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May 26, 2020

Via E-mail
Cathie Chiccine
EPA Region 7
Office of Regional Counsel
11201 Renner Blvd
Lenexa, KS 66219

Re: General Notice Letter for the Citizen's Gas & Electric Company Superfund Site in Council Bluffs, Iowa (IAD984589093)

Dear Ms. Chiccine,

As we have discussed, we represent Northern Natural Gas Company (NNG) in regard to this matter. This is in response to the Environmental Protection Agency's (EPA) general notice letter, regarding the Citizen's Gas & Electric Company Superfund Site (Site), to NNG dated March 26, 2020. Thank you for extending our time to respond to this general notice letter. As you know, EPA previously sent a 104 (e) information request to NNG, regarding the Site, dated June 10, 2019. NNG responded to that information request on August 30, 2019. This letter also supplements that response.

Background

Prior to going into the substantive provisions of our response, I offer some introductory comments. First, in discussing or referring to NNG in this letter, unless specifically indicated otherwise, we are referring to the company that currently exists and operates, and not to prior companies or divisions of companies. Second, as we discussed, we believe that this Site is complex, in regard to liability issues. This stems from the age of the Site, and from the complexity of the corporate history of various companies involved with the Site. Third, we believe some brief background on the natural gas industry will be helpful. An overview of the industry is provided at www.naturalgas.org (Business Overview, Industry and Market Structure). Companies that are interstate pipelines, for the transportation of natural gas, are regulated by the Federal Energy Regulatory Commission (FERC) pursuant to the Natural Gas Act (15 U.S.C. 717-717w). (*See* www.naturalgas.org Business Overview, Natural Gas Regulations, The Market Under Regulation). Companies in the retail business, namely that supply natural gas to end users in municipalities (e.g. residences, commercial businesses, and manufacturing facilities), are generally regulated as a public utility by a state public service commission. For example, in Iowa, the Iowa Utilities Board is the agency that regulates local distribution utilities.

Asserted Liability

The general notice letter included a draft Administrative Settlement Agreement and Order on Consent (ASAOC). Section IV, Finding of Fact of the ASAOC, Paragraph 17, has the alleged basis for NNG's potential liability in regard to the Site. There are three areas in Paragraph 17 that we disagree with and will focus on. These are addressed below.

1. Council Bluffs Gas Company

First, with regard to the Council Bluffs Gas Company (which appears to have been involved in the retail end of the natural gas industry), Paragraph 17 states, in part, as follows:

> "CBGC sold the Site property to Northern Natural Gas Company (NNG) in 1960, and CBGC was acquired and merged into the Peoples Natural Gas Company (Peoples) division of NNG."

We have reviewed various documents in regard to the above. These include certain responses by various potentially responsible parties (PRPs), to Iowa DNR and/or EPA, regarding information relating to the Site. These also include EPA's response to the FOIA request by the Fraser Stryker law firm. These also include documents on Iowa DNR's website, under the Contaminated Sites section, which relate to the Site.

We did not find a deed, or other conveyance document, for the transfer of ownership of the Site from CBGC to Northern Natural Gas Company in 1960. We did find a reference to the Council Bluffs Gas Company of Iowa being acquired and merged into the Peoples division in 1964. This was in historical documents provided by EPA to myself, on or about May 12, 2020. The document was in a packet labeled "Northern Natural Gas documents", and the document is titled "Enron Corporation- Company Profile, Information, Business Description, History Background Information on Enron Corporation." No supporting documentation for this reference was included in this document or packet.

Because no supporting evidence has been provided or located, we are unable to concur with these assertions. We believe that credible evidence, that substantiates these assertions, should be obtained before including these assertions as Findings of Fact. In addition, since these assertions are one component of the basis of the alleged liability of NNG with respect to the Site, there is no liability if these assertions are not substantiated.

2. Aquila - Peoples

Second, Paragraph 17 states, in part, as follows:

> "NNG changed its name to Internorth, Inc (Internorth). In 1985, Utilicorp United, Inc. (Utilicorp) bought Peoples' assets and the Site property from Internorth as part of an asset purchase. Internorth retained Peoples' liabilities."

We have reviewed Shook Hardy's letter on behalf of Aquila (f/k/a UtiliCorp United, Inc), dated July 15, 2002, to the Iowa DNR regarding the Site. A copy of Shook Hardy's letter, with its enclosures of certain provisions of the 1985 Purchase Agreement, is enclosed as Attachment 1. We understand that the analysis in this letter is the basis for the assertion, above, that InterNorth retained Peoples' liabilities.

Shook Hardy discusses the 1985 purchase, by Aquila, Inc. (f/k/a Utlilicorp United Inc.) from InterNorth, Inc. (d/b/a HNG/InterNorth), of the assets of Peoples Natural Gas Division of HNG/InterNorth. Shook Hardy states that MGP-related liabilities were not assumed by Aquila. Specifically, Shook Hardy states:

> "The specific language of the 1985 Asset Purchase Agreement excludes MGP-related liabilities from the specific liabilities assumed by Aquila. The Specified Liabilities that Aquila agreed to assume under the terms of the 1985 Asset

> Purchase Agreement are set out in Schedule M of the Agreement. The Specified Liabilities do not include MGP liabilities."

We agree that Aquila assumed the Specified Liabilities (a defined term under the 1985 Purchase Agreement, and a copy of this section which is included with Attachment 2), and that the Specified Liabilities are set out in Schedule M of the Purchase Agreement. However, we disagree with any assertion that the Specified Liabilities were the only liabilities assumed by Aquila under the Purchase Agreement. Further liabilities assumed by Aquila are described in that certain Buyer's Assumption Agreement that was executed and delivered by the parties at the closing of the transaction on December 20, 1985 (a copy of which is included as part of as Attachment 2). Six categories of liabilities were assumed. Item 4 on the Buyer's Assumption Agreement provides that Aquila assumed all "obligations for matters arising from and after the Closing Date." Item 6 on the Buyer's Assumption Agreement specifically provides that Aquila assumed all liabilities and obligations with respect to all lawsuits, claims, demands, actions or suits, costs or damages and expenses that are not recorded as liabilities on Seller's accounting books and records at Closing. Item 4 and/or Item 6 would cover liability with respect to the Site.

As acknowledged in Shook Hardy's July 15, 2002 letter, Aquila also agreed to indemnify HNG/InterNorth for the following liabilities:

> "All liabilities or obligations with respect to all lawsuits, claims, demands, actions or suits, losses, costs or damages and expenses ***that are not recorded as liabilities on Seller's accounting books and records at Closing...***" (Emphasis added)

We agree that Aquila is obligated to indemnify HNG/InterNorth for the liabilities specified above, which is Item 6 in Buyer's Assumption Agreement. However, Aquila also agreed to indemnify HNG/InterNorth for all other liabilities described in the Buyer's Assumption Agreement, and these other liabilities include Item 4.

Shook Hardy then further asserts in the July 15, 2002 letter that MGP-related liabilities were on HNG/InterNorth's books and records at the time of closing of the 1985 transaction, as follows:

> "MGP-related liabilities were included as liabilities in Enron's records as of the time of the closing of the 1985 transaction, as evidenced by Schedule J to the 1985 Asset Purchase Agreement. Schedule J lists litigation and other liabilities and specifically includes "Manufactured Gas Plant Sites." As "Manufactured Gas Plant Sites" were included in Enron's records at Closing as a liability, the indemnification and Assumption on Agreement do not apply to those liabilities."

We disagree with this assertion. Note, that Shook Hardy does not state that Manufactured Gas Plant Sites were included in "Enron's accounting books and records". Schedule J is not a listing of "liabilities on Seller's accounting books and records at Closing," (Emphasis added) Instead, Schedule J is a part of a disclosure schedule to the Purchase Agreement. HNG/InterNorth makes various representations and warranties in the Purchase Agreement. One representation and warranty (see Section 3.1(1) on Page 26) generally provides that, except as listed on Schedule J, there are no pending or threatened litigation, claims or regulatory proceedings against the Seller. In addition, the description of Manufactured Gas Plant Sites on Schedule J is generic, and neither the Site nor any other location is specifically described in this generic reference. Further, there is no evidence that there had been any communication from EPA and/or Iowa DNR with HNG/InterNorth, on or before 1985, concerning the Site.

Unless there is clear showing, based on credible evidence that any specific liability for the Site was recorded as such on HNG/InterNorth's accounting books and records at Closing, then such liability was specifically assumed by Aquila (and not retained by HNG/InterNorth) under the Purchase Agreement.

Thus, the trail to potential liability of NNG with respect to the Site also stops here.

3. Enron - Enron Holdings

Third, Paragraph 17 states, in part, as follows:

> "On July 14, 1986, Enron created a wholly-owned subsidiary named Enron Holdings, Inc. On April 11, 1990, Enron Holdings, Inc. changed its name to NNG."

Although not expressly stated in Paragraph 17, it appears that the contention is that Enron has liability for the Site, and that this liability was transferred to Enron Holdings, Inc., which became NNG by name change in 1990. While we agree Enron Holdings, Inc. was formed in 1986 and changed its name to NNG in 1990, we disagree that liability for the Site, if any, was transferred to Enron Holdings, Inc. (n/k/a NNG).

As indicated above and by the documents we have provided to you, Enron Holdings, Inc. was formed in 1986 and changed its name to NNG in 1990. On December 31, 1990, Enron Corp (Enron) transferred to NNG the assets, on the books and records of Enron, of the Northern Natural Gas Company Division of Enron. These assets are set forth in the General Conveyance, Assignment and Bill of Sale (General Conveyance, which was an enclosure with NNG's response to the 104 (e) information request). These were the interstate natural gas pipeline and related assets regulated by FERC (and did not include retail assets, such as the Peoples' assets which had been previously sold to Aquila - see Section 2 above). The NNG pipeline is depicted on Attachment 3, which is enclosed. This interstate natural gas pipeline, as shown on Attachment 3, is the same interstate pipeline system that was transferred by Enron to NNG on December 31, 1990. Various projects have been completed to expand the pipeline since 1990, but the "footprint" of the pipeline remains the same today as it was in 1990.

In connection with the transfer of these assets, NNG assumed certain obligations of Enron. These obligations (referred to as "Assumed Obligations" in the General Conveyance) were debts, obligations and liabilities of Enron relating to the Subject Property (Subject Property is a defined term in the General Conveyance, and generally this is the above-referenced interstate natural gas pipeline system and related assets). See General Conveyance Part I.A (which defines Subject Property) and Part II.B (which defines Assumed Obligations). The Assumed Obligations did not include any liabilities relating to the Peoples' assets (which assets had previously been sold to Aquila in 1985 as described above).

In order to complete this transfer, approval by FERC was needed. An application to obtain approval from FERC was filed, and in FERC's decision on the application, the following background was provided:

> "On February 1, 1990, Northern Natural Gas Company, Division of Enron Corp. (Division), and Northern Natural Gas Company (Northern) filed a joint application seeking authority, in effect, to transfer all of Division's assets and operations to Northern in a corporate restructuring. The parties styled the application as one seeking authority, under Section 7(c) of the Natural Gas Act (NGA), to amend Division's certificates by substituting Northern as their holder.....

> Northern is a wholly owned subsidiary of Enron Corp. that presently has no assets or operations. It was formed to acquire all those of Division, which is a natural gas company subject to Commission jurisdiction under the NGA. Division serves gas markets in Kansas, Nebraska, Iowa, Illinois, South Dakota, Minnesota, Wisconsin, and Michigan. It purchases natural gas supplies from numerous producing areas in the South, West, Midwest, offshore Louisiana and Texas and Canada, and transports gas through its pipelines to the natural gas markets it serves...
>
> As stated, Division proposes to transfer all of its assets and operations to Northern.[1] This includes redesignating Northern as the holder of Division's existing certificates[2] and substituting it as the applicant in Division's pending proceedings.[3] After the proposed restructuring, Northern will own and operate all of the gathering, compression, transmission, storage, and other appurtenant facilities now owned and operated by Division, and Northern will provide all of the services now provided by Division. In essence, Northern will be the successor-in-interest to Division. It will take over all of Division's assets, liabilities, contracts, service agreements, and other legal obligations. It will continue without interruption the identical operations and activities presently performed by Division." (Footnotes omitted) (Emphasis added)

See 52 FERC P 60156 (F.E.R.C.), 1990 WL 317732. FERC approved the application. A copy of this FERC decision is enclosed as Attachment 4.

Subsequent to this December 31, 1990 transfer, Enron continued to exist and operate. Liability, if any, regarding the Site did not transfer to NNG. Such liability, if any, remained with Enron.

Conclusion

As discussed above, NNG does not have liability for the Site. Accordingly, NNG will not volunteer to participate in the ASAOC.

After you've had an opportunity to review, if you have questions or would like to discuss, please let me know.

Sincerely,

Steven P. Case

cc: Jim Talcott via e-mail w/enc.