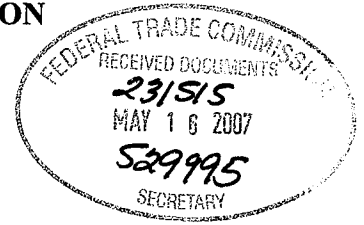


ORIGINAL

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**



)
In the Matter of,)
)
)
EQUITABLE RESOURCES, INC.,)
a corporation,)
)
DOMINION RESOURCES, INC.,)
a corporation,)
)
CONSOLIDATED NATURAL GAS)
COMPANY,)
a corporation,)
)
and)
)
THE PEOPLES NATURAL GAS)
COMPANY,)
a corporation.)

Docket No. 9322

PUBLIC

**RESPONDENTS' MOTION TO THE COMMISSION
TO REMOVE MATTER FROM ADJUDICATION**

Respondents Equitable Resources, Inc. ("Equitable"), Dominion Resources, Inc., Consolidated Natural Gas Company, and The Peoples Natural Gas Company ("Peoples") (collectively, "Respondents") move under Rule 3.26(c) of the FTC's Rules of Practice, 16 C.F.R. § 3.26(c), to remove this matter from adjudication. Respondents respectfully submit that the Commission should remove the matter from litigation to consider whether or not the public interest warrants further litigation in light of the dismissal on state action immunity grounds of the FTC's claims against the transaction by the United States District Court for the Western District of Pennsylvania (the "District Court") and the compelling benefits that the transaction would bring to the citizens and economy of western Pennsylvania.

BACKGROUND

On March 14, 2007, Complaint Counsel filed its administrative complaint. Respondents answered the complaint on April 9, asserting a number of defenses, including the state action immunity doctrine. On April 11, Complaint Counsel moved to strike Respondents' state action immunity defense.

On April 13, Complaint Counsel, proceeding under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), filed a complaint against the proposed transaction in the District Court. Complaint Counsel asserted the identical claims that it asserts in these administrative proceedings. The Court ordered expedited briefing of the Respondents' motion to dismiss on state action immunity grounds. In light of the proceedings before the District Court, on April 16, the Commission stayed all briefing on Complaint Counsel's motion to strike, "until further notice," "pending the proceedings in the federal district court." That stay remains in effect.

On May 14, 2007, the District Court granted Respondents' motion to dismiss, holding that the state action immunity doctrine barred the FTC's claims against the proposed transaction. *FTC v. Equitable Resources*, No. 07cv0490 (Mem. Op.) (May 14, 2007) (attached as Exhibit A). Noting that the parties agreed on the legal standard, the District Court concluded that "the application of the legal standard [was] rather straightforward." Mem. Op. at 11-12. The Court held that each of the two prongs of the test for state action immunity – that there be a "clear articulation" of state policy to displace competition with regulation and that the state "actively supervise" that policy, *see California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) – were readily met. *See* Mem. Op. at 13 ("Quite frankly, it is hard to imagine a more thorough 'articulation' of a state policy of regulation meant to take the place of free market competition than the overall comprehensive and pervasive governmental

regulatory scheme set forth in the [Public Utility] Code by the General Assembly of Pennsylvania”); *id.* at 18 (“It is obvious that the PUC is taking an active, hands-on approach to monitoring the transaction on an ongoing basis going forward, thus implementing the General Assembly’s intended agency oversight over the completed transaction.”). The District Court further held that “precedents of the United States Supreme Court and the United States Court of Appeals for the Third Circuit” compelled the application of state action immunity doctrine to bar the FTC’s claims. Mem. Op. at 19; *see also id.* at 12, 16-18 (discussing *Yeager’s Fuel v. Pa. Power & Light Co.*, 22 F.3d 1260 (3d Cir. 1994)).

In addition to dismissing Complaint Counsel’s antitrust case on the merits, the District Court’s order had the effect of denying Complaint Counsel’s motion for a preliminary injunction.

ARGUMENT

In light of the District Court’s strong holding in favor of state action immunity, the Commission “should consider whether or not the public interest warrants further litigation.” Rule 3.26(c). Continuing to litigate on the merits in light of the ruling on the state action immunity defense would cause needless expenditure of time and resources of the Commission and the parties. Conversely, removing the matter from adjudication would cause no prejudice to the Commission, Complaint Counsel, or the parties.

It is important to note that the District Court’s decision went directly to the merits of Complaint Counsel’s antitrust claims. It was not, as is more typically the case, simply a denial of a motion for preliminary injunction. Rather, it was a dispositive ruling that Complaint Counsel’s antitrust claims could not go forward as a matter of law because of the state action immunity doctrine. Unless reinstated on appeal, the FTC’s claims against the transaction are

extinguished. Indeed, because it is a final judgment on the merits disposing of the same claims amongst the same parties, the District Court's order precludes the FTC's claims in the administrative litigation under the doctrines of collateral estoppel and *res judicata*. See, e.g., *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398-99 (1981).

The Commission would also benefit from further discussion with the parties about the public policy implications of the substantial efficiencies that the proposed transaction would yield and the benefits that the proposed transaction would have for the citizens and economy of western Pennsylvania, including facts that emerged during the PUC proceedings and the District Court proceedings and that may not have been previously fully presented to the Commission previously. Simply put, it is not irrelevant that since the Commission voted out the complaint, the PUC has reviewed and approved the Pennsylvania administrative law judge's conclusions as to the existence of efficiencies and their impact on consumers. Nor is it irrelevant that a United States district court has reviewed the PUC's decision and found it to be "quite substantive" and to have been reached through a process that was "comprehensive," "open, thorough, and substantial." Mem. Op. at 9. There is no reason why the Commission should be deprived of the opportunity to revisit its prior determination to the contrary with the benefit of discussions with the parties before incurring the substantial expense of proceeding with this administrative proceeding and imposing such costs on the public.

The Pennsylvania PUC found, and the District Court emphasized, the "competition" that is at issue in the FTC's complaint benefits 500 commercial and industrial customers at the expense of more than 600,000 mostly residential customers. By contrast the transaction would lead to efficiencies that would benefit all customers. Those efficiencies,

which would in the aggregate amount to many tens of millions of dollars per year, would be in distribution,¹ gas gathering and supply,² and in overhead.³

The PUC found that the efficiencies that the transaction would yield would be passed back in large part to the customer base through the PUC's regulatory rate-making structure. The PUC, of course, is in a position to know the impact of its own administrative proceedings and powers. As a result of the rate case stay out (an agreement that Equitable entered into as a condition of approval of the transaction with the PUC that, if the transaction goes forward, Equitable and Peoples will not initiate proceedings to raise their rates until 2009), the vast majority of customers will avoid having a rate increase until late 2009. Without the stay-out agreement, both companies would in the near term seek, and obtain PUC approval for, a rate increase to address their current revenue deficiencies. Put another way, if the FTC prevails in blocking the transaction, western Pennsylvania would, according to the PUC, face rate increases. Thus, even if none of the efficiencies identified were ever realized, customers would directly and surely benefit from allowing the transaction to go forward. Indeed, it was this benefit that prompted the Commonwealth's Office of Consumer Advocate to support the transaction. Automatic passing through of efficiencies are particularly compelling in the Section

¹ As to distribution, the transaction would enable the combined company to avoid the cost of replacing aging infrastructure and of running overlapping facilities in certain areas, which the PUC found would save \$145 million over 20 years. Although Complaint Counsel asserts that these efficiencies are overstated because, it speculates, certain costs would be incurred to achieve them, Complaint Counsel in its District Court pleadings does not state that the costs necessarily eliminate any efficiencies. Thus, further information as to the costs, if any, of accomplishing this integration should be considered.

² In gas gathering and supply, the transaction would enable the companies to optimize the two companies' gas gathering infrastructure, which would increase capacity to gather local gas, thereby reducing the need for expensive interstate pipeline commitments. The PUC found that at least \$10 million per year would be saved, savings that Complaint Counsel's own expert concedes would be "potentially a significant benefit to the parties' customers."

³ Overhead costs of more than \$10 million per year would be realized through, among other things, elimination of redundant staffing and facilities.

7 analysis. *See, e.g., United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 149 (E.D.N.Y. 1997) (holding that promise to return \$50 million to the community from transaction efficiencies ensured that portion of savings would go to the public and was therefore cognizable).

Customers that purchase natural gas that is distributed over the companies' networks also will benefit directly from the efficiencies in gas supply and distribution that would be realized if the transaction goes forward. PUC regulations require the companies to supply gas *at cost* to customers to which they distribute gas. In other words, all savings in gas purchasing automatically and immediately go to the distribution customers that purchase the gas. To ensure that happens, the PUC monitors gas costs on a quarterly basis. Distribution customers accordingly are guaranteed 100% of the savings that the gas supply and distribution efficiencies would yield.⁴

Complaint Counsel argued to the District Court that the efficiencies here should be ignored because they are outside the relevant market, defined by Complaint Counsel as each individual service location of each individual customer that benefits from discriminatory discounts. This position runs counter to the Commission's policy expressed in the Merger Guidelines of crediting out-of-market efficiencies that are "inextricably linked" to a transaction and the relevant market. Merger Guidelines at 31 n.35. The Commission would be well served

⁴ The passing back of efficiencies would continue once the next rate case is initiated in 2009. At that point, the PUC will determine the costs and, applying the guaranteed rate of return, will decide the rates that need to be charged to generate the needed revenue. The efficiencies that had been realized at that time would serve to reduce the total cost base, thereby reducing the required revenue to meet the guaranteed rate of return and thereby reduce the approved rates below what they otherwise would have been. The net result of this would be that the companies' customers would benefit greatly from the transaction. Although it is true that some may see the end of discriminatory discounts and thus would pay more than they otherwise would for gas distribution, the vast majority of customers would pay less than they otherwise would. The total savings to customers would far exceed the total cost of the lost discriminatory discounts.

to revisit whether these efficiencies would benefit consumers, as found by the PUC, before proceeding with this adjudication.

CONCLUSION

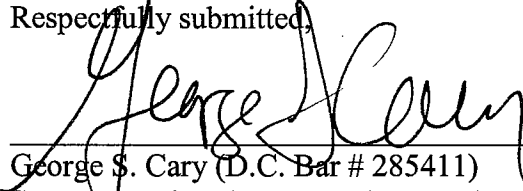
In light of these compelling circumstances, the Commission should withdraw the matter from litigation to consider, without the *ex parte* constraints of adjudicative proceedings, “whether or not the public interest warrants further litigation.” Rule 3.26(c). It likewise should do so to spare the Commission, its staff, and the parties the extraordinary distraction and expense of litigating the case on the antitrust merits where the District Court has ruled forcefully and conclusively that the state action immunity doctrine provides a complete defense to the FTC’s claims as a matter of law. Indeed, Complaint Counsel has already paid a private economist \$500,000 for a single expert report. If the adjudicative proceedings go forward, the costs on the FTC’s side alone will be many times that and, will start to approach the \$9 million that the FTC’s expert opines are the “additional revenues” that Equitable would collect through the elimination of discriminatory discounting.

A withdrawal of the matter from adjudication would not in any way affect the Commission’s ability to appeal the District Court’s dismissal should it choose to do so. Rather, one of the benefits of withdrawing the matter from adjudication would be that the Commission could consider the wisdom of such an appeal with the benefit of consultation with its staff and the parties, without *ex parte* constraints. In no other recent case where Complaint Counsel has not obtained an injunction against the proposed transaction has the Commission continued its administrative litigation pending appeal and there is no reason to deviate from that practice here.

For the foregoing reasons, Respondents respectfully submit that the Commission should remove this matter from adjudicative proceedings.

Dated: May 16, 2007

Respectfully submitted,



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The Peoples Natural Gas Company*

CERTIFICATE OF SERVICE

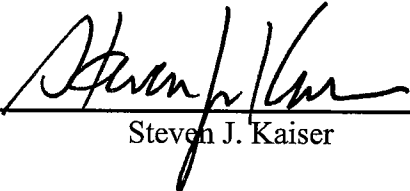
I HEREBY certify that copies of the foregoing RESPONDENT'S MOTION TO THE COMMISSION TO REMOVE MATTER FROM ADJUDICATION were served on the following persons this 16th day of May, 2007 as indicated below.

Complaint Counsel – BY HAND

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Counsel for Defendants Dominion Resources, Inc., Consolidated Natural Gas Company and The Peoples Natural Gas Company – BY EMAIL AND U.S. MAIL POSTAGE PREPAID

Howard Feller (hfeller@mcguirewoods.com>)
McGuire Woods
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030



Steven J. Kaiser

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FEDERAL TRADE COMMISSION,

Plaintiff,

07cv0490

ELECTRONICALLY FILED

v.

EQUITABLE RESOURCES, INC, DOMINION
RESOURCES, INC., CONSOLIDATED
NATURAL GAS COMPANY, THE PEOPLES
NATURAL GAS COMPANY,

Defendants,

and

PENNSYLVANIA PUBLIC UTILITY
COMMISSION and COMMONWEALTH OF
PENNSYLVANIA (through its Attorney
General)

Amicus Curiae.

**MEMORANDUM OPINION
GRANTING DEFENDANTS' MOTION TO DISMISS (DOC. NO. 18)**

Defendants are public utilities which operate under the authority and regulation of the Pennsylvania Public Utility Commission ("PUC"), pursuant to the Pennsylvania Public Utility Code (66 Pa.C.S. §§ 101-3351), who seek to dismiss the Complaint (doc. no. 1) of the Federal Trade Commission ("FTC"). The FTC in its Complaint requests preliminary injunctive relief to halt an intra-state acquisition of defendant Peoples Natural Gas Company ("Peoples Gas") by

defendant Equitable Resources Inc. (“Equitable Gas”), that was recently approved by the PUC,¹

¹ The essential details of the transactions are not contested, and are adequately summarized in the PUC’s Amicus Curiae Brief at 9-10, as follows:

On March 31, 2006, Equitable Resources Inc. (Equitable), and The Peoples Natural Gas Company, d/b/a Dominion Peoples (Peoples) (collectively, the Companies), filed a Joint Application seeking the Commissioner’s approval of the transfer of all stock and rights of The Peoples Natural Gas Company to Equitable Resources, Inc., and for the approval of the transfer of all stock of Hope Gas, Inc. dba Dominion Hope, to Equitable Resources, Inc.

Equitable is a publicly held, Pennsylvania corporation formed in 1925 by the consolidation and merger of Equitable Gas Company and Monongahela Natural Gas Corporation with a corporate history dating to 1888. It is headquartered in Pittsburgh and is an integrated energy company, with an emphasis on Appalachian area natural gas supply activities including production and gathering and natural gas distribution and transmission. Equitable Gas is the operating utility division of Equitable. It provides natural gas service to approximately 257,000 customers in ten Pennsylvania counties, including the City of Pittsburgh, and to 13, 474 and 3,702 customers in West Virginia and Kentucky, respectively. The Pennsylvania PUC has jurisdiction over Equitable Gas pursuant to sections 102, 501 and 1102 of the Pennsylvania Public Utility Code. 66 Pa.C.S. §§ 102, 501 and 1102.

Dominion Peoples, is a public utility corporation incorporated in Pennsylvania in 1885 that provides natural gas service to approximately 357,000 customers in 16 Pennsylvania counties. The Commission has jurisdiction over it pursuant to the Public Utility Code. *Id.* Dominion Hope is a natural gas public utility operating in West Virginia subject to the jurisdiction of the Public Service Commission of West Virginia. Dominion Peoples and Dominion Hope are direct, wholly-owned subsidiaries of The Consolidated Natural Gas Company, a holding company incorporated in Delaware. CNG is a direct, wholly-owned subsidiary of Dominion Resources, Inc., a holding company organized under the laws of the Commonwealth of Virginia.

* * *

Under the terms set forth in the Joint Application, Equitable would acquire Dominion Peoples and Dominion Hope in a stock transaction under which Dominion Peoples and Dominion Hope would become direct, wholly-owned subsidiaries of Equitable. Under terms of the Stock Purchase Agreement, Equitable would acquire all of the outstanding capital stock of Dominion Peoples and Dominion Hope. The consideration for the stock acquisition is approximately \$970 million, which the parties stated was determined by competitive bidding and arms-length negotiations. Once the