed the instant petition pursuant to the filing mandates contained in Rhode Island General Laws, Sections 39-3-24 and 39-3-25.

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[1] Narragansett is a subsidiary of National Grid USA. On February 15, 2006, National Grid USA executed a Purchase and Sale Agreement with Southern Union under which National Grid USA agreed to purchase the New England Gas Assets of Southern Union in Rhode Island. Under Section 8.1 of the Agreement, the purchase may be implemented directly by National Grid USA or through one of National Grid USA's subsidiaries. The joint petition reflects that National Grid USA has designated Narragansett as the appropriate subsidiary for the purpose of acquiring Southern Union's 'regulated and non-regulated gas distribution business' assets in Rhode Island.

In furtherance of starting the process of adjudicating the petition request, the Division established and published a filing deadline of April 10, 2006 for all motions to intervene in the docket. After receiving timely motions to intervene from a number of interested entities, and after conducting a hearing on the motions on April 25, 2006, the Division issued a decision on May 4, 2006 through which the current parties of record were authorized to participate in this docket.[2] The intervening parties include the Rhode Island Department of Attorney General ("Attorney General"), the Rhode Island Department of Environmental Management ("RIDEM"), the George Wiley Center ("Wiley Center") and the Town of Tiverton ("Tiverton"). The Division's Advocacy Section, an indispensable party, also entered an appearance in this docket.

Three of the intervening parties, the Attorney General, RIDEM and Tiverton, expressed a specific interest in the instant docket based on their concern over an issue of extensive soil contamination located in the Town of Tiverton. The record reflects that the contamination may have resulted from past dumping by the Fall River Gas Company ("FRGC"), a local distribution company doing business in Massachusetts that was acquired by Southern Union in a merger in 2000. Although Southern Union vehemently denies liability for the contamination in Tiverton, these Intervenors argue that it would be inconsistent with the public interest to permit Southern Union to sell its Rhode Island assets without an assurance that Southern Union will pay remediation costs if it is found liable for

[2] See Order No. 18591. The Division also notes that it subsequently denied a "*Motion To Stay And Request For An Emergency Hearing Thereon,*" that was filed by the Town of East Providence after its motion to intervene was denied by the Division in Order No. 18591 (See Order No. 18626, issued on June 1, 2006).

the contamination in Tiverton. In its decision approving intervention status for these parties, the Division framed the scope of their interventions by holding that the Division "*cannot direct Southern Union to agree to a remediation plan before an appropriate Court makes a finding of liability. However, the Division finds that it is both in the public interest and reasonable for the...[parties] to be seeking assurances that the proposed asset sale does not negatively impact Southern Union's ability to pay for remedial actions in the event it is found liable for any of the contamination in Tiverton.*"[3] The Division subsequently expanded the scope of these interventions, through a discovery-related decision, by allowing the parties to explore "*the related question of whether Southern Union is attempting to assign its potential liability in the Tiverton contamination matter to a smaller subsidiary or affiliated company, with less financial resources.*"[4]

After addressing the intervention issues, the Division next met with the parties at a pre-hearing conference on May 11, 2006 for the purpose of establishing a procedural schedule. An initial procedural schedule was adopted by agreement of the parties at that conference. The adopted procedural schedule targeted July 25, 2006 as the date for a final decision in this docket rather than the June 30, 2006 date initially proposed by the Petitioners.[5]

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[3] Order No. 18591, p. 16.
[4] Order No. 18641, pp. 3-4.
[5] The schedule was subsequently amended on May 26, 2006 to afford the Attorney General additional time to conduct discovery (See Order No. 18620), on June 16, 2006 to afford the Wiley Center additional time to submit pre-filed direct testimony (See Order No. 18641), and on June 19, 2006 to afford the Attorney General additional time to submit pre-filed direct testimony (granted by the Hearing Officer during a telephone conference with all parties conducted on June 19, 2006).

The Division conducted two duly noticed public hearings on Narragansett's and Southern Union's joint petition, on June 29 and 30, 2006. The hearings were held at the Division's hearing room located at 89 Jefferson Boulevard in Warwick. The following counsel entered appearances:

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| For Narragansett: | Laura S. Olton, Esq., and<br>Thomas G. Robinson, Esq. |
| For Southern Union: | Gerald J. Petros, Esq.,<br>Robert Keegan, Esq., and<br>Cheryl Kimball, Esq. |
| For the Attorney General: | Paul J. Roberti, Esq.<br>Assistant Attorney General |
| For the Division's Advocacy Section: | Leo J. Wold, Esq.<br>Special Asst. Attorney General |
| For RIDEM: | Brian A. Wagner, Esq. |
| For Tiverton: | Jeanne Scott, Esq. |
| For the Wiley Center: | B. Jean Rosiello, Esq. |

## 2. The Petitioners' Direct Case

In their petition, Narragansett and Southern Union assert that Narragansett's acquisition of the New England Gas Company assets ("New England Gas Assets") satisfies the requirements under R.I.G.L. §39-3-25, supra, because the acquisition "is consistent with the public interest and...will not diminish the facilities of the Companies used for furnishing service to the public...[6] The joint petition also states that if the Division approves Narragansett's acquisition of the New England Gas Assets: "all of the rights, privileges,

[6] Joint Petitioners Exhibit 1, p. 5

easements, powers and franchises held or enjoyed by New England Gas will become vested in Narragansett...and...Narragansett will become the sole and exclusive gas distribution company serving the cities and towns in Rhode Island..."[7] The Petitioners also claim that the acquisition of the New England Gas Assets by Narragansett will:

> *(a) result in efficiencies and cost savings from increasing the customer base and consolidating operating and administrative functions in Rhode Island and the northeastern United States, combining electric and gas distribution operations in Rhode Island, and joining the expertise in the Rhode Island Gas distribution business with that developed in the other natural gas operations of National Grid in the Northeast and the United Kingdom;*
>
> *(b) reduce administrative costs of regulation incurred by both the Division and the Public Utilities Commission by reducing the number of distribution companies subject to regulatory oversight;*
>
> *(c) facilitate the implementation of common Division and Commission policies for gas and electric delivery services throughout the State of Rhode Island; and*
>
> (d) *improve the ability of the gas and electric distribution utilities to provide reliable service to the public.*

The joint petition also contains three ancillary requests. First, the Petitioners request that the Division provide two separate declarations that the mandatory "two-thirds shareholder vote" provision contained in R.I.G.L. §39-3-

[7] Id., p. 4.

24(3) is not required for either petitioner in this case. The pertinent provision provides as follows:

> *Any public utility may merge with any other public utility or sell...all or any part of its property, assets, plant, and business to any other public utility, provided that the merger or sale...of all or substantially all of its property, assets, plant, and business shall be authorized by a vote of at least two-thirds (2/3) in interest of its shareholders at a meeting duly called for that purpose.*

Regarding this request, Southern Union relates that the assets it is conveying to Narragansett constitute less than 10 percent of the total asset base of Southern Union. In view of its overall size, Southern Union contends that "the sale of the New England Gas Assets does not approach the statutory standard of a sale or lease of 'all or substantially all' of Southern Union's assets. Southern Union requests the declaration to "assist in ensuring that the transaction will be closed within the timeframe established in the Agreement."[8]

Similarly, Narragansett requests a declaration that it need not conduct any shareholder vote associated with the instant transaction. Narragansett contends: "[b]y its terms, Section 39-3-24(3) of the General Laws requires a shareholder vote only from the selling company when there is no merger involved."[9]

The second request is a request that the Division issue its final decision in this docket by June 30, 2006. In support of this request, the petition reflects that the purchase and sale agreement that was executed by the Petitioners contains a planned closing date of August 25, 2006. The Petitioners observed that a decision

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[8] Joint Petition, p. 8.
[9] Id., pp. 8-9.

by June 30, 2006 *"provides for a thirty day appeal period necessary to achieve a "Final Order" as defined in Section 1.1 of the Agreement, and allows sufficient time for the Petitioners to take the steps necessary to prepare for and complete the transaction on a timely basis."*[10] Notwithstanding this request, the Hearing Officer decided during the pre-hearing conference to adopt a final ruling target date of July 25, 2006, supra. The Hearing Officer concluded that the June 30, 2006 request was unreasonable in view of the number of parties and the complexity of issues involved in this docket.

The third request is for the Division to accept for filing under R.I.G.L. §39-3-10 the tariffs that Narragansett has submitted with the filing, to become effective on the closing of the transaction. Regarding this request, Narragansett states that the tariff filing is necessary to reflect the change in ownership and the name change. Narragansett relates that it will continue to operate under the terms of the New England Gas Company's existing rate settlement. Narragansett states that the prices and terms in the tariffs are unchanged and will continue in effect until they are superceded by the approval by the Commission of new rates for gas delivery customers.[11]

In support of their joint petition, the Petitioners proffered two witnesses in this docket. The witnesses were identified as Mr. Ronald T. Gerwatowski, Narragansett's Vice President of Distribution Regulatory Services[12]; and Mr. Richard N. Marshall, Vice President and Treasurer, Southern Union Company.

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[10] Id., p. 9.
[11] Id., pp. 7- 8 and 11.
[12] As indicated in a previous footnote, Narragansett is a subsidiary of National Grid USA.

Mr. Gerwatowski began his pre-filed direct testimony with a description of the Petitioners. He testified that National Grid USA is a holding company incorporated in Delaware, which is indirectly owned by National Grid plc, incorporated in the United Kingdom. Mr. Gerwatowski related that National Grid USA owns the common equity of several electric utility companies, including Narragansett, Massachusetts Electric Company, Nantucket Electric Company, New England Power Company, and Granite State Electric Company in New England and Niagara Mohawk Power Corporation (through Niagara Mohawk Holdings) in New York.[13]

Mr. Gerwatowski related that Narragansett provides electric delivery services to all of Rhode Island with the exception of Block Island and the Pascoag Utility District. He stated that although Narragansett has not operated gas facilities in Rhode Island for a long time, National Grid is the leading gas distribution operator in the United Kingdom, serving over 10 million customers. Mr. Gerwatowski also noted that National Grid serves 565,000 gas customers in New York. Mr. Gerwatowski also related that National Grid has recently announced an agreement to merge with KeySpan Corporation, which operates gas and electric facilities on Long Island and gas distribution systems in New York City, Massachusetts and New Hampshire.[14]

Mr. Gerwatowski next testified that Southern Union is a Delaware corporation, with its headquarters in Houston, Texas. He related that Southern Union acquired Providence Gas Company, Valley Gas Company, and Bristol and

[13] Joint Petitioners Exhibit 1, Gerwatowski pre-filed direct testimony, p. 4.
[14] Id., p. 5.

Warren Gas Company in a series of transactions that were approved by the Division in Docket Nos. D-00-02 and D-00-03. Mr. Gerwatowski explained that as part of those transactions, the Providence Gas Company, Valley Gas Company, and Bristol and Warren Gas Company were merged into Southern Union and became a part of an operating division called New England Gas Company.[15] He related that the New England Gas Company distributes natural gas to 245,000 customers in Rhode Island through over 3000 miles of gas mains.[16]

Mr. Gerwatowski next described the steps that Narragansett is taking to implement the acquisition of the New England Gas Assets. He explained that following the approval by the Division and the completion of the Hart Scott Rodino Antitrust review by the Department of Justice or the Federal Trade Commission, together with several smaller and more ministerial permits,[17] National Grid USA and Narragansett will move forward with the closing. Mr. Gerwatowski testified that after the transaction, the New England Gas Assets would be operated as a division of Narragansett, within a single corporation, doing business as 'National Grid' in Rhode Island.[18] Mr. Gerwatowski also testified that National Grid USA is paying $575 million for the New England Gas Assets and the other Rhode Island unregulated subsidiaries. He related that the payment includes $498 million of cash and the assumption of approximately $77 million of existing debt.[19]

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[15] Id., pp. 5-6.
[16] Id., p. 6.
[17] These permits are listed in Schedules 4.3 and 5.3 of the Purchase and Sale Agreement.
[18] Id., pp. 6-7.
[19] Id., p. 7.

Mr. Gerwatowski also testified that Narragansett and New England Gas Company have established an integration team whose main objective is to "achieve a seamless transaction for customers, ensure the continued safety of the system, and facilitate consolidation of operations."[20] As a secondary objective, Mr. Gerwatowski related that the transition team would begin a review process, after the closing, to identify areas of synergies and savings and to identify ways to improve service to customers.[21] Mr. Gerwatowski related that potential savings could come from lower administrative and general costs, operating expenses, improved procurement, and more effective use of combined facilities and offices.[22] As examples, Mr. Gerwatowski testified that savings would occur in metering, billing and customer service. He related: "we may also be able to reduce operating costs by consolidating facilities and buildings, improving procurements with more purchasing power, and lowering financing costs through access to broader capital markets."[23]

Mr. Gerwatowski stated that Narragansett proposes to file a new gas rate plan with the Rhode Island Public Utilities Commission ("Commission") within six months after the closing. He related that "we will develop and include in the filing appropriate cost allocation metrics between the gas and electric operations of Narragansett following the closing." Mr. Gerwatowski noted that National Grid has "these allocations in place for [its]...combined operations in New York," which he described as a "good starting point for the development of an accounting and

[20] Id.
[21] Id.
[22] Id., p. 8.
[23] Id., pp. 8-9.

ratemaking methodology here in Rhode Island to separately determine the cost of service for gas and electric operations..."[24]

Mr. Gerwatowski testified that the New England Gas Company's currently approved rates would continue in effect after the closing. He indicated that the joint petition contains an exhibit that includes "a set of the gas tariffs and rate schedules."[25] He emphasized that the "only change to these tariffs and rate schedules is to change the utility's name." Mr. Gerwatowski added that Narragansett would also be assuming the obligations under the pre-existing gas rate plan of the New England Gas Company, dated June 14, 2002. He related that while the 'Rate Freeze Period' under the existing gas rate plan expired on July 1, 2005, the plan otherwise remains in effect until suspended by further Commission action.[26]

Mr. Gerwatowski next related that even after Narragansett develops and files a new rate plan for gas delivery customers in approximately six months, Narragansett's electric savings will continue through the earnings sharing mechanism in Narragansett's electric rate plan, which he noted is in the second year of a five-year distribution rate freeze. He testified that Narragansett expects that the customers' share of the savings from the acquisition will be reflected in both gas delivery rates and in improved infrastructure and service to customers. Mr. Gerwatowski also noted that "these savings will be realized while protecting New England Gas Company employees." He explained that all existing labor

[24] Id., p. 9.
[25] Joint Petitioners Exhibit 3.
[26] Id., p. 10.

contracts will be honored, and all New England Gas Company active employees will be offered a position with National Grid.[27]

In his final comments, Mr. Gerwatowski opined that the "merger will also lower the administrative costs of the Division and Commission." He stated that National Grid would also be able to implement state energy policies efficiently and effectively through a single company that provides electric and gas delivery services to nearly all customers and communities in Rhode Island.[28] He also opined that the combination of personnel and equipment would improve Narragansett's ability to respond to storms and other emergencies.[29]

Mr. Richard Marshall was proffered by Southern Union to describe the sale of the Rhode Island assets of New England Gas Company to National Grid for $575 million less assumed debt of $77 million, and to outline the timeline anticipated for the closing of the transaction.[30]

Mr. Marshall testified that at year-end December 31, 2005, Southern Union provided natural gas local distribution service to approximately a million customers in Missouri, Pennsylvania, Rhode Island and Massachusetts. He related that the Company serves approximately 245,000 customers in Rhode Island and approximately 50,000 customers in Massachusetts through its New England Gas Company division. In addition to its local distribution assets, Mr.

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[27] Id., pp. 10-11.
[28] Id., p. 11.
[29] Id.
[30] Joint Petitioners Exhibit 1, Marshall pre-filed direct testimony, p. 1.

Marshall also briefly described Southern Union's transmission assets, which are owned through several direct subsidiaries.[31]

Mr. Marshall next testified that there have been two changes to Southern Union's organization in 2006. He related that on March 1, 2006 Southern Union purchased 100 percent of the general and limited partnership interests in Sid Richardson Energy Services Ltd., a privately held natural gas gathering and processing company, and Richardson Energy Marketing, Ltd and 100 percent of the general partnership interests in Leapartners, LP (together "SRES") for $1.6 billion.[32] Mr. Marshall testified that this transaction was the latest in a long-term business strategy to change Southern Union's core business from a local retail user utility to a wholesale leader in the natural gas transportation and services industry. Mr. Marshall related that with the addition of the SRES business, Southern Union now has more than 22,000 miles of gathering and transportation pipelines stretching from the Gulf of Mexico to the Southwest, Midwest and Canada.[33]

Mr. Marshall testified that the other organizational change took place on January 26, 2006, the date Southern Union entered into a definitive agreement to sell the assets of its PG Energy division to UGI Corporation for $580 million. He related that the sale is currently being reviewed by the Pennsylvania Public Utilities Commission and is expected to close on or before August 25, 2006.[34]

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[31] Id., pp. 2-3.
[32] Id., p. 3.
[33] Id., pp. 3-4.
[34] Id., p. 4.

Mr. Marshall next explained that the sale of the New England Gas Assets is, as noted earlier, part of a continuing transformation over the past several years of Southern Union's core business from a local retail user utility to a wholesale leader in the natural gas transportation and services industry. He related that the proceeds from this sale would be used to retire a portion of the bridge facility financing for the acquisition of SRES.[35]

Mr. Marshall then moved to a description of the basic elements of the transaction. He related that the Agreement provides for the sale of the New England Gas Assets for $575 million less assumed debt of $77 million. He stated that the Boards of Directors for both companies have approved the sale, which he related is anticipated to close on August 25, 2006. Mr. Marshall also reiterated that under the Agreement, National Grid will honor all labor agreements currently in effect with the New England Gas Company in Rhode Island and will offer employment with National Grid to all active New England Gas Company employees in Rhode Island upon completion of the sale. He added that further plans about how to combine the operations and functions of both companies would be developed over the next several months. He also echoed Mr. Gerwatowski's statement that the Agreement is contingent upon the approval of the Division and antitrust clearance by the Federal Trade Commission under the Hart Scott Rodino Antitrust Improvements Act of 1976.[36]

Mr. Marshall opined that the proposed transaction would be beneficial for Rhode Island customers for several reasons. Specifically, Mr. Marshall noted that

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[35] Id., p. 5.
[36] Id., pp. 5-6.

Rhode Island customers are familiar with National Grid; that National Grid currently provides natural gas services to millions of customers in the United Kingdom and New York; and that National Grid is likely to produce cost savings by virtue of its ability to coordinate and consolidate certain corporate functions as well as the opportunity to integrate the operations of its other Northeast companies over the long term.[37]

Mr. Marshall additionally noted that the sale of the New England Gas Company Assets to National Grid would have no immediate impact on the base rates charged to the New England Gas Company's customers in Rhode Island or have an adverse affect on the quality of service currently experienced by these customers.[38]

In his final comments, Mr. Marshall emphasized the timing of the transaction, reiterating the Petitioners' plans to close the transaction by August 25, 2006. He also repeated the request made in the joint petition for a Division declaration that that the mandatory "two-thirds shareholder vote" provision contained in R.I.G.L. §39-3-24(3) is not required for Southern Union in this case.[39]

### 3. The Advocacy Section's Direct Case

The Advocacy Section proffered two witnesses in this docket. The witnesses were identified as: Mr. Bruce R. Oliver, President, Revilo Hill Associates, Inc., 7103 Laketree Drive, Fairfax Station, Virginia; and Mr. David J. Effron, CPA, 386

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[37] Id., p. 6.
[38] Id., p. 7.
[39] Id., pp. 8-9.

Main Street, Ridgefield, Connecticut. Mr. Oliver is an economist specializing in the areas of utility rates, energy, and regulatory policy matters. Mr. Effron is a consultant specializing in utility regulation.

Mr. Oliver indicated that he was engaged by the Advocacy Section to analyze National Grid's proposal to purchase the Rhode Island assets of the New England Gas Company. Mr. Oliver stated that his testimony addresses the regulatory standards upon which such mergers should be evaluated and the considerations necessary to assess whether the proposed transaction is consistent with the public interest. [40]

In his initial comments, Mr. Oliver stated that on the basis of his review and analysis of the joint petition, supporting testimony, exhibits, work papers, and data request responses from the Petitioners, he recommends that the Division adopt the following findings and conclusions:

> *1. As provided under Section 39-3-25 of the Rhode Island General Laws, the Petitioners must demonstrate: (a) That the proposed merger will not diminish facilities for furnishing service to the public, and (b) That the terms of the merger are consistent with the public interest.*
>
> *2. Any assessment of the merits of the proposed merger must consider whether the ability to provide safe and adequate service at the lowest reasonable cost will be jeopardized. In this context, the Division's determinations in this proceeding should address: (a) The degree to which the proposed transaction can be expected to impact ratepayer costs, (b) The effects of the transaction on the safety and reliability of the services provided, (c) The impact of the transaction on competition, and (d) The potential influences of the*

[40] Advocacy Section Exhibit 1, pp. 1-2.

*transaction on regulatory control and oversight of utility operations."*

*3. National Grid has the size, financial strength, and demonstrated experience and expertise in the operation of both gas systems and combined gas and electric systems to assume responsibility for New England Gas Company's Rhode Island business.*

*4. Although the costs and benefits associated with the proposed transaction are not well developed at this point, a number of considerations suggest that the proposed transaction has the potential to ultimately yield net benefits for Rhode Island consumers. However, given the potentially significant front end costs that are expected to be incurred to integrate and consolidate the New England Gas Company's Rhode Island business operations with Narragansett's existing electric operations, timing considerations associated with recognition of the costs and benefits of achieving combined operations are likely to be key determinants of near term ratepayer impact. Thus, a requirement for the new Rate Plan that Narragansett intends to file (subsequent to Division approval of the proposed transaction) should be that such Rate Plan will not adversely impact rates for Rhode Island gas or electric utility customers.*

*5. The time period allowed for Narragansett's preparation and filing of a new Rate Plan should be extended from six months from the date of a decision by the Division to approve this transaction to [a] period of not-to-exceed one-year (12-months) from the date of the Division's approval of this transaction.*

*6. Narragansett should be required to include in its Rate Plan an assessment of the service quality standards, if any, that are necessary to ensure a continued maintenance [of] high quality service for Rhode Island gas and electric consumers throughout the effective period of the proposed Rate Plan.*

*7. Coupled with appropriate requirements for timely filing of a Rate Plan and regulatory policies that ensure the (1) maintenance of service quality and (2) appropriate matching of the costs and benefits*

> *associated with the integration and consolidation of Narragansett and New England Gas operations, the proposed transaction appears to expose ratepayers to little risk while possibly providing an opportunity to receive benefits from achieved efficiencies in operations.*[41]

Mr. Oliver indicated that he didn't believe that a finding that "ratepayers would experience no net harm" would be sufficient to justify a conclusion that the transaction is "consistent with the public interest". Instead he opined that "fairness in the distribution of benefits from the transaction between shareholders and ratepayers represents an important element of the considerations that determine whether the transaction meets the public interest standard in Rhode Island law." Mr. Oliver further opined that "fairness in the allocation of net benefits from the transaction between gas and electric ratepayers must also be a consideration." [42]

Mr. Oliver also testified that he was not concerned with Narragansett's decision to acquire the New England Gas Company's non-regulated business activities. He noted that the referenced non-regulated business activities include only a small appliance business, which he concluded, "should have no significant impact on the overall costs or benefits of the transaction to either shareholders or ratepayers."[43]

Mr. Oliver also noted that it is not uncommon for a single company to operate both gas and electric distribution utility operations within a state. He identified a number of utilities in the country that combine gas and electric utility

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[41] Id., pp. 5-8.
[42] Id., pp. 11-12.
[43] Id., pp. 12-13.

distribution operations under a single ownership structure. He also acknowledged that National Grid itself has experience with the operation of a combined gas and electric utility in New York.[44]

Mr. Oliver next addressed the benefits that the Petitioners claim will accrue to Rhode Island if the proposed transaction is approved. On this point, Mr. Oliver related that "the value to the State of Rhode Island and its consumers of the benefits asserted by the joint petitioners is vague, or at least difficult to quantify with much certainty."[45] He testified that although there appears to be some long-term potential for savings neither the timing nor the magnitude of such savings could be readily identified. Mr. Oliver contended that "in the absence of a full consolidation plan and a rate plan for Narragansett's gas and electric operations in Rhode Island, it is premature to attempt to quantify the net benefits, if any, that Rhode Island consumers will experience as a result of the proposed transaction."[46]

Mr. Oliver testified that the benefits associated with increasing the customer base are not clear-cut in this instance. He observed that Narragansett and New England Gas Company are presently parts of larger organizations; and while some overall increase in numbers of customers may be achieved for Narragansett, Mr. Oliver concluded that the "value of any net gain is not easily measured." Similarly, Mr. Oliver concluded that any assessment of the net benefits from consolidating operating and administrative functions must weigh

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[44] Id., pp. 13-14.
[45] Id., pp. 14-16.
[46] Id., p. 16.

the benefits each utility presently receives as part of a larger organization. He opined that consideration must also be given to the practicality and costs of consolidating operating functions. He suggested that not all operating functions for gas and electric distribution utilities can be easily or efficiently consolidated.[47]

On the other hand, Mr. Oliver identified three operating areas that he felt offered particularly strong potential for significant cost savings, namely, (1) customer information systems and billing, (2) meter reading, and (3) customer service/call center functions. He related, however, that savings in each of these areas would only be achieved over time and through the incurrence of a noticeable level of transition expense, which Mr. Oliver believes Narragansett has underestimated in its synergy savings projections.[48]

Mr. Oliver next addressed Narragansett's anticipated reduction in the administrative costs of regulation from the proposed merger of electric and gas operations in Rhode Island. He asserted that if "this transaction has any impact on the administrative costs of regulation incurred by the Division and the...Commission, such impact is not likely to be dramatic."[49] Mr. Oliver observed that much of the Division and Commission activities would continue to be separable into gas and electric matters. He related that separate gas and electric service rates will continue to be required, as will separate terms and conditions of service that reflect the inherent differences in gas system and electric system operations and cost structures. He added that engineering and

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[47] Id., pp. 17-18.
[48] Id., pp. 18-21.
[49] Id., p. 21.

safety concerns will also continue to require separate gas and electric expertise; and that annual gas cost accounting, gas cost recoveries, and distribution adjustment clause activities will not be readily consolidated with electric activities.[50]

Mr. Oliver additionally questioned whether the Narragansett's acquisition of the New England Gas Company would facilitate the implementation of common Division and Commission policies. Mr. Oliver related that an effort was made by the Advocacy Section during discovery to investigate the nature of the statewide policies that the consolidation of electric and gas operations under Narragansett would facilitate. According to the witness, Narragansett offered two examples: (1) customer termination and billing regulations[51], and (2) low income program administration. However, Mr. Oliver related that the likelihood and benefit of common policies remains unclear. He concluded: "to the extent that the need for and appropriateness of common gas system and electric system policies can be identified, some savings in this area may be achievable. Still, the dollar value of savings attributable to the establishment of such common policies is expected to be relatively small."[52]

Mr. Oliver next discussed the issue of whether the proposed transaction would improve the reliability of gas and electric services in Rhode Island. On this point, Mr. Oliver contended that because "no evidence of perceptible improvement

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[50] Id., pp. 21-22.
[51] Mr. Oliver noted that Narragansett indicated in one of its discovery responses that it would not terminate electric service due to arrearages on natural gas bills. Mr. Oliver responded that "given the comparatively high costs of gas service over the past winter, I anticipate that this response addresses a concern of many payment troubled gas customers." Id., p. 24.
[52] Id., pp. 22-23.

in service reliability has been provided" "the Petitioners' assertions...should be given little weight."[53] Nevertheless, Mr. Oliver related: "on the other hand, no evidence of improved service reliability should be necessary for approval of the proposed transaction...the focus of considerations in this proceeding should be on maintenance of high service reliability expectations."[54]

Regarding the matter of electric rates, Mr. Oliver testified that "there is no explicit requirement for such transactions to produce immediate rate reductions." He noted that "utility mergers and acquisitions, however, are commonly linked to a rate plan that is intended to ensure that service quality and reliability are maintained and benefits produced through the consolidation of activities are shared with ratepayers."[55] Mr. Oliver then related that although the Advocacy Section appreciates the willingness of Narragansett to file a rate plan within six months after approval by the Division, he has a concern that six months "may not be long enough for Narragansett to develop a full and meaningful consolidation plan for its gas and electric operations in Rhode Island." Mr. Oliver maintained that the "quality of the record in support of a new rate plan could be enhanced if greater time is taken by Narragansett to consider the elements of a proposed rate plan before it is filed." Mr. Oliver thereupon related that the Advocacy Section "would not be opposed to extending the period for

[53] Id., p. 24.
[54] Id., pp. 24-25.
[55] Id., p. 26.

Narragansett's filing of a new rate plan to as long as one year (12-months) from the date of a decision by the Division..."[56]

Mr. Oliver next testified that he found no evidence that Rhode Island consumers would be harmed by Narragansett's acquisition of the New England Gas Company's Rhode Island business. He related that National Grid has demonstrated experience in the operation of gas utilities as well as in the operation of combined gas and electric utility operations. He also observed that National Grid has sufficient overall size and financial strength to ensure continued operation of both utility services in Rhode Island. He did caution, however, "that depending on the parameters of the rate plan ultimately adopted for Narragansett's gas and electric operations, there is some potential that Rhode Island could be adversely affected in the near-term if the electric operations is not carefully synchronized with the timing of expected benefits to be derived through the consolidation." He opined that if "an appropriate synchronization of costs and benefits is not achieved, it is possible that the upfront costs of consolidation of Narragansett's gas and electric operations could exceed the benefits realized in the first few years of consolidated operations."[57]

Mr. Oliver also testified that service quality should not suffer if the Division approves the proposed transaction. He related that because Narragansett proposes to operate under the terms of the existing New England Gas Company rate settlement until a new rate plan is adopted, current levels of service quality would remain in place. He added that when Narragansett files a new rate plan

[56] Id., pp. 26-27.
[57] Id., pp. 28-29.

the Division will "assess the extent of service quality protections that will be needed, if any..."[58]

Mr. Oliver also concluded that the proposed transaction would not have any impact on the New England Gas Company's existing environmental response activities. He related that the New England Gas Company's existing rate settlement includes specific provisions that address the recovery of costs associated with environmental response activities, which Narragansett will adopt. He also observed that the Purchase and Sale Agreement explicitly provides for Southern Union to retain responsibility for "certain environmental liabilities," which the Advocacy Section presently believes protects the interests of Rhode Island ratepayers.[59]

In his concluding comments, Mr. Oliver opined that the proposed transaction can ultimately yield net benefits for Rhode Island ratepayers if a rate plan and regulatory polices are adopted that "(a) ensure the maintenance of service quality, and (b) reasonably synchronize the costs of consolidation with the expected timing of benefits to be derived from those expenditures..." He emphasized however, "that the benefits, if any, that the ratepayers will experience will be strongly influenced by the parameters of the Rate Plan ultimately approved by the Commission." Mr. Oliver also referred to the testimony of Mr. Effron, wherein he discusses "the rate treatment of accumulated deferred income tax rate base credits." Mr. Oliver warned that "if those credits, or the equivalent amount

[58] Id., p. 29.
[59] Id., p. 30.

of ratepayer benefit, are not included in the filed Rate Plan, significant adverse ratepayer impacts could result."[60]

The Advocacy Section's second witness, Mr. David Effron, stated that the purpose of his testimony "is to address consequences of the proposed transaction that could potentially have an adverse effect on rates paid by customers if not addressed and resolved."[61] Mr. Effron indicated that his testimony focuses on certain accounting implications, revenue requirement matters, and other rate issues associated with the proposed transaction that "should be considered by the Division in its determination of whether the proposed acquisition...is consistent with the public interest."[62]

Mr. Effron first observed that the proposed transaction would result in the recording of "a substantial acquisition premium." He related that if the acquisition premium were to be incorporated into the ratemaking formula, "it would increase the revenue requirement associated with utility cost of service in Rhode Island significantly." Mr. Effron therefore asserted that the Division should impose as a condition of the merger that "Narragansett should agree not to seek any recovery of the acquisition premium in the electric or gas distribution cost of service."[63]

Mr. Effron explained that if "the purchase price is greater than the fair value of the assets less the fair value of the liabilities (the net book value) of NEG, the difference will be recorded as an acquisition premium, or goodwill." Mr.

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[60] Id., p. 31.
[61] Advocacy Section Exhibit 2, p. 4.
[62] Id.
[63] Id., p. 5.

Effron related that it is "contemplated that such an acquisition premium will be recorded."[64] Mr. Effron testified that the acquisition premium would thereafter remain on the books of Narragansett, subject to future evaluation of the premium for impairment. Regarding the magnitude of the acquisition premium, Mr. Effron stated that the exact amount in unknown at this time, but Narragansett estimates that the acquisition price will exceed the fair value of the net assets by approximately $250 million.[65]

Mr. Effron expressed concern that although Narragansett has stated in a data response that "it is not anticipated that the acquisition premium would be included in the determination of the revenue requirement," the response appears to reserve the "option of including the acquisition premium in the determination of revenue requirement if negotiations do not result in a satisfactory rate plan or a satisfactory rate plan is not ultimately approved by the Commission." Mr. Effron warned that if the goodwill recorded in association with the merger were recognized for ratemaking purposes it would result in a "substantial increase to revenue requirements." Mr. Effron predicted that if the goodwill were included in rate base, the rate base would increase from $243 million to $493 million.[66]

Mr. Effron further related that the booking of goodwill also affects the capital structure. He testified that based on the present earnings sharing formula, New England Gas Company's capital structure contains 43.6% common equity. He explained that if the goodwill is assigned to that capital structure for

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[64] Id., pp. 6-7.
[65] Id., p. 7.
[66] Id., p. 8.

ratemaking purposes, the result would be a capital structure with a common equity ratio of 72.2%; he also emphasized that the New England Gas Company's earnings sharing formula allows for a 11.25% return on common equity.[67]

Mr. Effron also testified that exclusive of the effect of recording the goodwill, the revenue requirement related to the return on rate base, including the income taxes on the equity component of the return, is $28.4 million. He related that the inclusion of goodwill in rate base, and the related effect of the goodwill on the capital structure, increases the revenue requirement related to the return on rate base to $76.8 million. Mr. Effron consequently concluded that "recognition of the goodwill for ratemaking purposes would increase NEG's annual revenue requirement by some $48 million."[68]

In defense of his position, Mr. Effron asserted that, "in theory", it is not appropriate to recognize goodwill booked as a result of a merger or acquisition for ratemaking purposes. He related that if the price being paid is in excess of net book value it is the responsibility of the shareholders, and not the ratepayers, to cover the difference. He contended that the acquisition premium "is not related to the cost of providing service to...customers."[69]

Mr. Effron also rejected the idea recognizing goodwill for ratemaking purposes based on his opinion that to do so would be inconsistent with the "public interest." He related: "one key element in such a finding must be that the proposed transaction will have no adverse impact on existing rates." He testified

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[67] Id., pp. 8-9.
[68] Id., p. 9.
[69] Id., pp. 9-10.

that to achieve this end, "any acquisition-related costs must be offset by savings attributable to the acquisition." Mr. Effron concluded that "even under the most optimistic forecasts, I do not believe that the annual savings allocable to NEG will be anything remotely approaching the revenue requirement effect of the goodwill."[70]

Mr. Effron also raised a number of ratemaking-related issues that he wanted Narragansett to consider before it files its future rate plan with the Commission. Specifically, Mr. Effron asserted that the Commission should not approve the rate plan "unless it improves on the present NEG rate plan, and gas distribution rates should be frozen until the ...Commission...renders a decision on the new rate plan." He also contended that all transaction costs should be excluded from the cost of service; that integration costs should be recoverable only to the extent that Narragansett can demonstrate that savings attributable to the acquisition exceed such integration costs; and that recovery of a regulatory asset to offset the additional pension and PBOP ("post-retirement benefits other than pensions") liability should only be allowed to the extent that Narragansett can verify that such recovery does not result in greater pension and PBOP expenses in the cost of service than those expenses would be in the absence of the acquisition. Mr. Effron also related that if a mechanism were not established to offset the effect of the elimination of the balance of "Accumulated Deferred Income Taxes" ("ADIT") or hold ratepayers harmless from the revenue requirement

[70] Id., pp. 10-11.

effect of the loss of this rate base deduction, the proposed transaction would result in an adverse effect on rates paid by customers.[71]

On the matter of ADIT, Mr. Effron explained that the proposed transaction affects the balance of ADIT deducted from plant-in-service for the purpose of determining the New England Gas Company rate base used to establish rates and in the earnings sharing calculation. Mr. Effron related that the effect of eliminating the balance of ADIT at this time will increase the New England Gas Company revenue requirement by $4 million in the first year of the merger and impose additional costs in the years immediately following the proposed transaction. Mr. Effron observed that the "initial increase to the revenue requirement resulting from the elimination of the ADIT exceeds the synergy savings that have so far been identified."[72]

Mr. Effron also rejected the inclusion of "integration costs" into Narragansett's revenue requirement. He related that Southern Union estimates that it will incur approximately $1 million in costs to complete the proposed transaction. Mr. Effron noted that through April 30, 2006, National Grid had incurred approximately $1.4 million in costs and expects to incur additional costs of approximately $1 million to complete the transaction. Mr. Effron contended that the transaction costs are expenditures being incurred on behalf of shareholders to consummate the merger, not costs being incurred to achieve savings; accordingly he concluded that "transaction costs should be treated as

[71] Id., pp. 5-6 and 15-17.
[72] Id., pp. 18-19.

shareholder costs that are not recoverable from ratepayers."[73] However, Mr. Effron conceded that "to the extent that integration costs result in the achievement of savings, such costs should be potentially recoverable."[74]

Mr. Effron concluded his testimony by commenting on the significance that the Petitioners attach to the planned August 25, 2006 closing date. Mr. Effron testified that under the terms of the Purchase and Sale Agreement, the Petitioners may extend the August 25, 2006 closing date by 120 days. Mr. Effron testified that the significance of the August 25, 2006 date is rooted exclusively in a tax advantage for Southern Union. He explained that if the proposed transaction closes by August 28, 2006 (the first business day after August 25), Southern Union would be eligible for favorable tax treatment, known as 'like-kind exchange' on the property being sold. He related that this favorable tax treatment would entail deferral of federal income taxes payable on any gain on the sale of the New England Gas Company assets.[7576]

### 4. The Wiley Center's Direct Case

The Wiley Center proffered one witness in this docket. The witness was identified as: Mr. John Howat, Senior Policy Analyst, National Consumer Law Center, 77 Summer Street, 10th Floor, Boston, Massachusetts. In his testimony, Mr. Howat discusses the potential impacts on low-income ratepayers from the proposed acquisition by Narragansett of the New England Gas Company's

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[73] Id., pp. 13-15.
[74] Id. p. 15.
[75] Id., pp. 20-21.
[76] The value of this "like-kind-exchange" tax benefit is projected at $13 million, infra.

regulated distribution business. He also makes some recommendations designed to mitigate those potential impacts.

Mr. Howat related that it is impossible to determine the impact on low-income consumers that will result from the proposed acquisition because rate impacts, and the structure and function of the new entity will not be determined until a later date.[77] However, Mr. Howat related that "merger and acquisition outcomes involving consolidation, dilution, or relocation of customer service functions such as call centers can directly and disproportionately impact low-income consumers."[78]

Mr. Howat additionally observed that consolidating billing systems that do not separate the arrearages for electric and natural gas services "could have a particularly adverse impact on payment troubled electric customers."[79]

Mr. Howat also observed that "there currently is no guarantee that customers will receive any rate or bill benefit as a result of the proposed acquisition." Relying on Mr. Effron's testimony, Mr. Howat expressed concern that if the goodwill associated with Narragansett's payment of an acquisition premium were recognized for ratemaking purposes, low-income ratepayers would be disproportionately harmed by an adverse rate impact.[80]

To safeguard against these potential harms, Mr. Howat offered three recommendations. First, he related that there is a need for low income electric and natural gas payment assistance that goes beyond that which is currently

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[77] Howat pre-filed direct testimony, p. 4.
[78] Id., p. 5.
[79] Id.
[80] Id., p. 6.

offered through Narragansett's low-income discount and New England Gas Company's partial LIHEAP match. He opined that approval of the Petitioner's proposal should be conditioned on a mandate for Narragansett to develop as part of its rate plan filing a targeted discount program that is designed to provide LIHEAP participants with the benefits to lower household natural gas and electricity burdens to the same level paid by median income households. He added that the low-income program should also include an effective arrearage management proposal, similar to that which National Grid operates in Massachusetts.[81]

As a second recommendation, Mr. Howat urged the Division to condition the approval of the proposed transaction "on a requirement that a deficit in payment for electric service not be used to terminate gas service and vice versa." He related that absent such a condition, service disconnection impacts on electric customers could serve to undermine the health, safety and wellbeing of low-income customers.[82]

Thirdly, Mr. Howat suggested that the Division condition its approval on an "assurance of the availability...of dedicated supervisory call center staff to respond to emergency needs of low-income customers."[83]

In support of his recommendations Mr. Howat provided several examples of merger proceeding precedents for low-income benefits. These cases reflect stipulated agreements wherein the utilities agreed to provide discounts, payment

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[81] Id., pp. 6-7.
[82] Id., p. 7.
[83] Id.

assistance, matching contributions, customer education and outreach, and/or dedicated supervisory customer service personnel.[84]

### 5. The Attorney General's Direct Case

The Attorney General proffered one witness in this docket. The witness was identified as Philip L. Sussler, Esq., an attorney specializing in electric utility and energy industries and environmental law. Mr. Sussler began his testimony with a general discussion related to assessing and allocating liability for environmental pollution.[85] After proving a brief history on the subject, Mr. Sussler identified the controlling laws as the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")[86] at the federal level, and the Industrial Property Remediation and Reuse Act (the "Rhode Island Act") in Rhode Island.[87][88]

Mr. Sussler next provided a summary of the Tiverton contamination matter, which he researched from available public records. He related that the matter began with sub-surface (sewer project) excavations in the Bay Street Area of Tiverton in 2002. Mr. Sussler related that during these excavations the soil "was observed to have a 'blue color' indicative of coal gasification waste material (i.e., cyanide)."[89] He added that "extensive petroleum-based contamination was discovered and a petroleum sheen was observed in groundwater seeping into the excavation."[90] Mr. Sussler testified that soil borings later discovered "semivolatile organic compounds (SVOCs), particularly polycyclic aromatic hydrocarbons

[84] Id., pp. 7-8.
[85] Attorney General Exhibit 1 (Sussler pre-filed direct testimony), pp. 2-3.
[86] 42 U.S.C. Sections 9601 *et seq.*
[87] R.I.G.L. Chapter 23-19.14.
[88] Attorney General Exhibit 1 (Sussler pre-filed direct testimony), pp. 3-5.
[89] Id., p. 6.
[90] Id., pp. 6-7.

(PAHs), and cyanide at levels exceeding both the...[RIDEM] Residential and Industrial/Commercial Direct Exposure Criteria (RDEC and I/CDEC)." He related that the area impacted by the contamination includes approximately 100 residential parcels and several commercial properties in the northeastern section of Tiverton, along and proximate to Bay Street and several streets intersecting with Bay Street.[91] Mr. Sussler observed that an engineering report issued in 2004 indicated that "anecdotal evidence has been found to link this contamination to historic dumping of manufactured gas plant waste material by the former Fall River Gas Company."[92]

Mr. Sussler testified that he is not endorsing any particular cost estimate, but "under reasonable estimates and assumptions" the cost of remediation in this matter could "range into the many $10s of million of dollars."[93] Mr. Sussler also opined that Southern Union, as the successor in interest to FRGC through a full merger of FRGC into Southern Union, is liable for the contamination under CERCLA.[94] Mr. Sussler also explained that under the "joint and several nature of the liability under CERCLA, assuming...[FRGC] is the source of some of the contamination at the Bay Street Area...[Southern Union] can be held liable for the full amount of liability, even though some of the contamination may have been caused by other parties."[95]

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[91] Id., p. 7.
[92] Id.
[93] Id., p. 8.
[94] Id., p. 9.
[95] Id., pp. 9-10.

Mr. Sussler testified that despite CERCLA, "the resurgence of the application of traditional corporate law doctrines to successor liability for environmental contamination provides very important planning and structuring tools to corporations to limit or seek to limit environmental liability."[96] Mr. Sussler testified that this trend started after the U.S. Supreme Court's 1998 decision in United States v. Best Foods, Inc.[97] Mr. Sussler related that the importance and significance of these planning tools is also commensurate with the degree of exposure to environmental liability faced by a particular corporation. Mr. Sussler related that if the exposure is large, there is a strong incentive for a corporation to employ these tools. He explained:

> *"a pattern for accomplishing this is for the parent entity, which initially bears liability under CERCLA, through a series of transactions to transfer a major portion of its assets to subsidiary or spun-off corporations. Each such transaction is an asset sale, so that the transfer does not shift the liabilities held by the parent to the subsidiary or spun-off entity. Also each such sale is carefully structured so that it does not trigger...[the] exceptions to the cut-off of successor liability associated with an asset sale. Ultimately, after a series of such transactions, the majority of assets are shifted to subsidiaries or spun off with defenses to environmental liability. The well known restructuring of W.R. Grace Company follows this pattern."*[98]

Mr. Sussler testified that "the circumstances and incentives exist for [Southern Union] to follow a similar path." He related that Southern Union, as evidenced in its various financial reports, "has embarked on a business strategy of extensive acquisition and selling of properties and businesses." Mr. Sussler

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[96] Id., p. 10.
[97] 524 U.S. 51 (1998).
[98] Attorney General Exhibit 1 (Sussler pre-filed direct testimony), p. 10.

remarked that "this plan apparently includes selling off many of its natural gas distribution businesses and refocusing on, and increasing, its business in pipeline and gathering and storage activities." He added that with the repeal of the Public Utility Holding Company Act of 1935 ("PUHCA") and the passage of the Energy Policy Act of 2005, Southern Union no longer has the long-standing regulatory restriction on reorganizing its business into subsidiaries and holding companies. Mr. Sussler opined that by segregating the issue of liability from this proceeding, and thus leaving the matter for litigation that will invariably take many years, Southern Union will have the time necessary to execute a strategy of multiple transfers of assets to subsidiaries and spun-off limited liability entities so as to reduce and compartmentalize its environmental liabilities.[99]

Mr. Sussler therefore concluded that the proposed sale of the Rhode Island assets of Southern Union and Southern Union's plan to create a Massachusetts subsidiary to own its Massachusetts assets reduces the State of Rhode Island's ability to enforce the environmental liability rules applicable to the Bay Street Environmental Area. He reasoned that Southern Union's creation of a Massachusetts subsidiary "can be a vehicle for freeing the Massachusetts assets from the liability, when purchased by a subsequent purchaser through an asset purchase..." Mr. Sussler also reasoned that the Southern Union "sale of the Rhode Island assets, followed by the sale of the Massachusetts assets may form the beginning of a strategy...for ultimately compartmentalizing liability and impairing the State's recourse to establish liability and ultimately recover the

[99] Id., pp. 10-11.

costs of remediation."[100] Mr. Sussler further reasoned that by virtue of the sale of Southern Union's assets to Narragansett, Narragansett may be able to shield itself from liability for environmental harms under CERCLA, in all instances where Narragansett is not a current owner or operator of the contaminated site. Mr. Sussler noted that while this may reduce costs incurred by Narragansett's Rhode Island regulated operations, "it could also shift such costs and risks of environmental clean-up because of the refusal of private parties, who are otherwise responsible, to do so."[101]

Mr. Sussler additionally testified that the State's ability to enforce the clean up of the Bay Street Environmental Area against Southern Union is further diminished by the loss of natural gas rate recovery mechanisms in Rhode Island and Massachusetts. He related that with the sale of the Rhode Island and Massachusetts assets, and the retention of liability by Southern Union, the recovery of the costs of clean up through rates will no longer be available. Mr. Sussler remarked that this might be the reason why Southern Union has adopted a strategy of an "aggressive defensive litigation against taking responsibility for the clean-up coupled with an enhanced sale price for the assets, where the purchaser may be freed from this environmental liability."[102] Mr. Sussler added that the State's ability to enforce a clean-up will hinge on Southern Union's "amenability to service of process and to the jurisdiction of the Rhode Island

[100] Id., pp. 11-12.
[101] Id., p. 12.
[102] Id.

courts, given the possibility of the ending of its jurisdictional contacts in Rhode Island following the completion of the sale."[103]

Based on the foregoing analysis, Mr. Sussler recommended that the Division not approve the proposed transaction unless Southern Union agrees to execute an agreement that incorporates various conditions, "which address and attempt to mitigate the reduced ability of the State of Rhode Island to enforce its authorities against... [Southern Union] with respect to the Bay Street Environmental Matters, which would otherwise result from an unconditioned approval of the proposed transaction."[104] Mr. Sussler thereupon offered as an exhibit to his pre-filed testimony a comprehensive "*Responsibility, Recourse and Financial Assurance Agreement*", which he urged the Division to adopt in this matter.[105]

### 6. Tiverton's Direct Case

The Town of Tiverton proffered one witness in this docket. The witness was identified as Mr. David Sousa, the Town's former Administrator during the years 2003 and 2004.

Mr. Sousa testified that during his tenure as the Tiverton Town Administrator he became aware of a contamination problem in the Cory's Lane area of the Town. He described the contamination as involving "manufactured gas by-products."[106] Mr. Sousa related that he subsequently had discussions with representatives of the New England Gas Company about the contamination

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[103] Id., p. 13.
[104] Id. p. 14.
[105] Id., pp. 14-18 and attached "Exhibit 1" and "Exhibit A."
[106] Sousa pre-filed direct testimony, p. 2.

issue sometime in 2003. Mr. Souza testified that during that meeting, "New England Gas verbally committed to me that New England Gas would remediate the contamination at Cory's Lane."[107]

Mr. Sousa related, however, that the New England Gas Company never cleaned the Cory's Lane area. He was also surprised to learn that Southern Union received a portion of a $15 million remediation claim from the management of the FRGC on January 9, 2004. He related that none of that money was ever spent cleaning up the contamination at Cory's Lane.[108]

### 7. Narragansett's Rebuttal Case

Narragansett submitted pre-filed rebuttal testimony in response to the Advocacy Section's direct case. Narragansett proffered two rebuttal witnesses, namely, Mr. Ronald T. Gerwatowski, Vice President of Distribution Regulatory Services in New England, National Grid USA, who previously testified as a direct case witness for the Petitioners in this docket, supra; and Mr. Michael D. Laflamme, Manager of Regulatory Support for National Grid USA Service Company, Inc., a company that provides engineering, financial, administrative and other technical support to subsidiary companies of National Grid USA, including Narragansett.

Mr. Gerwatowski first responded to Mr. Oliver's testimony. He disagreed with that Mr. Oliver's characterization that the transaction has the "potential" to bring net benefits to customers." Mr. Gerwatowski related that Narragansett believes "the benefits are more than just a possibility." He testified that the

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[107] Id.
[108] Id., pp. 2-3.

premise for going forward with the transaction is to achieve savings that can be shared with customers in the form of a shared savings rate plan agreement similar in structure to what has been approved by the Commission in the past for Narragansett. He contended that such an agreement aligns the interests of the Company and its customers by establishing appropriate incentives to maximize savings. Mr. Gerwatowski testified: "our analysis has shown real savings and efficiencies to be gained through this transaction which will be permanently reflected in our cost of doing business over the long term."[109]

Mr. Gerwatowski agreed with Mr. Oliver's statement that it is important that the transaction not adversely impact rates. However, he emphasized that Narragansett's "synergies saving" analysis estimated gross annual savings at $4.9 million per year for Rhode Islanders ($1.6 million for gas customers and $3.3 million for electric customers). He added that Narragansett would also be willing to ensure that costs and savings are synchronized in rates.[110]

Mr. Gerwatowski agreed with Mr. Oliver's recommendations to extend the time for the filing of a new rate plan from six months to a period up to twelve months following the approval, and to include service quality standards in the new rate plan. He related that Narragansett would adopt these recommendations.[111]

In response to concerns raised by Mr. Oliver, Mr. Gerwatowski reported that since answering Advocacy Section Data Request 2-5(b), the Company has

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[109] Gerwatowski pre-filed rebuttal testimony, pp. 1-2.
[110] Id., pp. 2-3.
[111] Id., p. 4.

learned that it is possible, with some technical modifications, to read both gas and electric AMR meters from one vehicle. He concluded: "we expect that savings should occur from consolidating the meter reading system."[112] Additionally, in response to concerns about consolidating billing systems, Mr. Gerwatowski related that Narragansett "has not yet made a decision as to whether it will actually consolidate electric and gas bills in Rhode Island.[113]

To clarify some possible confusion, Mr. Gerwatowski distinguished between union and non-union employees relative to Narragansett's pledge to offer continued employment to all existing New England Gas Company employees for at least one year. He indicated that for employees not covered by a collective bargaining agreement, "all these employees ...will be offered a job with National Grid. Any employee who accepts an offer of employment, but is later terminated for reasons other than cause within one year, will be entitled to severance benefits, as specified in the Purchase and Sale Agreement."[114]

Mr. Gerwatowski next addressed some of the concerns raised by Mr. Effron. Starting with the acquisition premium, Mr. Gerwatowski responded: "we do not believe this should be an issue." Mr. Gerwatowski explained as follows:

> *When National Grid made its offer to purchase the New England Gas assets and operations in Rhode Island, it was the Company's expectation that it would file a rate plan with the Commission that would be similar in structure to the rate plan currently in effect for Narragansett's electric operations. That plan provides the Company with a reasonable opportunity to recover some of the acquisition premium indirectly, through a mechanism*

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[112] Id., p. 5.
[113] Id.
[114] Id., p. 6.

*that we commonly refer to as a shared savings plan. The shared savings plan is not an explicit recovery in the cost of service of acquisition premium. Under the plan, the Company and customers share in the benefits of any savings that can be achieved by the Company over a specified period. This is not an entitlement to recover acquisition premium directly in rates and the Company does not claim that it is entitled to such direct recovery in Rhode Island. Instead, the plan depends on the ability of the Company to perform. Thus, it is an incentive mechanism, under which both the Company and customers benefit. We interpret Mr. Effron's testimony as expressing the Division's view that the Company should not be allowed direct recovery of the acquisition premium by recognizing goodwill for ratemaking purposes, but the Division does not object to the Company filing or negotiating a shared savings mechanism to be approved by the Commission. If this understanding is correct, then we are in agreement with the Division. The Company will not propose to recognize goodwill for ratemaking purposes, but rather will be seeking approval of a shared savings plan that allows the Company and customers to share in the cost savings benefits of the transaction, and in fact provides proper incentives to the Company to maximize such cost savings."*[115]

Similarly, Mr. Gerwatowski related that the issue relating to deferred taxes also should not be an issue. He testified that while the impact of deferred tax reserves will give rise to an increase in the gas operations' revenue requirement, Narragansett commits that any rate plan filing to be made with the Commission would contain customer benefits in the form of cost savings and/or settlement credits that would more than offset this revenue requirement impact.[116]

In his concluding remarks, Mr. Gerwatowski related that Narragansett's new rate plan would consist of many parts. He testified that compared to the New England Gas Company's current costs, some of Narragansett's costs will be

[115] Id., pp. 7-8.
[116] Id. pp. 8-9.

lower and some higher. He contended, however, "when measured on a total company basis, the cost of providing service to customers will be lower than New England Gas Company's costs standing alone, absent the merger. Measured using overall revenue requirements, there will be no adverse impact on rates from the transaction."[117] Mr. Gerwatowski added that the rate plan, measured as a whole, will be designed to produce benefits for customers through the allocation of synergy savings, which would not have been achievable had the transaction not occurred. He related that these benefits could be passed along to customers through many different means, such as through, "lower rates, enhanced infrastructure programs, forms of settlement credits that assure stable delivery rates, or a combination of approaches."[118]

Mr. Gerwatowski closed his rebuttal testimony by emphasizing that there are qualitative factors that should also be considered by the Division. As examples, he noted that Narragansett provides "high quality delivery service to its customers", has "demonstrated over the years a strong commitment to act responsibly in the communities in which we serve," and has "a strong track record in interacting with government entities who have supervisory responsibility over the Company in a very cooperative manner, including a high degree of integrity."[119]

Mr. Laflamme, Narragansett's second rebuttal witness, responded to Mr. Effron's recommendations concerning pension and PBOP expense post

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[117] Id., p. 9.
[118] Id., pp. 9-10.
[119] Id., pp. 10-11.

acquisition. He related that Narragansett is "in agreement...that the pension and PBOP losses should not be recovered from customers immediately, but rather offset by a regulatory asset." Mr. Laflamme related that Narragansett is also "in agreement that the regulatory asset should be amortized in a fashion that otherwise reasonably matches the pension and PBOP expense..." He thereupon called Mr. Effron's concern "simply a question of timing as all gains or losses produced in the pension and PBOP plans must eventually be recognized." However, Mr. Laflamme stated that Narragansett "will not have the numbers to work out the amortization schedule until we file the rate plan." He related that at that time, "we should be able to develop an amortization schedule that reasonably matches the estimated timing that would have been experienced for these losses absent the merger and the fair valuation that it creates."[120]

Mr. Laflamme related that the issue does not have to be decided now. He testified that "the issue will best be evaluated by the Division and other parties in the context of the rate plan when we actually have the facts before us."[121] He also urged the Division to not condition the approval of the proposed transaction on ratemaking issues.[122]

## 8. Public Comment

The Division heard public comment from sixteen individuals in this docket, including the Honorable Arthur Handy, State Representative, District 18; and Mr.

[120] LaFlamme pre-filed rebuttal testimony, pp. 3-4.
[121] Id., p. 7.
[122] Id., pp. 7-8.

Henry Shelton, the Director of the George Wiley Center. The tenor of the comments is summarized below:

- There was opposition voiced against the possible consolidation of currently separate electric and gas bills into one integrated bill.

- A representative of the Wellington Condominium Association ("WCA") in Newport related that its complex is located on a former coal gasification site that was owned and operated by Southern Union's predecessor, Providence Energy. WCA is concerned about how the proposed transaction "might impact the ability of either National Grid or Southern Union to fund the investigation and long-term remediation and reimburse the property owners for the costs incurred to date for emergency measures they have taken."[123]

- Many individuals recommended that the Division "make concessions" for those ratepayers who cannot pay their utility bills before approving the proposed transaction. Several individuals urged the Division to first establish a rate for low-income ratepayers that is specifically linked to the ratepayer's level of income. Other recommendations included: service restoration upon a payment of ten percent toward the unpaid balance; no winter shutoffs; the implementation of a "PIPP program" (percentage of income payment plan) with an arrearage forgiveness component; no winter shutoffs for households with "preschool children"; the adoption of special rates for the elderly and young families; a one-year moratorium against all shutoffs; and the adoption of an

[123] 6/29/06, Tr. 10.

annual $500 forgiveness allowance, like the program currently in effect in Massachusetts.

- Representative Handy described the proposed transaction "as an opportunity" for adopting a policy for "letting people get turned back on for a lower amount, ten percent of the back bills is a very reasonable step to take" and to introduce "a smaller version of PIP[P]...to demonstrate its effectiveness."[124]

- Some individuals expressed concern that a corporation from the United Kingdom was acquiring utility assets in Rhode Island. One individual heard that National Grid was requiring the "poor" to use "prepay" meters in England, and hoped that this approach would not be used in Rhode Island.

- One individual questioned the reasonableness of approving a combining of gas and electric utility services into an even bigger monopoly.

- Mr. Shelton urged the Division "to hold off on any type of final decision until ...[National Grid] tells us much more than we've heard already of what is coming in the future. What is going to be their policy for shutoffs? It's too vague."

## 9. Findings

### A. Applicable Law

Before reaching findings on the many issues raised and discussed in this docket, a close examination of the pertinent law is instructive. The relevant provisions of Rhode Island General Laws, Sections 39-3-24, 39-3-25 and 39-3-26 are reproduced below:

[124] 6/29/06, Tr. 23-25.

- ***39-3-24. Transactions between utilities for which approval required.*** - *With the consent and approval of the division, but not otherwise:*
*(2) Any public utility may purchase or lease all or any part of the property, assets, plant, and business of any other public utility or merge with any other public utility, and in connection therewith may exercise and enjoy all of the rights, powers, easements, privileges, and franchises theretofore exercised and enjoyed by the other public utility with respect to the property, assets, plant, and business so purchased, leased, or merged.*
*(3) Any public utility may merge with any other public utility or sell or lease all or any part of its property, assets, plant, and business to any other public utility, provided that the merger or a sale or lease of substantially all of its property, assets, plant, and business shall be authorized by a vote of at least two-thirds (2/3) in interest of its stockholders at a meeting duly called for the purpose...*

- ***39-3-25. Proceedings for approval of transactions between utilities.*** - *The proceedings for obtaining the consent and approval of the division for such authority shall be as follows: There shall be filed with the division a petition, joint or otherwise, as the case may be, signed and verified by the president and secretary of the respective companies, clearly setting forth the object and purpose desired, stating whether or not it is for the purchase, sale, lease, or making of contracts or for any other purpose in §39-3-24 provided, and also the terms and conditions of the same. The division shall upon the filing of the petition, if it deem a hearing necessary, fix a time and place for the hearing thereof. If, after the hearing, or, in case no hearing is required, the division is satisfied that the prayer of the petition should be granted, 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, it shall make such order in the premises as it may deem proper and the circumstances may require.*

- ***39-3-26. Charters amended to authorize approved transactions.*** - *The charters of all corporations subject to regulation by the division are hereby amended to the extent necessary to authorize the carrying out of*

*any agreement, merger, purchase, sale, or lease approved by the division as provided in §§39-3-24 and 39-3-25.*

B. Petitioners' Request For Declarations Regarding "two-thirds shareholder vote" Provision Contained in R.I.G.L. §39-3-24(3).

The Division agrees that the assets Southern Union is conveying to Narragansett (less than 10 percent of its total asset base) does not approach the statutory standard of a sale of "all or substantially all" of Southern Union's assets. Therefore, the Division finds that Southern Union is not subject to the two-thirds shareholder vote requirement contained in §39-3-24(3) and that the provision does not apply in this case.

The Division also finds that Narragansett is similarly not subject to the two-thirds shareholder vote requirement contained in §39-3-24(3). The Division agrees that the provision conceptually applies only to the shareholders of the "selling" utility company.

C. Request for Final Decision by June 30, 2006.

In their joint petition, the Petitioners requested that the Division issue its final decision in this docket by June 30, 2006. The record reflects that the primary reason for the request is a $13 million tax advantage, known as a "like-kind exchange," that Southern Union would be eligible for if the proposed transaction closes by August 28, 2006 (the first business day after August 25). Notwithstanding the planned August 25, 2006 closing date, Southern Union requested the Division's decision be issued by June 30, 2006 in order to allow a statutorily prescribed 30-day appeal period to pass and also to allow "sufficient

time for the Petitioners to take the steps necessary to prepare for and complete the transaction on a timely basis".

As evidenced by the adopted procedural schedule in this docket, the Division effectively denied this request from the outset. Instead, the Division adopted a compromise target decision date of July 25, 2006, which the Division concluded provided a reasonable discovery period, adequate time for the preparation of pre-filed witness testimony, and two public hearings, while at the same time affording Southern Union a chance to take advantage of the favorable tax treatment. Even though the Attorney General maintains that the Division unreasonably expedited this docket, the Division finds no evidence that any party was denied a full opportunity to meaningfully participate in this docket.

D. Tariffs

Attached to the joint petition, Narragansett has submitted a set of tariffs, which it has offered in accordance with the tariff filing requirements contained in R.I.G.L. §39-3-10. Narragansett states that the tariff filing is necessary to reflect the change in ownership and the name change, and has requested that the tariffs become effective on the closing date of the transaction. Narragansett relates that it will continue to operate under the terms of the New England Gas Company's existing rate settlement, and that the rates and terms in the tariffs are unchanged and will continue in effect until they are superceded by the approval by the Commission of new rates for gas delivery customers.

The Division has reviewed these tariffs and finds that the proposed tariffs are rate-neutral and only reflect a simple name change. As Commission approval

is not required to effectuate these changes, the Division will accept the replacement tariffs. The Division notes that none of the parties objected to the adoption of the tariffs.

### E. Whether the Facilities for Furnishing Service to the Public will be Diminished?

The only non-Petitioner party addressing the fundamental question of whether "the facilities for furnishing service to the public will be diminished" as a consequence of the proposed transaction was the Advocacy Section. Mr. Oliver, qualified as an expert in utility rates, energy, and regulatory policy matters, testified that he discerned no evidence that Rhode Island consumers would be harmed by Narragansett's acquisition of the New England Gas Company's Rhode Island business. Mr. Oliver opined that National Grid has demonstrated experience in the operation of gas utilities as well as in the operation of combined gas and electric utility operations. He also concluded that National Grid has sufficient overall size and financial strength to ensure continued operation of both utility services in Rhode Island.

Mr. Oliver further concluded that service quality would not suffer if the Division approved the proposed transaction. Mr. Oliver based this conclusion on Narragansett's proposal to operate under the terms of the existing New England Gas Company rate settlement until the Commission approves a new rate plan. Mr. Oliver expressed comfort in knowing that the Division would be able to assess and address service quality protection issues, if deemed necessary, when Narragansett files its rate plan with the Commission.

As the record reflects no contrary conclusions with respect to this issue, the Division is compelled to find that the proposed transaction, if approved, will not diminish the facilities for furnishing service to the public.

F. Whether the Sale is Consistent with the Public Interest?

The question of whether the proposed transaction is "consistent with the public interest" was intensely debated and challenged in this docket. As there is no instructive caselaw in Rhode Island on how this R.I.G.L. §39-3-25 criterion should be interpreted, the intervening parties have argued in favor of a broad interpretation, requesting that the Division consider such factors as speculative future environmental remediation costs, linked to contamination sites in Tiverton, Newport and elsewhere; and also concessions for low-income ratepayers, including rate discounts, an arrearage forgiveness program, and more liberal "shutoff" and payment plan policies. Some members of the public argued that combining the two utility services into one company is not in the public interest. The Advocacy Section discussed the issue in the context of the acquisition premium, and whether the ability to provide safe and adequate service at the lowest reasonable cost will be jeopardized.

Another nuance attached to the "public interest" debate involves the question of whether the phrase "consistent with the public interest" in the context of R.I.G.L. §39-3-25 means that the proposed transaction must result in a "net benefit" to ratepayers and/or members of the general public in order to be properly approved by the Division. While the law in Rhode Island has yet to be developed regarding this question, the Division finds that the plain meaning of

the words must be controlling.[125] Toward that end, the word "consistent" is defined as "being in agreement: compatible", and the term "public interest" is defined as "the well-being of the general public".[126] These definitions would suggest that the Division could only approve the proposed transaction upon a finding that the sale of the New England Gas Company's business assets would not unfavorably impact the general public. It therefore appears that a "net benefit" is not a prerequisite for approval.

The Division has considered the approval criteria in R.I.G.L. §39-3-25 and finds that approval is limited to two factors/criteria, one that specifically addresses the present and future needs of ratepayers, and one that ensures no harm to the general public as a whole (including ratepayers). The first criterion requires an evaluation of whether "the facilities for furnishing service to the public will not thereby be diminished" if the transaction is approved, supra. This provision unambiguously mandates that the Division must conclude, before approving a R.I.G.L. §39-3-24 petition, that there will be no degradation of utility services after the transaction is consummated. The Division has addressed this question/criterion elsewhere in this report and order.

The second approval criterion, "consistent with the public interest" requires a finding that the proposed transaction will not unfavorably impact the general public (including ratepayers). The Division will not expand the parameters of this criterion, as urged by some of the parties, to include a prerequisite demonstration that the transaction produces a "net benefit" to ratepayers and the general public.

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[125] See Bristol County Water Company v. PUC, 363 A.2d 444 (R.I. 1976).
[126] Riverside Webster's II New College Dictionary, Copyright 1995.

The Division finds that such an expansion would constitute an improper attempt to augment the Division's jurisdiction through a strained interpretation of an unambiguous statute.[127]

Notwithstanding this finding, the Division does agree with the Advocacy Section's position that net savings resulting from the transaction, estimated currently at $4.9 million per year for Rhode Island ratepayers, ought to be fairly distributed between shareholders and ratepayers; and between electric customers and gas customers. The Division also notes and acknowledges Narragansett's commitment to share these savings with ratepayers.[128] However, this discussion must take place in the Commission docket established to consider the reasonableness of Narragansett's future rate plan filing.

i. Low-Income Ratepayers' "Public Interest" Concerns and Recommendations

It is abundantly clear from the Wiley Center's direct case, and the public sentiment expressed during the hearing on June 29, 2006, that the increasing cost of energy is taking its toll on Rhode Island's low-income ratepayers. The record reflects that monthly shutoffs for gas customers remains high and that monthly shutoffs for electric customers have increased from previous years, that more Rhode Islanders and Rhode Island children have fallen below the poverty level, and that the State's median household income has lagged.[129]

Mr. Howat concluded that it is presently impossible to know for sure how the proposed acquisition may impact low-income consumers. He opined that only

[127] See City of East Providence v. PUC, 566 A.2d 1305 (R.I. 1989)
[128] Narragansett's Post-hearing Memorandum, p. 3.
[129] See Wiley Center Exhibit 2.

after the rate impacts, and the structure and function of the new entity are known, will low-income ratepayers be in a position to assess the impact of the proposed transaction. As an example, Mr. Howat observed that consolidating billing systems that do not separate the arrearages for electric and gas services could have "a particularly adverse impact on payment troubled electric customers."[130]

To protect low-income consumers from potential harm, Mr. Howat urged the Division to condition the approval of the instant petition on expanded rate discount programs, a requirement that a deficit in payment for one utility service not be used to terminate both utility services, and that Narragansett provide dedicated personnel to respond to the needs of low-income customers.

In its post-hearing memorandum, the Wiley Center, building on Mr. Howat's testimony and conclusions, argued that the "public interest" requires a merger that is "beneficial" to low-income customers. Thereupon, the Wiley Center urged the Division to adopt the following specific conditions for approval:

- *Require the merged entity not to use any deficit in payment of a bill for gas service to terminate electric service and vice versa.*
- *Require the merged entity: to restore terminated gas service upon payment of the unpaid gas bill, and to restore terminated electric service upon payment of a percentage of the unpaid electric bill, and to limit the percentage payment required to 10%.*
- *Prohibit the merged entity from requiring payment of a percentage of a combined unpaid gas and electric bill as a condition of restoration of either service.*
- *To the extent that the low-income policies of the gas company differ from those of the electric company, require*

[130] Wiley Center Exhibit 1, p. 5.

*the merged entity to adopt the policies most favorable to low-income people.*

- *Require the merged entity to adhere to a moratorium on all terminations during winter months.*
- *Require the merged entity not to terminate any household in which there is a child under age six.*
- *Require the merged entity to adopt a percentage of payment plan with a three-year forgiveness provision.*
- *Require the merged entity immediately to develop a rate plan with a targeted discount designed to lower gas/electric burdens of low-income customers to the level paid by median income customers.*
- *Require payment of 20% of anticipated merger benefits into a merger public benefit fund targeted to help low-income households.*
- *Require a dedicated supervisory call center to respond to the emergency needs of low-income customers.*[131]

Those individuals offering public comment echoed Mr. Howat's recommendations and also urged the Division to condition the proposed transaction on the adoption of an arrearage forgiveness program, a reduced deposit amount of ten percent (from the current minimum of 25 percent) for service restorations, and more favorable shutoff rules.

Narragansett strongly objected to any rate-related conditions being attached to the approval of the proposed transaction. Narragansett argues that rate issues can only be addressed by the Commission, and only after Narragansett prepares and files its rate plan. Narragansett asserted that it would be inappropriate for the Division to adopt as conditions and mandate the concessions being advocated by the Wiley Center and the public. Narragansett contends that issues such as rate discounts, an arrearage management program, bill consolidation, and dedicated supervisory call center staff are all matters that

[131] Wiley Center Post-Hearing Memorandum, pp. 1-2.

would be properly before the Commission in a future rate plan proceeding.[132] Narragansett also emphasizes that it has not decided whether it will want to consolidate bills in Rhode Island in the future.[133]

The Division recognizes the value of the sincere expressions of financial hardship and desperation from the State's low-income ratepayers in this docket. The personal adversity stories and passionate pleas for help cannot be ignored. However, notwithstanding the Wiley Center's jurisdiction-related assertions, the Division's jurisdictional authority is limited and its legal ability to influence rates and shutoff (service termination) policies is subordinate to the jurisdictional authority of the Commission. The Division is further mindful of the recent enactment of "*The Comprehensive Energy Conservation, Efficiency and Affordability Act of 2006*" (the "Act"), which has already addressed many of the low-income ratepayers' concerns that were voiced in this proceeding.

The Act requires each gas and electric distribution company to submit to the Commission, by January 2, 2007, a plan for affordable energy for low- income households, "including very low income households." Under the Act, the plan to be submitted to the Commission shall provide for the implementation of an "affordable energy fund" and shall include provisions for "discounted distribution rates and customer charges, payments on arrearages and unpaid balances by low-income households..." The Act mandates an expeditious review of each plan by the Commission and implementation of each plan by November 1, 2007.[134]

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[132] 6/29/06, Tr. 78-86.
[133] Id., Tr. 81-83; and Narragansett's Post-Hearing Memorandum, p. 7.
[134] Contained in §39-1-27.10 and Chapter 42-141 of the Act.

The Act also requires the Commission to amend its current "*Rules and Regulations Governing the Termination of Residential Electric, Gas, and Water Service*", for effect on July 1, 2007, as may be necessary to implement the Act's more relaxed service restoration, and new arrearage forgiveness provisions for very low income households.[135]

As Mr. Howat perceptively concluded, it is presently impossible to know for sure how the proposed acquisition may ultimately impact low-income consumers. But the final answer to that question rests with the Commission, not the Division, as it solely has jurisdiction to consider Narragansett's future rate plan filing. For the Division to attach rate-related and service termination-related conditions to an approval of the proposed transaction would not only be contrary to the Division's jurisdictional powers under R.I.G.L. §39-3-25, but also tantamount to an attempted usurpation of a long-established Commission ratemaking function. The Division is similarly not in a position to undermine the General Assembly's efforts to address the concerns of the State's low-income utility consumers. For example, providing funding for an arrearage forgiveness program is a legislative function. Although some members of the public, and the Wiley Center have demanded such a program as a condition precedent to the proposed transaction, the Division is legally powerless to order such a program. Moreover, some of the concessions sought in this docket exceed what the General Assembly has determined to be reasonable under the Act. The most obvious example is the request for service restoration upon a down payment of ten percent of a

[135] Contained in §39-2-1 of the Act.

customer's unpaid balance. This very "ten percent" down payment issue has been previously considered by the General Assembly through previously submitted proposed legislation, but never accepted. In contrast, the Act provides for a "twenty-five percent" down payment. The Division also notes that the Commission's existing "*Rules and Regulations Governing the Termination of Residential Electric, Gas, and Water Service*" also require "protected customers" to pay a minimum twenty-five percent down payment.

Although the Division cannot approve the foregoing recommendations, the Division will, however, go on record that it will oppose any future rate plan provision by Narragansett, before the Commission, that includes a billing system consolidation proposal that does not separate the arrearages for electric and gas services and/or any rate plan provision that proposes the termination of both gas and electric services when an arrearage in only one utility service exists.

In closing, the Division finds that it is not in the public interest to deny or impede the State's proper ratemaking authority, the Public Utilities Commission, from exercising its statutory duty to supervise and regulate gas and electric rates. It is abundantly clear from both statutory law and the case law that has developed therefrom that the Commission is the State agency solely responsible for setting gas and electric rates and for promulgating rules and regulations governing the termination of utility service for outstanding indebtedness.[136] Therefore, while the public comments expressed in this docket and the Wiley Center's concerns and recommendations are compelling, it would be

[136] See R.I.G.L. §§39-1-3, 39-1.1-3, 39-3-11; Town of New Shoreham v. Rhode Island Public Utilities Commission, 464 A.2d 730 (R.I. 1983), Narragansett Electric v. Burke, 381 A.2d 1358

inappropriate for the Division to attempt to circumvent the Commission's ratemaking authority under the guise of imposing arguably illegal rate-related conditions on the proposed transaction.

The Division also must reject the recommendation that the instant decision be delayed until such time as Narragansett has finalized the provisions of its rate plan. The record reflects that up to 12 months will be required to prepare and file a meaningful rate plan. Moreover, the contents of the rate plan would have to be fully vetted before the Commission in a rate proceeding that will invariably involve several parties (including the Wiley Center), which will take many additional months to adjudicate. Pre-filing the rate plan with the Division in the context of the instant docket would be pointless, as the final word on the provisions of that rate plan rests exclusively with the Commission.

ii. The Acquisition Premium, and Whether the Ability to Provide Safe, Adequate, Reliable, Efficient, and Least Cost Public Utility Service will be Jeopardized?

The Advocacy Section asserted that any assessment of the merits of the proposed merger must consider whether the ability to provide safe, adequate, reliable, and efficient service at the lowest reasonable cost will be jeopardized. In order to make this determination, the Advocacy Section advises the Division to consider (1) the degree to which the proposed transaction can be expected to impact ratepayer costs, (2) the effects of the transaction on the safety and reliability of the services provided, (3) the impact of the transaction on

competition, and (4) the potential influences of the transaction on regulatory control and oversight of utility operations.[137]

Regarding the last two items above, the Advocacy Section offered no evidence to suggest that the proposed transaction would negatively impact competition, or the Division's and Commission's regulatory control and oversight of Narragansett's combined utility operations.

Although Mr. Oliver stated that the value of the benefits from the proposed acquisition are difficult to quantify with certainty, he identified three operating areas that he believed offered strong potential for cost savings. Specifically, Mr. Oliver opined that the merger would likely result in savings in the areas of (1) customer information systems and billing, (2) meter reading, and (3) customer service/call center functions.

Mr. Oliver additionally opined that some small savings might be achievable in the context of implementing common gas system and electric system statewide policies, such as in the areas of customer termination and billing regulations and low-income program administration.

On the issue of service reliability, Mr. Oliver could not confirm that service reliability would be improved through the merger; however, he contended that the focus should instead be on whether "high service reliability" would be preserved after the merger has been consummated. He offered no evidence to suggest that a degradation of service reliability would result from the proposed transaction.

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[137] Advocacy Section Exhibit 1, pp. 1-2.

With respect to Narragansett's rate plan, Mr. Oliver was successful in convincing Narragansett to spend additional time in developing a full and meaningful consolidation plan. Narragansett adopted the Advocacy Section's recommendation on this matter and has agreed to file a rate plan with the Commission within 12 months rather than in six months as initially proposed.[138] But Mr. Oliver stressed that the rate plan to be filed must synchronize the costs of consolidation with the expected timing of benefits to be derived from those expenditures. He stated that the Division would be assessing this synchronization issue when the rate plan eventually goes before the Commission.

During cross-examination by the Attorney General, Mr. Oliver suggested the proposed transaction was in the public interest simply on the basis that a larger utility would be acquiring the assets of the New England Gas Company. He maintained that in general, "the larger utility can most often finance at lower cost which reduces cost to customers." He additionally emphasized that the larger utility will have greater purchasing power, which also benefits ratepayers.[139]

Mr. Effron's initial concerns on whether the proposed transaction could have an adverse effect on rates, as raised in his pre-filed direct testimony, were subsequently eased when cross-examined by the Attorney General during the hearing. On the issue of the acquisition premium (including transaction costs), Mr. Effron related:

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[138] 6/29/06, Tr. 93.
[139] 6/29/06, Tr. 234-240

> *"I think the company has made it pretty clear that there isn't any intent to recover it in rates and if the rate plan that emerges ultimately is anything similar to the...rate plans...[in] effect for New England Gas Company or presently in effect for Narragansett, there will not be any recovery of the acquisition premium. So in that regard I think the relative size of the acquisition premium compared to the rate base is pretty irrelevant to ratepayers. That was something that was negotiated between the buyer and the seller and as long as it doesn't impact the rates, and again, I don't believe it will impact the rates, then I don't believe it's of any relevance to the customers."*[140]

Mr. Effron similarly expressed relief with regard to his earlier concerns over the possible negative impacts from accumulated deferred income tax and pension issues. Mr. Effron indicated that he was satisfied with the explanations offered in Messrs. Gerwatowski and Laflamme's rebuttal testimony. Specifically, on the issue of pension expense, he testified:

> *"I think the company has agreed that one way or the other the PBOP and pension expense included in the company's revenue requirement will not be different from what it would have been in the absence of the proposed transaction to the extent that it's possible given the assumptions that go into the calculation of those expenses to maintain that neutrality. Mr. Laflamme has stated that that was the company's intent and that was the goal and I think that's appropriate."*

In its post-hearing memorandum, the Advocacy Section stated that it was satisfied with Narragansett's commitments to (1) freeze gas delivery rates until there is a Commission decision on a new rate plan, (2) not recognize good will for

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[140] Id., Tr. 246-247. In addition to Narragansett's pre-filed rebuttal testimony, Mr. Effron was also referring to testimony from Mr. Gerwatowski made during cross-examination by Mr. Wold, the Advocacy Section's attorney. During questioning, Mr. Gerwatowski related: *"It's never been our intention to file a cost of service and ask for recognition of goodwill for ratemaking purposes which would be effectively recovering directly the acquisition premium in rates. It has always been our intention to follow the precedent that we established now with our electric plan and on the gas side they did it as well using the shared savings mechanism."* 6/29/06, Tr. 92.

ratemaking purposes, (3) exclude transaction costs from any future cost of service, (4) not seek a recovery of integration costs unless the Company can demonstrate that savings attributable to the integration exceed such costs, and (5) not place ratepayers in a worse position with respect to accumulated deferred income taxes and PBOP expenses (Narragansett later reiterated these commitments in its post-hearing memorandum). In view of these commitments, the Advocacy Section concluded that ratepayers would not be harmed from the proposed transaction.[141]

The Division has carefully studied the Advocacy Section's very thorough examination of the proposed transaction, including the responses elicited from the Petitioners during discovery[142], and based on the Advocacy Section's conclusions, and Narragansett's rate plan commitments, the Division finds that the proposed transaction will not jeopardize the future ability to provide safe, adequate, reliable, efficient, and least cost public utility service.

iii. Combining Separate Gas and Electric Utility Functions into One Public Utility Company.

Some members of the public questioned whether it would be in the public interest to integrate currently separate natural gas and electric distribution companies and functions into one combined company operation.

The Division has considered this question and finds that the consolidation, in and of itself, is not inherently inimical to the public interest. In deciding this issue, the Division principally relied on the expert witness testimony of Mr. Oliver,

[141] Advocacy Section Post-Hearing Memorandum, pp. 3-4.
[142] Advocacy Section Exhibit 3, which includes nine separate sets of discovery.

who testified that it is not uncommon for a single company to operate both gas and electric distribution utility operations within a state. Indeed, Mr. Oliver provided thirteen examples of combined operations around the country. He also observed that National Grid's combined operation in New York has operated successfully for years.

iv. Environmental Remediation Costs and the "Public Interest"

In a May 4, 2006 order, which provided findings relative to the many intervention motions that were filed in this docket, the Division held that it "cannot direct Southern Union to agree to a remediation plan before an appropriate Court makes a finding of liability."[143] The Division did decide however, that it "is both in the public interest and reasonable for these...[Intervenors] to be seeking assurances that the proposed asset sale does not negatively impact Southern Union's ability to pay for remedial actions in the event it is found liable for any of the contamination in Tiverton." The Division subsequently expanded the scope of these interventions, through a discovery-related decision, by allowing the parties to explore "the related question of whether Southern Union is attempting to assign its potential liability in the Tiverton contamination matter to a smaller subsidiary or affiliated company, with less financial resources."[144] Predicated on the foregoing decisions, there was an astonishing amount of concomitant discovery, testimony, and legal argument dedicated to this narrow issue in this docket. In fact, the Tiverton contamination issue evolved into the dominant issue in this proceeding.

[143] Order No. 18591, p. 16.
[144] Order No. 18641, pp. 3-4.

The Attorney General and Tiverton maintain that the public interest criterion in R.I.G.L. §39-3-25 demands that the Division impose a condition on the proposed transaction that would require Southern Union to fund an escrow account that could be used to pay for potential Tiverton contamination-related remediation costs in the event that Southern Union is subsequently determined by a court to be financially responsible for the contamination in Tiverton. The Attorney General and Tiverton, relying on a stipulated "estimated remedial cost range" of between $30 million and $55 million, recommend that the Division adopt and compel the highest range of funding for the escrow account, $55 million, as a pre-condition to the approval of the proposed transaction.[145]

In support of this recommendation, the Attorney General observes that Southern Union is "currently engaged in a massive conversion of its business—restructuring its corporate enterprise to sell off its natural gas distribution assets and focus on wholesale energy markets, including the gathering, processing and transportation of natural gas."[146] The Attorney General further observes that all of the natural distribution businesses and assets sold or proposed for sale have been, or are, owned directly by Southern Union, the parent corporation; and that all of the new businesses acquired by Southern Union are held "through first, second or third tier limited liability entities."[147] Based on these observations, the Attorney General concludes that Southern Union intends to divest its distribution assets in order to "become a pure holding company, with multiple layers of

[145] See Joint Exhibit 1; Tiverton Post-Hearing Memorandum, p. 4; and Attorney General Post-Hearing Memorandum, p. 19.
[146] Attorney General Post-Hearing Memorandum, p. 2.
[147] Id.

operating subsidiaries."[148] The Attorney General thereafter posits that Southern Union's "holding company structure will render the interests that the company owns immune from pre and post judgment collection procedures," which the Attorney General contends will result in the State of Rhode Island not being able to "satisfy any judgment that it may happen to obtain against Southern [Union] in any future remediation action."[149]

The Attorney General relies on the U.S. Supreme Court's decision in United States v. Best Foods, Inc., 524 U.S. 51 (1998) as support for its concern that Southern Union may be able to insulate itself from having to pay a future judgment by selling its assets rather than its stock. The Attorney General maintains that this business strategy "becomes a planning tool that corporations can utilize to structure their liabilities and assets to reduce and mitigate liabilities."[150] The Attorney General argues that the "Division must look beyond Southern [Union's] currently stated plans and make some reasonable judgments about the intermediate and longer-term operating environment which Southern [Union] faces and the feasible options it has which, if exercised, may, in fact, undermine the State's ability to establish, enforce and collect upon such liability."[151]

The Advocacy Section did not address the Tiverton environmental remediation funding issue directly in testimony except to state that:

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[148] Id., p. 7.
[149] Id., pp. 7-13.
[150] Id., p. 14-15, referring to Sussler testimony at 6/30/06, Tr. 87.
[151] Id., p. 15.

> *"...at this point, the Advocacy Section finds nothing in Southern Union's retention of such liabilities that would be necessarily adverse to the interests of ratepayers, but the Advocacy Section is open to consideration of credible arguments that may be presented on this matter by other parties. Also, other parties to the docket may address issues affecting the public interest that go beyond the scope of ratepayers' interest."*[152]

In its post-hearing memorandum, the Advocacy Section touched on the issue of the recommended escrow requirement, and indicated that it "defers to the legal expertise of the ...Attorney General and the...RIDEM in the area of the enforcement of environmental laws." The Advocacy Section did opine though, that the Attorney General's and Tiverton's recommendation for a $55 million escrow "appears to be somewhat excessive," in view of the stipulated range of $30 million to $55 million, and because "Southern Union appears to have several sources of funds external to the company to pay the liability: Cost Recovery Per Directives of the MDTE[153], Insurance Recovery, and Reimbursements of Responsible Parties."[154] As an alternative proposal, the Advocacy Section recommended that the Division instead adopt and compel an escrow in the sum of $13 million to coincide with the $13 million "like-kind exchange" tax advantage that Southern Union would be eligible for if the proposed transaction closes by August 25, 2006.[155]

Both Petitioners rejected the idea of an escrow fund condition attached to the approval of the proposed transaction. Narragansett observes that Southern

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[152] Advocacy Section Exhibit 1, p. 30.
[153] MDTE is an acronym for Massachusetts Department of Telecommunications and Energy.
[154] Advocacy Section Post-Hearing Memorandum, p. 2, referring to a response from Southern Union to Advocacy Section data request 4-3 (contained in Advocacy Section Exhibit 3).
[155] Advocacy Section Post-Hearing Memorandum, pp. 1-2, referring to a response from Southern Union to Advocacy Section data requests 5-4 and 9-2 (contained in Advocacy Section Exhibit 3).

Union has provided evidence from its filing with the U.S. Securities & Exchange Commission that it has assets worth over $7 billion. Narragansett also points out that Mr. Marshall, Southern Union's Treasurer, testified that Southern Union currently not only had over $20 million in cash on the books, but that it had a revolving credit facility for $400 million, with a balance of approximately $200 million.[156] Narragansett contends that Southern Union has sufficiently proven that it is "financially capable of meeting a $55 million clean up obligation even after their Rhode Island assets are sold."[157]

Southern Union argues that there is no legal or factual basis to support the creation of an escrow fund. Southern Union argues that the record demonstrates that the sale of its Rhode Island assets to National Grid/Narragansett will not impact its ability to pay a Tiverton judgment. Southern Union related that the record reflects undisputed evidence that Southern Union has $7.5 billion in assets and $4.0 billion in debt, and that the 'net spread' of $3.5 billion will remain unaffected by this transaction.[158] Southern Union argues that the record further shows that it could pay a potential Tiverton judgment in several ways, including: (1) out of the 'revolving loan' facility, (2) by obtaining additional borrowings, or (3) through the issuance of additional equity or long-term debt instruments.[159] Southern Union observes that the upper range of the potential Tiverton judgment, $55 million, "is less than 1% of Southern Union's assets, and

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[156] Narragansett Post-Hearing Memorandum, pp. 9-10, referring to testimony from Mr. Marshall at 6/30/06, Tr. 193-197.
[157] Id., p. 10.
[158] Southern Union Post-Hearing Memorandum, p. 5, referring to testimony from Mr. Marshall at 6/30/06, Tr. 194-195.
[159] Id., referring to testimony from Mr. Marshall at 6/30/06, Tr. 195-197.

less than 2% of Southern Union's outstanding debt.[160] In short, Southern Union contends it has met its burden to demonstrate the ability to pay on a future judgment of liability and that the proposed asset sale will not have a negative impact on its ability to pay any such reasonably foreseeable future judgment.

To further allay any concerns that Southern Union might engage in unlawful corporate actions to avoid its potential obligation to fund a remediation in Tiverton, Southern Union underscores that it has placed the following stipulation on the record:

> *(i) Upon its merger with FRGC in 2000, Southern Union acquired and succeeded to whatever potential legal liabilities FRGC had at that date relating to environmental contamination that may have existed in the 'Bay Street Area' of Tiverton, Rhode Island (the 'FRGC Tiverton Liabilities');*
>
> *(ii) Neither the approval of the Joint Petition in this proceeding, nor the potential transfer of Southern Union's Massachusetts assets to a wholly owned subsidiary ('Massachusetts Transfer') shall alter: (i) Southern Union's liability for the FRGC Tiverton Liabilities; or (ii) Southern Union's legal obligation to satisfy a final (following all appeals) enforceable judgment entered against it arising out of the FRGC Tiverton Liabilities;*
>
> (iii) *Southern Union shall not assert in any judicial, administrative or other legal proceeding that by reason of the form or structure to its present or planned Massachusetts corporate organization it is not liable for the FRGC Tiverton Liabilities...*[161]

[160] Id.
[161] Id., p. 8.

Related to this stipulation, the Division notes that Mr. Marshall categorically denied on the record that Southern Union had "any plans to restructure its corporate holdings to shield assets from the potential Tiverton liability."[162]

Southern Union argues that an escrow fund would deny it the ability to use its funds for legitimate business purposes and would constitute a penalty unsupported by record evidence. Southern Union characterizes the proposed escrow fund as "a form of stealth attachment, without any due process of the kind required in court, including the substantial burden on the movant to show a likelihood of success on the merits and demonstrated proof of the need for security."[163] Southern Union adds that an escrow fund would also inappropriately cause it "to set-aside millions of dollars for an indeterminate period", which Southern Union argues will cause "injury to...its shareholders, and...carrying costs without any ability to recoup them."[164]

The Division has devoted a significant amount of time to evaluating the record and arguments associated with the Tiverton contamination issue and its arguable "public interest" nexus to the proposed transaction. Before stating its findings, the Division believes that a brief recitation of the travel of the Tiverton contamination matter is useful. The Division will rely on the chronology of events identified in Mr. Sussler's testimony, which the Division has decided to admit on the record, infra, and from argument received during the April 25, 2006 hearing

[162] 6/30/06, Tr. 198.
[163] Id., pp. 8-9.
[164] Id., p. 9.

conducted in this docket. It is the Division's belief that none of these facts are in dispute.

Soil removed during excavations conducted in the Bay Street area of Tiverton in 2002, which was later analyzed by an engineering company in 2004, revealed petroleum-based contamination. RIDEM investigated the matter in late 2002 and early 2003, and later issued a "Letter of Responsibility" to Southern Union, as owner of the former FRGC, as well as the Town of Tiverton, on March 17, 2003. RIDEM subsequently issued a "Notice of Intent to Enforce" to Southern Union on November 23, 2005. Through its regulatory actions, RIDEM has requested that Southern Union undertake a site investigation and take certain remedial actions, including providing an estimate of the cost of remediation. While Southern Union has performed various investigations of the Bay Street area in response to RIDEM's directives, Southern Union contests its liability for the contamination and the scope of the investigations and remedy proposed by RIDEM. Southern Union to date has not made an estimate of the cost of remediation.

When considering the intervention motions that were filed in this case, the Division realized the potential for this proceeding becoming a proxy "liability" case, essentially a shortcut for some parties to bypass the proper judicial channels that must be followed in environmental remediation and CERCLA cases. A first sign was Attorney McConnell's request, made on behalf of a group of 129 Bay Street area residents that moved to intervene in this docket, that the Division "impose as a condition of the sale that a... real remediation program be

implemented, and that the residents, who have been living under this cloud for three years, get the relief that they so rightly deserve...I think you do have jurisdiction under the public interest aspect of the statute that authorizes it."[165] Concerned about where this proxy "liability" issue could lead, the Division polled the intervention movants on whether any of them were looking to establish an "escrow" through this proceeding, to be funded by Southern Union, to ensure that funds would be available in the future if Southern Union were found liable for the contamination in Tiverton. Perhaps fearing that it would jeopardize the approval of their intervention petitions, the prospective intervenors universally stepped away from the notion of imposing an escrow fund condition on Southern Union in this case.[166]

Now, despite the Division's unambiguous decision denying the parties any room to turn this proceeding into a proxy "liability" case, the Attorney General and Tiverton have closed their respective cases with recommendations that the Division do precisely that - force Southern Union to fund a $55 million escrow (in view of the Company's perceived liability), and to reopen the proceeding so that they may pursue additional discovery for the purpose of expanding the case into an investigation of Southern Union's "liability" connection to the Tiverton contamination matter.[167] For the reasons set forth below, the Division finds the foregoing recommendations unreasonable.

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[165] 4/25/06, Tr. 37-39.
[166] Id., Tr. 49-53.
[167] 6/29/30, Tr. 57-58; 6/30/06, Tr. 241-247, 250.

Beginning with the request to reopen and expand the scope of the docket, the Attorney General argues that the public interest criterion in R.I.G.L. §39-3-25 now requires the Division to reopen and broaden the scope of this case to "include the question of how likely it is that Southern Union is, in fact, going to be held liable for the Tiverton, Bay Street contamination..."[168] The Division has made it perfectly clear from the outset, and through the discovery phase of this case (as evidenced in its discovery-related decisions), that this docket would not become a proxy liability case. Simply put, the Division neither has the expertise nor the authority to address such issues. Other venues and/or proceedings exist for this purpose. Accordingly, the Attorney General's motion for a "stay" (to reopen) and for an expansion of the scope of this proceeding shall be denied.

It is the opinion and finding of the Division, that the recommended escrow fund, $55 million by the Attorney General and Tiverton, $13 million by the Advocacy Section, constitutes another improper effort to bypass the Courts and Southern Union's due process rights. Even though the Attorney General has apparently already concluded that Southern Union is solely responsible for the contamination in the Bay Street area, and must consequently immediately pay for the attendant damages and injuries, the Division will not proceed down this path and ignore that Southern Union has a legal right to deny culpability and defend itself in the RIDEM investigation matter and ultimately, if necessary, in proper trial and appellate courts.

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[168] 6/30/06, Tr. 241.

The Division further predicates its finding on the anemic evidentiary record and legal line of reasoning proffered by the escrow fund proponents in this docket. Only one witness, Mr. Philip Sussler, a purported expert witness on the subject, was the entire foundation on which the escrow proponents have based their demands. Unfortunately, Mr. Sussler provided nothing concrete in terms of evidence to suggest that Southern Union was in the process of restructuring its business interests in order to avoid environmental remediation expenses in Tiverton.

In its place, Mr. Sussler's offered a thesis, in which he hypothesizes the possibility of Southern Union pursuing a course of action wholly designed to deny the Tiverton plaintiffs of remediation-related compensation. Mr. Sussler suggests that CERCLA protections have been undermined by "the resurgence of the application of traditional corporate law doctrines" and that polluters now have a bona fide chance of insulating themselves from liability. Both Mr. Sussler and the Attorney General cite the Best Foods case, supra, as the seminal case on this point. They also mention the "W.R Grace Company" case as an example of a worse case scenario. Noticeably, Mr. Sussler and the Attorney General rely exclusively on these two cases as the abstract basis for their claim that the Courts have weakened CERCLA protections. However, the Division notes that the Best Foods case narrowly dealt with the issue of the standards for imposing derivative liability on a parent corporation for liabilities incurred by a subsidiary. In the Division's fact pattern, Southern Union is not a subsidiary, it is, and will continue to be the parent company with respect to the Tiverton contamination

remediation issue. In the W. R. Grace Company case, there were thousands of asbestos injury claims and significant environmental liability claims involved, whose aggregate damages amount exceeded the net assets of the W.R. Grace Company. The Division further notes that Mr. Sussler could not definitively opine that the Best Foods decision provides a de facto defense for Southern Union. Rather he testified that under Best Foods, "...a corporation that purchases only the assets of another corporation and not its stock **may** be able to avoid liability under CERCLA..." Of significant importance, however, it appears from Mr. Sussler's testimony that the ability to attempt to avoid liability hinges upon whether the transaction(s) between the companies is fraudulent (i.e., the transfer is for inadequate consideration). Accordingly, the Attorney General would have the Division accept as a likely scenario that Southern Union, a $7.5 billion company, is going to risk criminal prosecution and related fines, and incalculable fraudulent transfer-related litigation expense in furtherance of a scheme to evade a potential $30-50 million environmental expense in Rhode Island, a liability that Southern Union not only disputes, but a liability that Southern Union knows may likely be shared by contributory parties, including the town of Tiverton.

Mr. Sussler's warning that Southern Union's business restructuring "**could**" "reduce the ability of the State of Rhode Island to enforce and/or collect recovery for legal liabilities" was further undermined by the following admissions/concessions, which were elicited during cross-examination by Southern Union:

- Mr. Sussler accepted that any potential liability for the Tiverton site that the Fall River Gas Company had now resides with Southern Union[169];
- Mr. Sussler accepted that Southern Union cannot "avoid" its potential liability under CERCLA in relation to Tiverton by transferring assets either through a sale or the formation of a subsidiary. His only qualification was the issue of whether other creditors would be competing for the assets too.[170]
- Mr. Sussler also accepted that Southern Union's contemplated "Massachusetts Transfer" or any other future transfer of assets through the creation of a subsidiary does not hinder a creditor's ability to satisfy a judgment because the creditor can obtain satisfaction by attaching the parent's stock in its subsidiaries.[171]
- Mr. Sussler also accepted that there are no facts and no evidence to indicate that Southern Union has, plans to, or will transfer or "cabin" its assets to protect them from the reach of any creditor who may obtain a judgment in connection with Tiverton.[172]
- Mr. Sussler also accepted that there are laws in every state prohibiting fraudulent conveyances to protect creditors from a

[169] 6/30/06, Tr. 122.
[170] Id., Tr. 120-137.
[171] Id.
[172] Id., Tr. 144.

corporate reorganization designed to obstruct the collection of a legitimate judgment.[173]

- Mr. Sussler also accepted that laws allowing for "long-arm" jurisdiction and service of process on entities doing business outside Rhode Island protect a creditor's ability to reach Southern Union, even if it has no assets in Rhode Island.[174]
- Mr. Sussler also accepted that the *W.R. Grace* case[175] is distinguishable from the Southern Union case based on the fact that the damages in the *W.R. Grace* case exceeded the net worth of that company, compared to the instant case where the maximum liability figure of $55 million represents less than 1% of Southern Union's assets and less than 2% of its debt.[176]

As a final observation on the issue of whether Southern Union can evade a future judgment, the Division notes the argument from Attorney McConnell, on behalf of his 129 clients (made during the hearing conducted on the intervention motions) as reflected below:

Hearing Officer: Mr. McConnell, if you get a judgment in Federal Court, do you believe that you will not be able to collect the funds from Southern Union?

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[173] Id., Tr. 144-147.
[174] Id., Tr. 152-154.
[175] Mr. Sussler and the Attorney General have cited the W.R. Grace bankruptcy case as an example of an intentional corporate restructuring designed to evade environmental remediation liability.
[176] Id., Tr. 148-150, 194-197.

Attorney McConnell: Again, Mr. Hearing Officer, that was never a concern. We have had an accountant look at what was on the website in terms of the P&S. We think there is going to be close to a 500 million dollar profit from this sale. We think there is going to be substantial tax deferrals. We also believe that there is insurance that covers this. So, we are not concerned that we can't collect when we do get a judgment.[177]

The Division additionally questions the Attorney General's rationale in recommending such a large escrow. During testimony elicited from Mr. Marshall at the June 30, 2006 hearing, Mr. Marshall declared that Southern Union would not agree to consummate the proposed purchase and sale agreement if the Division attached an escrow as a condition of approval. The following dialog between Mr. Marshall and Attorney Petros reflects the inflexibility of Southern Union's position on the subject:

Mr. Petros: You heard a few moments ago Mr. Sussler made a recommendation that $55 million dollars be put in an escrow as a condition of closing of this transaction. Did you hear that?

Mr. Marshall: Yes, I did.

Mr. Petros: If that—if that condition is imposed on this transaction, will this transaction close?

[177] 4/25/06, Tr. 52.

Mr. Marshall: No, it will not.[178]

Following this exchange, the Attorney General then attempted to negotiate for a lesser escrow amount with Mr. Marshall. Noting the $13 million expected by Southern Union from the "like-kind exchange" tax benefit, Mr. Roberti asked Mr. Marshall if Southern Union would be willing to fund an escrow with this level of funding instead.[179] However, when the Attorney General was directed by the hearing officer to discontinue this line of questioning, Mr. Roberti retorted: "So be it. We'll stick with the 55..."[180] It appears to the Division, that the Attorney General's now immovable position on the propriety of a $55 million escrow, may be more about dissatisfaction with Southern Union's lack of interest in negotiating some escrow sum, and less about the "public interest" connection to the maximum end of the range of projected remediation costs.

The Division similarly questions why the Attorney General is interested in establishing an escrow fund only for the Tiverton contamination site. The Attorney General was sympathetic during its opening statement on the matter of the contamination found at the Wellington Condominium Association in Newport. Additionally, RIDEM Exhibit No 1 identifies a total of thirty contamination sites in Rhode Island that RIDEM asserts are connected to Southern Union. In fact, the Attorney General questioned Mr. Sussler at length about these other sites. In reply, Mr. Sussler suggested that separate escrow funds should be established for

[178] 6/30/06, Tr. 198.
[179] Id., Tr. 212-220.
[180] Id., Tr. 220.

all of them.[181] Yet, the Attorney General only supports an escrow for Tiverton. While the Division finds this position inconsistent, the Division must question the practical effect of a single escrow for a single contamination site when there appears to be many more contamination sites connected to Southern Union in Rhode Island. The Division finds it contradictory that the Attorney General is patiently willing to rely on RIDEM and/or the Courts to resolve the other contamination site remediation matters but unwilling to use the same legal process(es) for the Tiverton contamination site.

The Division also thought it illuminating that RIDEM, the State's chief environmental protection agency, never joined with the other parties' recommendation for an escrow fund condition in this case. Interestingly, RIDEM expressed no opposition to the approval of the proposed transaction during the proceedings, or at the close of the record in this docket.

The Division is aware that RIDEM issued a "Letter of Responsibility" to Southern Union (and Tiverton) in March of 2003, and a "Notice of Intent to Enforce" to Southern Union in November of 2005. In this proceeding, RIDEM has stated that it is not its responsibility to perform a risk assessment in Tiverton. RIDEM asserts that the risk assessment task goes to Southern Union.[182] However, in this docket, RIDEM is essentially complaining to the Division that Southern Union is not cooperating in the RIDEM investigation.[183] The Division questions why this apparent impasse between RIDEM and Southern Union is an

[181] Id., Tr. 182-185.
[182] 6/30/06, Tr. 9.
[183] Id., Tr. 29.

issue in this docket. In response to questions from the hearing officer, RIDEM explained that the next step for it to take with regard to the deadlock with Southern Union is to issue a "notice of violation," which RIDEM described as an "administrative complaint."[184] RIDEM also states that it also has the authority to haul Southern Union into Court over the issue.[185]

The Division would encourage Southern Union to re-establish the site investigation and area definition activities that RIDEM has requested. However, in the absence of such cooperation, the Division finds that RIDEM has the statutory authority to compel Southern Union to perform these risk assessment tasks. The Division does not find this matter to be a "public interest" consideration in this docket. Moreover, the Division finds that if the Attorney General believes that the evidence against Southern Union's liability and risk of flight from this liability is so overwhelming, the Attorney General ought to be persuading RIDEM to complete its official regulatory duties, and perhaps explore pursuing a civil action in Superior Court, in connection with a RIDEM enforcement action, to compel a surety bond or other form of security to protect the interests of the public.

### G. Southern Union's Motion to Exclude and/or Strike Mr. Sussler's Testimony

Southern Union challenged Mr. Sussler's competence as an expert witness in this docket, and consequently moved to exclude and/or strike his testimony. As evidenced by the forgoing issue discussions, the Division has decided to admit

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[184] Id., Tr. 45.
[185] Id.

Mr. Sussler's pre-filed direct testimony. The Division would generally rely on R.I.G.L. §42-35-10 and Rule 25(a) of the Division's *Rules of Practice and Procedure* as the basis for this decision.[186] Accordingly, Southern Union's motion to exclude and/or strike the testimony of Philip L. Sussler shall be denied.

## 10. Conclusion

The Division was faced with a series of extremely difficult decisions to make in this docket. The contamination in Tiverton is a serious matter, as is the contamination at the Wellington Condominium Association in Newport, and the various other sites identified in this docket. The Wiley Center's plea for assistance for low-income ratepayers and the public speakers' expressions of desperation is also a very significant matter.

However, based on the Division's careful evaluation of the facts and applicable law, the Division has concluded that this agency is not the proper forum for addressing these issues. The Division finds that the environmental remediation matters being pressed by the Attorney General and Tiverton properly belong before RIDEM and the Courts. Further, The General Assembly and the Commission must act upon and decide the issues of concern raised by and on behalf of low-income ratepayers.

Moreover, the Division finds that the proposed asset sale will not negatively impact Southern Union's ability to pay for remedial actions in the event it is found liable for any of the contamination in Tiverton. The Division notes that none of the parties in this case have disputed Southern Union's financial capacity

[186] See also Sterling Shoe Company v. Norberg, 411 F. Supp 128 (D.R.I. 1976).

to generate $55 million for the Tiverton remediation, if needed. The Division also finds insufficient evidence that Southern Union is in the process of scheming to restructure its business interests in order to evade potential environmental remediation expenses. The stipulation offered by Southern Union in this regard, and the concessions made by Mr. Sussler in response to Southern Union's cross-examination were both very persuasive, supra. The Division also finds, based on its stipulation, that Southern Union is legally estopped from making the assertion that because of changes in the corporate structure it can avoid liability or potential financial responsibility for environmental contamination in Tiverton in any forum of competent jurisdiction that is reviewing or has determined that Southern Union is fully or partially liable for such contamination. The Division's decision to not impose an escrow condition on Southern Union in this case hinges upon these findings, a respect for due process under the law and the judicial system that must address and decide such matters, and also a genuine belief that an escrow condition in this matter would jeopardize the proposed purchase and sale agreement, an outcome that the Division strongly believes would not be in the best interest of the State's electric and gas utility ratepayers. Regarding this last point, the Division finds it persuasive that none of the parties objected to the proposed purchase and sale agreement on the ground that it would be detrimental to ratepayers. While the Wiley Center expressed rate-related concerns that the Division has decided are outside the scope of this proceeding, the Division finds that the record reflects favorably on proposed unification of gas and electric service operations in Rhode Island.

In the final analysis, the Division finds that the proposed transaction is in the public and ratepayer interest. The Division has concluded that the sale of Southern Union's Rhode Island assets to National Grid USA will not adversely impact electric and gas distribution services in Rhode Island. Indeed, the record reflects the likelihood that tangible benefits and savings will result from the sale. The Division notes that current rates will remain in place, along with current staffing, until Narragansett files a new rate plan, which the Commission, with assistance from the Wiley Center, the Division and the public, will comprehensively evaluate and resolve.

Now, therefore, it is

(18676) ORDERED:

1. That the March 16, 2006 joint petition filing by National Grid USA, through the Narragansett Electric Company, and the Southern Union Company seeking approval of the Division for the purchase by Narragansett of the assets associated with the regulated gas distribution business owned and operated by Southern Union Company in Rhode Island as the New England Gas Company, is hereby approved.
2. That the Narragansett Electric Company's tariff filing, as attached to the joint petition, offered in accordance with the tariff filing requirements contained in R.I.G.L. §39-3-10, is hereby approved. The Division approves the tariffs knowing that Narragansett will continue to operate under the terms of the New England Gas Company's existing rate settlement, and that the rates and terms in the tariffs are unchanged and will continue in effect

until they are superceded by the approval by the Commission of new rates for gas delivery customers.

3. As indicated herein, the Division agrees that the assets Southern Union is conveying to Narragansett does not approach the statutory standard of a sale of "all or substantially all" of Southern Union's assets necessary to trigger the two-thirds shareholder vote requirement contained in §39-3-24(3); and that Narragansett is similarly not subject to the two-thirds shareholder vote requirement contained in §39-3-24(3). Consequently, the Division hereby declares that the provision does not apply for either Petitioner in this case.
4. That the Attorney General's motion to stay and expand the scope of this docket, as discussed herein,[187] is hereby denied.
5. That Southern Union's motion to exclude and/or strike the testimony of Philip L. Sussler is hereby denied.

Dated and Effective at Warwick, Rhode Island on July 25, 2006.

Division of Public Utilities and Carriers

John Spirito, Jr., Esq.
Hearing Officer

APPROVED: *
Thomas F. Ahern
Administrator

* See attached "COMMENTS FROM THE ADMINISTRATOR"

[187] This motion was also referred to by the Attorney General as a "motion for reconsideration".

COMMENTS FROM THE ADMINISTRATOR:

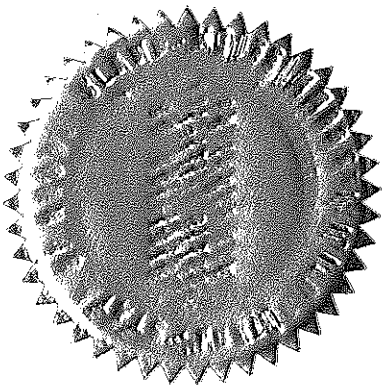
Pursuant to the authority contained in Rhode Island General Laws, Section 39-1-15, I have decided to approve the Hearing Officer's recommended decision in this docket. Hearing Officer Spirito conducted a very professional and well-managed case and has proffered for my consideration findings that are well reasoned and clearly based upon a painstaking examination of the record evidence and a careful review of the relevant law.

I did consider modifying the decision to establish an "escrow" condition on the proposed asset sale, a condition aggressively urged by some of the parties. But, after carefully considering the related evidence and arguments presented in this case, I firmly believe that the hearing officer has reached the proper conclusion on this matter. I agree that the imposition of an escrow would be an improper usurpation of authority and an intrusion into an area best left to the Courts.

Notwithstanding my decision on the proposed escrow, I must say that I am deeply disappointed in Southern Union's apparent lack of interest in cooperating with RIDEM in its regulatory investigation. As the Hearing Officer has stated in his findings, I too would encourage Southern Union to re-establish the site investigation and area definition activities that RIDEM has requested as soon as possible. This stalemate must be resolved, now.

MR. SPIRITO'S RECOMMENDED DECISION IS APPROVED IN ITS ENTIRETY:

Thomas F. Ahern
Administrator



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## NOTICE OF AVAILABILITY OF JUDICIAL REVIEW

(PROVIDED PURSUANT TO R.I.G.L. §42-35-12)

Please be advised that if you are aggrieved by this final decision (report and order) of the Rhode Island Division of Public Utilities and Carriers ("Division") you may seek judicial review of the Division's final decision by filing an appeal with the Rhode Island Superior Court. You have thirty (30) days from the mailing date (or hand delivery date) of the Division's final decision to file your appeal. The procedures for filing the appeal are set forth in Rhode Island General Laws, Section 42-35-15.

Proceedings for review may be instituted by filing a complaint in the Superior Court of Providence or Kent Counties. Copies of the complaint must be served upon the Division and all other parties of record in your case. You must serve copies of the complaint within ten (10) days after your complaint is filed with the Superior Court.

Please be advised that the filing of a complaint (appeal) with the Superior Court does not itself stay enforcement of the Division's final decision. You may however, seek a stay from the Division and/or from the Court.

The judicial review shall be conducted by the Superior Court without a jury and shall be confined to the record. The Court, upon request, shall hear oral argument and receive written briefs.