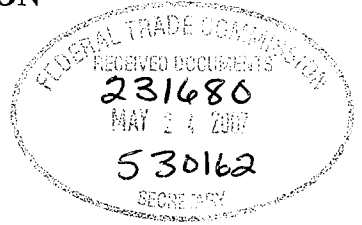


UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



\_\_\_\_\_  
)  
**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' RESPONSE TO COMPLAINT COUNSEL'S MOTION TO STAY**  
**COMPLAINT COUNSEL'S DISCOVERY OBLIGATIONS**

Respondents Equitable Resources, Inc. ("Equitable"), Dominion Resources, Inc., Consolidated Natural Gas Company, and The Peoples Natural Gas Company ("Peoples") (collectively, "Respondents") hereby respond to Complaint Counsel's Motion to Stay Complaint Counsel's Discovery Obligations.

Through its motion, Complaint Counsel seeks a *one-sided* stay that would permit Complaint Counsel *not to respond* to the discovery requests that were served on it on April 20, 2007 (to which it did not object when its objections were due on May 4) or otherwise fulfill its discovery obligations, but would *require* Respondents *to respond* to Complaint Counsel's discovery requests and any other discovery requests it promulgates. It seeks such a one-sided stay having just a few days ago objected to Respondents' motion under Rule 3.26 to relieve the

litigation burden on both parties pending the Third Circuit's decision by removing the matter from adjudication with the specious argument that that motion was "premature." In other words, Complaint Counsel wants the litigation burden to continue on Respondents but not on itself while it awaits the Third Circuit's decision on the appeal of the district court's dismissal of the FTC's claims. Fundamental fairness requires that both sides be treated equally and that this matter either be removed from adjudication or stayed in its entirety.

By filing this motion, Complaint Counsel has made clear that which has been obvious since the District Court dismissed the FTC's complaint: the administrative litigation should not proceed while federal court appellate proceedings are ongoing. Indeed, in contrast to what Complaint Counsel is now telling the Commission, Complaint Counsel previously agreed that continued administrative adjudication of this matter pending appeal would be wasteful and burdensome.<sup>1</sup> That is especially true now that the district court has not once but twice held that state action immunity bars the FTC's claims as a matter of law and, in denying the FTC's motion for an injunction pending appeal, held that the FTC had not even demonstrated "a substantial issue on the merits of the state action immunity doctrine." *FTC v. Equitable Resources*, No. 07-cv-0490 (May 17, 2007) (Memorandum Opinion Denying Plaintiff FTC's Motion for an Injunction) at 9 (attached as Exhibit B). As Respondents urged in their motion to remove the matter from adjudication, continuing the administrative litigation in these circumstances would

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<sup>1</sup> On May 22, Complaint Counsel contacted Equitable's counsel and, in light of the impending burden on Complaint Counsel of discovery responses due on May 24, suggested that the parties agree to a mutual stay of discovery. Because a discovery stay alone would be unworkable with other critical scheduling dates fast approaching, Complaint Counsel and Respondents instead agreed to file a motion to stay the *entire* adjudicative proceedings pending the resolution of the FTC's Third Circuit appeal. Complaint Counsel prepared a draft joint motion and order to that effect, which Respondents authorized Complaint Counsel to sign on their behalf. (An email chain of this exchange is attached as Exhibit A.) On May 23, however, the Bureau of Competition decided instead to file the present motion for a one-sided stay rather than the mutual stay of the entire adjudication previously agreed.

be wasteful of all parties' resources, time, energy, and money. Complaint Counsel's solution, to avoid that burden for itself while imposing it on Respondents would be, simply put, utterly unfair and abusive.

Surprisingly, Complaint Counsel argues that "Respondents would gain an unfair advantage if Complaint Counsel unilaterally produces its discoverable materials." Mot. at 1. That argument, however, is misleading and disingenuous. The only thing that is unilateral about the discovery in this case is that Respondents have produced literally millions of pages of documents, hundreds of pages of interrogatory responses, and multiple witnesses for deposition to Complaint Counsel while Complaint Counsel has produced *nothing* in discovery, neither in the federal court proceeding nor here. Indeed, when Respondents asked Complaint Counsel to produce the materials the FTC had received from third parties in time to be used to defend against the FTC's preliminary injunction motion, Complaint Counsel refused. Meanwhile, in the limited third-party depositions that were taken in the federal court proceedings before the FTC's claims were dismissed, multiple witnesses testified that the declarations presented by the FTC in support of its preliminary injunction were prepared by the FTC, were at best based on hearsay rather than actual knowledge, and in some cases were inaccurate and not reviewed by the declarants before signing.

Complaint Counsel also only partially relates Respondents' objections to Complaint Counsel's discovery requests. On May 4, *i.e.*, well before the district court dismissed the FTC's claims on state action immunity grounds, Respondents objected to Complaint Counsel's discovery requests on the grounds that they were vague, overbroad, and cumulative and, in part, sought irrelevant information, particularly in light of the massive quantity of materials and information that Respondents already had provided in response to the FTC's

second request. Complaint Counsel has never sought to engage Respondents on those objections. Thus, although it is correct that the *res judicata* effect of the district court's dismissal eliminates any need for further discovery, that is only one of several reasons that Complaint Counsel's discovery requests are objectionable. In any event, if Complaint Counsel is dissatisfied with Respondent's responses, its remedy is to meet and confer and, if unable to resolve the issue, move to compel; its remedy is not to ignore its own discovery obligations or seek to avoid them through the artifice of a one-sided discovery stay.

By contrast, Complaint Counsel chose not to object to Respondents' discovery requests by the May 4 deadline, thereby waiving any objections that it might have. It is only now, on the eve of the deadline for Complaint Counsel to respond to the unobjected-to requests, that Complaint Counsel seeks avoid its discovery obligations by seeking special treatment for itself that it would deny Respondents.

### CONCLUSION

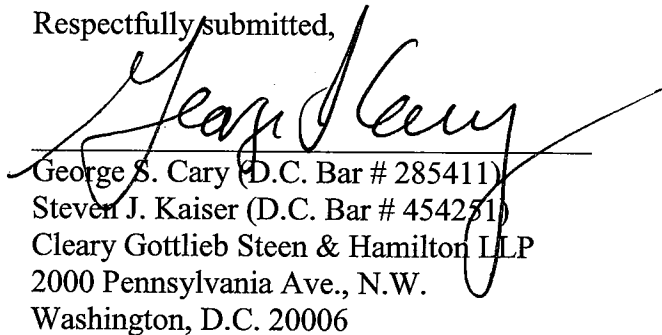
Respondents have urged Complaint Counsel, in the interests of fairness, justice, and efficiency, not to pursue administrative litigation while any federal court appeals process is pending. At a minimum, as Complaint Counsel itself recognized in agreeing to file a joint motion to stay, a complete stay of the administrative proceedings while the appeal is ongoing should be entered. Indeed, Complaint Counsel could have achieved the relief it seeks had it not objected to Respondents' motion to remove the matter from adjudication, or had it not backed out of its agreement to a stay. Now, Complaint Counsel asks for a one sided stay that would relieve it and it alone from discovery.

In the interests of fairness, justice, and efficiency, if not fundamental due process, Complaint Counsel's motion for a one-sided stay must be denied. Respondents' motion under

Rule 3.26 to remove the matter from adjudication should be granted, as the futility of proceeding with this litigation while any appeal is pending is now apparently clear to Complaint Counsel as it has been to Respondents. In the alternative, the parties' agreement to stay proceedings while the matter is on appeal should be enforced, and the draft proposed order that Complaint Counsel prepared to that effect (which is attached as Exhibit C) should be entered forthwith. In the meantime, there is no stay, and, per the Commission's April 24 order, Complaint Counsel must produce the materials and information requested in Respondents' discovery requests, to which it has not objected, and must do so without further delay.

Dated: May 24, 2007

Respectfully submitted,



George S. Cary (D.C. Bar # 285411)  
Steven J. Kaiser (D.C. Bar # 454251)  
Cleary Gottlieb Steen & Hamilton LLP  
2000 Pennsylvania Ave., N.W.  
Washington, D.C. 20006

*Counsel for Equitable Resources, Inc.*

Howard Feller (VA Bar # 18248)  
J. Brent Justus (VA Bar # 45525)  
MCGUIRE WOODS LLP  
One James Center  
901 East Cary Street  
Richmond, Virginia 23219-4030

*Counsel for Dominion Resources, Inc.,  
Consolidated Natural Gas Company, and  
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 24<sup>th</sup> day of May, 2007 as indicated below.

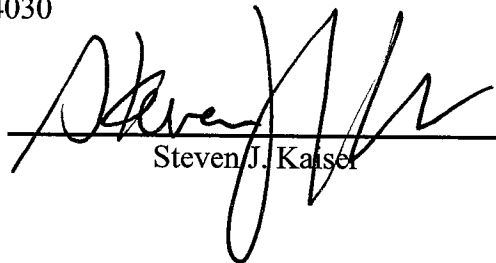
Complaint Counsel (by electronic mail and by first class mail, postage prepaid)

Patricia V. Galvan, Esq. (pgalvan@ftc.gov)  
Federal Trade Commission  
601 New Jersey Avenue, NW  
Washington, DC 20001

Thomas H. Brock, Esq. (tbrock@ftc.gov)  
Federal Trade Commission  
601 New Jersey Avenue, NW  
Washington, DC 20001

Counsel for Defendants Dominion Resources, Inc., Consolidated Natural Gas Company and The Peoples Natural Gas Company (by electronic mail and by first class mail, postage prepaid)

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

  
Steven J. Kaiser

**EXHIBIT A**



"Broyles, Phillip L."  
<PBROYLES@ftc.gov>  
22 May 2007 04:00 PM

To "Steven J Kaiser" <skaiser@cgsh.com>, "Justus,  
J. Brent" <bjustus@mcguirewoods.com>  
cc "Telpner, Brian" <BTELPNER@ftc.gov>, gcary@cgsh.com,  
"Feller, Howard" <hfeller@mcguirewoods.com>, "Galvan,  
Patricia V." <PGALVAN@ftc.gov>  
bcc

Subject RE: Equitable, D9322

Thank you both.

Phill Broyles  
Assistant Director  
Mergers III  
202-326-2805  
202-262-2180

-----Original Message-----

From: Steven J Kaiser [mailto:skaiser@cgsh.com]  
Sent: Tuesday, May 22, 2007 3:59 PM  
To: Justus, J. Brent  
Cc: Telpner, Brian; gcary@cgsh.com; Feller, Howard; Broyles, Phillip L.;  
Galvan, Patricia V.  
Subject: RE: Equitable, D9322

Yes, you are authorized to sign George's name (or mine) for Equitable.  
Thanks.

---

Steven J. Kaiser  
CLEARY GOTTLIEB STEEN & HAMILTON LLP  
2000 Pennsylvania Avenue, NW, Washington, D.C. 20006  
Direct: 202.974.1554 | Gen: 202.974.1500 | Fax: 202.974.1999  
skaiser@cgsh.com | <http://www.clearygottlieb.com>

"Justus, J. Brent" <bjustus@mcguirewoods.com>

22 May 2007 03:58 PM To  
"Broyles, Phillip L." <PBROYLES@ftc.gov>, "Steven J Kaiser"  
<skaiser@cgsh.com>, "Telpner, Brian" <BTELPNER@ftc.gov>  
cc  
gcary@cgsh.com, "Galvan, Patricia V." <PGALVAN@ftc.gov>, "Feller,  
Howard" <hfeller@mcguirewoods.com>  
Subject  
RE: Equitable, D9322

You can sign for Howard.

Brent

-----Original Message-----

From: Broyles, Phillip L. [mailto:PBROYLES@ftc.gov]  
Sent: Tuesday, May 22, 2007 3:57 PM  
To: Steven J Kaiser; Telpner, Brian  
Cc: gcary@cgsh.com; Galvan, Patricia V.; Justus, J. Brent  
Subject: RE: Equitable, D9322

I assume, then, that we can sign for you?

Phill Broyles  
Assistant Director  
Mergers III  
202-326-2805  
202-262-2180

-----Original Message-----

From: Steven J Kaiser [mailto:skaiser@cgsh.com]  
Sent: Tuesday, May 22, 2007 3:54 PM  
To: Telpner, Brian  
Cc: gcary@cgsh.com; Broyles, Phillip L.; Galvan, Patricia V.;  
bjustus@mcguirewoods.com  
Subject: Re: Equitable, D9322

Respondents are fine with these papers and you can go ahead and file them. Thanks.

---

Steven J. Kaiser  
CLEARY GOTTLIEB STEEN & HAMILTON LLP  
2000 Pennsylvania Avenue, NW, Washington, D.C. 20006  
Direct: 202.974.1554 | Gen: 202.974.1500 | Fax: 202.974.1999  
skaiser@cgsh.com | <http://www.clearygottlieb.com>

"Telpner, Brian" <BTELPNER@ftc.gov>

22 May 2007 03:23 PM To  
gcary@cgsh.com, skaiser@cgsh.com  
cc  
"Broyles, Phillip L." <PBROYLES@ftc.gov>, "Galvan, Patricia V."  
<PGALVAN@ftc.gov>  
Subject  
Equitable, D9322

George and Steve:

As Phill discussed, attached are drafts of our proposed joint motion to

stay and the proposed order. Please let me know if you have any questions.

Regards,

Brian Telpner  
Bureau of Competition  
Federal Trade Commission  
601 New Jersey Ave. NW  
Washington, DC 20001  
tel. (202) 326-2782  
fax (202) 326-3383[attachment "05.22.07 Draft Joint Mtn to Stay.wpd"  
deleted by Steven J Kaiser/DC/Cgsh] [attachment "05.22.07 Draft Joint  
Proposed Order.wpd" deleted by Steven J Kaiser/DC/Cgsh]

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administrative litigation. On May 14, 2007, the district court dismissed the complaint on state action grounds. On May 16, 2007, the Commission filed notice of appeal of the district court's ruling. The Third Circuit has captioned the case *FTC v. Equitable Resources, Inc.*, Docket No. 07-2499 (3d Cir., docketed May 18, 2007).

In light of the significant legal questions pending appellate review, Complaint Counsel and Respondents submit that continuing the administrative litigation may prove unnecessarily burdensome to the parties and the Commission. The Third Circuit's ruling will address the application of state action defense, the briefing of which the Commission has already stayed in this proceeding. The requested stay would alleviate the need for the Commission to manage discovery and would free the parties from devoting time and resources to discovery obligations while the appeal is pending. In addition, a stay would create a further opportunity for Respondents to engage Complaint Counsel and the Commission on the merits of the underlying transaction and the public interest in this litigation.

Accordingly, Complaint Counsel and Respondents respectfully request that the Commission stay this administrative proceeding until the appellate court completes its review of the district court's order. In light of the limited time before discovery obligations arise under the Commission's Revised Joint Case Management Statement of April 24, 2007, the parties request that the Commission promptly grant this motion.

Respectfully submitted,

---

Patricia V. Galvan, Esq.

Federal Trade Commission  
601 New Jersey Avenue, NW  
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[Pgalkan@ftc.gov](mailto:Pgalkan@ftc.gov)  
(202) 326-2473

Complaint Counsel

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(202) 974-1500

Counsel for Respondent Equitable  
Resources, Inc.

---

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[Hfeller@mcguirewoods.com](mailto:Hfeller@mcguirewoods.com)  
(804) 775-4393

Counsel For Respondents Dominion  
Resources, Inc., Consolidated Natural Gas  
Company, and The Peoples Natural Gas  
Company

DATED: May \_\_, 2007

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

**COMMISSIONERS:**     **Deborah Platt Majoras, Chairman**  
                          **Pamela Jones Harbour**  
                          **Jon Leibowitz**  
                          **William E. Kovacic**  
                          **J. Thomas Rosch**

In the Matter of	)	
	)	
EQUITABLE RESOURCES, INC.,	)	
	)	
DOMINION RESOURCES, INC.,	)	Docket No. 9322
	)	
CONSOLIDATED NATURAL GAS COMPANY,	)	[DRAFT - FOR COUNSEL
	)	REVIEW ONLY]
and	)	
	)	
THE PEOPLES NATURAL GAS COMPANY,	)	
	)	
Respondents.	)	
	)	

**[PROPOSED] ORDER STAYING ADMINISTRATIVE PROCEEDING**

This matter came before the Commission on a Joint Motion to Stay Administrative Proceeding. Having considered the motion, it is hereby

ORDERED, that Joint Motion to Stay Administrative Proceeding dated May 22, 2007, is hereby granted,

IT IS FURTHER ORDERED, that the above-captioned administrative proceeding is stayed pending resolution of the Commission's appeal to the U.S. Court of Appeals for the Third Circuit of the federal district court's dismissal of the Commission's request for preliminary injunctive relief.

By the Commission.

ISSUED: \_\_\_\_\_

\_\_\_\_\_  
Donald S. Clark  
Secretary

## **EXHIBIT B**

