

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

<b>FEDERAL TRADE COMMISSION,</b>	)	
	)	
<b>Plaintiff-Appellant,</b>	)	
	)	
<b>v.</b>	)	<b>No. 07-2499</b>
	)	
<b>EQUITABLE RESOURCES, INC.,</b>	)	<b>Appeal from the United States</b>
<b>DOMINION RESOURCES, INC.,</b>	)	<b>District Court for the Western</b>
<b>CONSOLIDATED NATURAL GAS</b>	)	<b>District of Pennsylvania,</b>
<b>COMPANY, and THE PEOPLES</b>	)	<b>No. 07-cv-00490-AJS</b>
<b>NATURAL GAS COMPANY,</b>	)	
	)	
<b>Defendants-Appellees.</b>	)	

**EMERGENCY MOTION OF THE FEDERAL TRADE COMMISSION  
FOR AN INJUNCTION PENDING APPEAL**

Plaintiff-appellant Federal Trade Commission (“FTC”) seeks emergency relief, pursuant to Fed. R. App. P. 8(a), and 3d Cir. LAR 8.1 and 27.7, to enjoin pending appeal the acquisition by Equitable Resources, Inc. (“Equitable”) of The Peoples Natural Gas Company (“Dominion Peoples”) from Dominion Resources, Inc. (“Dominion”). Although the FTC has sought an injunction pending appeal in the district court, that court has not yet ruled on the motion.<sup>1</sup> In the absence of temporary injunctive relief, however, the parties would be free to consummate the transaction *on Monday, May 21*. An order freezing the status quo is urgently needed.

If the parties are allowed to consummate the proposed acquisition, it will entirely eliminate a form of competition that has brought great benefit to western Pennsylvania businesses, institutions, and consumers. It will then be more difficult, if not impossible, for this Court, the district court, or the FTC to implement effective relief. Absent such relief, consumers will lose discounts and other price incentives, will face higher prices, and will lose choices. That is, they will lose the core benefits of a competitive market.

The FTC is likely to prevail on the merits of this appeal because the district court improperly applied the state action defense and dismissed the FTC’s complaint. (The court’s opinion (“Opin.”) is attached hereto as Attachment 1.) Instead of

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<sup>1</sup> The FTC is lodging this emergency motion at this time to provide this Court with as much advance notice as possible, as required by 3d Cir. LAR 27.7. The FTC understands that this motion will be considered as filed as soon as the district court rules on the motion currently before it.

identifying any state policy to displace competition with regulation with respect to acquisitions such as the one challenged by the FTC, the court merely relied on what it believed to be a pervasive regulatory scheme. It ignored Pennsylvania law that prohibits anticompetitive acquisitions in this industry, and it misunderstood the balance between state and federal interests that the Supreme Court has struck in its state action rulings. Only by granting an injunction pending appeal can this Court assure that there is meaningful review of these serious legal errors.

### **BACKGROUND**

On March 31, 2006, Equitable and Dominion sought approval from Pennsylvania's Public Utility Commission ("PUC") for Equitable to acquire Dominion Peoples. PUC Opin. at 2. (The PUC's opinion is attached hereto as Attachment 2.) Equitable distributes natural gas through pipelines directly to residential, commercial, and industrial customers in ten counties in western Pennsylvania. PUC Initial Decision ("ID") at 9. (The ID is attached hereto as Attachment 3.) Dominion Peoples also distributes natural gas to customers in western Pennsylvania. ID at 9. Their service areas overlap so that in some areas, both companies have pipelines, and customers may choose between the two companies for gas distribution service. ID at 58. As recognized by defendants, this "gas-on-gas" distribution competition affects approximately "500 geographically advantaged

customers who are uniquely positioned to leverage discounts.” D.5 at 1. These are large commercial, industrial, and institutional customers who purchase more than 27 billion cubic feet of natural gas per year and at a cost of approximately \$13,000,000. Equitable and Dominion Peoples compete for these major customers by offering discounts from the maximum rates authorized by the PUC. *See* ID at 36. As a result of this competition, those customers are currently able to obtain better deals for natural gas distribution service. Such customers include schools, hospitals, churches, and other organizations that provide a variety of services to thousands of people in western Pennsylvania.<sup>2</sup>

Pursuant to Pennsylvania law, public utilities may not consummate the sort of acquisition proposed by Equitable and Dominion unless they first obtain a certificate of public convenience from the PUC. 66 Pa. Cons. Stat. § 1102(a)(3). The PUC will grant a certificate only if it determines that the acquisition “is necessary or proper for the service, accommodation, convenience, or safety of the public.” 66 Pa. Cons. Stat. § 1103. Pennsylvania law specifically prohibits the PUC from granting approval, however, if the acquisition is “likely to result in anticompetitive or discriminatory conduct, including the unlawful exercise of market power \* \* \*.” 66 Pa. Cons. Stat.

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<sup>2</sup> Among those who have been are able to take advantage of the competition between Equitable and Peoples, but who face the possible loss of those discounts if the acquisition is consummated, are Mercy Hospital, Duquesne University, Forbes Nursing Center, and the Animal Rescue League of Western Pennsylvania.

§ 2210(b).

During the proceedings before the PUC, a wide variety of parties intervened or filed objections to the acquisition, including customers adversely affected by the acquisition. ID at 1-2. On December 1, 2006, Equitable and Dominion filed a settlement agreement reached with some, but not all, of the intervenors. A PUC administrative law judge (“ALJ”) held hearings, and on February 5, 2007, he issued an initial decision approving the acquisition. On April 13, 2007, the PUC affirmed the ALJ’s initial decision with a few minor modifications.

The FTC conducted its own investigation into the economic impact of the proposed acquisition. That investigation showed that, among other things, Equitable projected it would reap more than \$160 million in incremental revenue by eliminating discounts and raising prices charged to customers that currently benefit from competition between the two companies. The FTC’s investigation also showed that defendants’ customers are already feeling these anticompetitive effects because the defendants -- in anticipation of the acquisition -- have already begun to pull back on competing with each other.

In light of this and other evidence, the FTC found reason to believe that the proposed acquisition would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45, and, on March 14, 2007, issued an administrative complaint challenging the

acquisition.<sup>3</sup> On April 13, the FTC filed its complaint in this case, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b).<sup>4</sup> The complaint seeks a preliminary injunction to prevent Equitable and Dominion from consummating the acquisition pending the resolution of the FTC's administrative proceeding. D.1. Equitable and Dominion filed a motion to dismiss before the district court, arguing that the state action doctrine renders Equitable's acquisition of Dominion Peoples exempt from the federal antitrust laws. D.18. The PUC filed an *amicus* brief in support of the motion to dismiss. D.24. The FTC filed its opposition to the motion to dismiss on April 27, D.44, and the Commonwealth of Pennsylvania filed a brief as *amicus curiae* in support of the FTC. D.39 (the Commonwealth's brief is attached hereto as Attachment 4).

On May 14, 2007, the district court (per Judge Schwab) granted the motion to

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<sup>3</sup> Defendants asserted various affirmative defenses in the FTC action, including the contention that the acquisition is exempt from federal antitrust review pursuant to the state action doctrine. The FTC's complaint counsel moved to strike the state action defense, arguing that Pennsylvania had not clearly articulated a policy to permit Equitable and Dominion to effectuate an anticompetitive acquisition, and that Pennsylvania would not actively supervise Equitable's postmerger anticompetitive conduct. On April 16, 2007, the FTC stayed all further briefing on this issue, pending resolution of defendants' motion to dismiss in this case.

<sup>4</sup> Section 13(b) provides that the FTC is entitled to a preliminary injunction "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."

dismiss. The court first recognized that, for defendants' state action defense to prevail, they must show that both parts of the test set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), are satisfied. Opin. at 12. With respect to the first part of the test, clear articulation by the state of a policy to displace competition with regulation, the court held that the standard had been met because, in connection with the approval of acquisitions, Pennsylvania had enacted a "comprehensive and pervasive governmental regulatory scheme." Opin. at 13.

Next, the court concluded that the second part of the *Midcal* test, active supervision, was also satisfied because, after the acquisition, the defendants would be required to report to the PUC regarding a list of specific matters such as its accounting methodology, its supply contracts, and its data interface system. Opin. at 17-18. Accordingly, the court held that the state action doctrine applied, and it dismissed the FTC's complaint.

## ARGUMENT

### **I. APPLICATION OF THE STANDARD FOR AN INJUNCTION PENDING APPEAL WARRANTS THE GRANT OF THIS INTERIM RELIEF**

In determining whether to issue an injunction pending appeal, this Court considers four factors: (1) whether the movant is likely to succeed on the merits of its appeal; (2) whether the movant will be irreparably injured without such an

injunction; (3) whether other parties interested in the proceedings will be substantially harmed by an injunction; and (4) where the public interest lies. *Republic of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 658 (3d Cir. 1991) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). These factors are to be balanced against each other. Where -- as is the case here -- the latter three factors strongly favor interim relief, an injunction pending appeal is properly granted, notwithstanding that the likelihood of success on the merits may be “difficult to predict.” *Prometheus Radio Project v. FCC*, No. 03-3388, 2003 WL 22052896 (3d Cir. Sept. 3, 2003); *see Hilton*, 481 U.S. at 778 (first factor satisfied by showing of “substantial case on the merits” if other factors favor interim relief).

Judged by these standards, the requested injunction should be granted.

## **II. THE FTC IS LIKELY TO SUCCEED ON THE MERITS**

### **A. The State Action Doctrine**

The Supreme Court first articulated the state action doctrine in *Parker v. Brown*, 317 U.S. 341 (1943), where the Court upheld California’s Agricultural Prorate Act against a Sherman Act challenge. The Court determined that federal statutes do not limit the sovereign states’ autonomous authority over their own officers, agents, and policies, in the absence of clear congressional intent to do so, and it found no such intent in the language or legislative history of the Sherman Act.

*Id.* at 350-51. Accordingly, the Court held that, when a “state in adopting and enforcing [a] program \* \* \*, as sovereign, imposed the restraint [on competition] as an act of government,” the Sherman Act does not prohibit the restraint. *Id.* at 352.

Although *Parker* involved acts of the state itself, the Supreme Court subsequently confirmed that the state action doctrine also protects certain private conduct from the federal antitrust laws. The Court has articulated a two-part test for determining whether anticompetitive conduct of private entities qualifies as “state action”: (1) the challenged conduct must be undertaken pursuant to a “clearly articulated and affirmatively expressed” state policy to displace competition; and (2) the conduct must be “actively supervised” by the state itself. *Midcal*, 445 U.S. at 105 (internal quotation marks omitted). Because the state action doctrine provides exemption from the antitrust laws, it is disfavored, *Ticor*, 504 U.S. at 636; and because the state action doctrine is an affirmative defense, the burden of proof is on the defendants to show that this standard has been met, *Yeager’s Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1266 (3d Cir. 1994).

**B. The FTC is likely to show that the district court incorrectly held the merger exempt from antitrust scrutiny**

The district court incorrectly granted defendants’ motion to dismiss because it misunderstood the state action doctrine, ignored relevant state law, and improperly conflated the state action doctrine with the merits of the underlying case (*i.e.*, whether

the acquisition is anticompetitive).

**1. The district court erred in holding that Pennsylvania has a clearly articulated policy to displace competition**

a. The court’s most fundamental error, an error that infects every part of its decision, was to equate an ostensibly “comprehensive” state regulatory scheme (*see* Opin. at 13) with a state policy to displace the type of competition that is at issue here, *i.e.*, competition among natural gas companies that already compete to provide gas distribution services to consumers who have enjoyed the benefits of such competition. The court repeatedly referred to the “pervasive” nature of Pennsylvania’s regulation of utilities, as if that were a talisman authorizing any and all anticompetitive effects. *See, e.g.*, Opin. at 4-5 (PUC regulates across a “broad spectrum of activities”); at 7 (“detailed and comprehensive statutory scheme”); at 9, 13 (“pervasive”); at 10 (“thorough and substantive”); at 14 (“*many* statutory factors” (emphasis in original)).

The district court’s approach is directly at odds with the teachings of the Supreme Court and this Court. In *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), an electric utility asserted state action in defense of a marketing program whereby it distributed light bulbs to its customers. The Michigan Public Service Commission “pervasively” regulated the distribution of electricity, and had also approved the light bulb distribution program. *Id.* at 581. Nonetheless, the Court rejected the state action

defense because there was no clear repugnancy between the distribution program and federal antitrust laws. *Id.* at 598. “[A]ll economic regulation does not necessarily suppress competition.” *Id.* at 595.

In *Yeager’s Fuel*, this Court held that Pennsylvania Power & Light’s practice of offering incentives to builders who installed high efficiency electric heating in newly constructed homes was exempt from antitrust challenge pursuant to the state action defense. This Court did not base that conclusion, however, on a generalized assessment of the extent of state regulation, but on its specific recognition that a state statute permitting utilities to offer rebates to promote energy conservation “could easily be foreseen to provide one company with a competitive advantage over another \* \* \*.” 22 F.3d at 1268. That is, because Pennsylvania statute urged PP&L to offer rebates, that statute satisfied the first part of the *Midcal* test with respect to a challenge directed to the consequences of that rebate program.

To the extent that the district court focused on the specifics of the statutory scheme at all, it erroneously relied on provisions that arguably contemplate *some* loss of competition, but have nothing to do with the rivalry lost here. The court pointed to the fact that the “public interest” analysis that the PUC must undertake includes considerations such as the protection of labor interests, the assurance of service reliability, and the provision of service to low-income households. *Opin.* at 14. Such requirements may have some impact on the vigor of competition, in that they impose

constraints on the ability of utilities to pare costs. But so do many general purpose laws, such as minimum wage laws and environmental controls. In our economic system, rivals are still expected to compete, within such cost constraints, unless there is a clearly articulated policy displacing the type of competition at issue.

Thus, a state can “displace competition,” *see* Opin. at 13, not simply by adding a layer of regulatory requirements with which competitors must also abide, but by authorizing conduct that is *inconsistent* with competition. But the district court points to nothing in Pennsylvania law supporting its contention that, in connection with this acquisition, the General Assembly had, in fact, “replaced free market competition with regulation.” *See* Opin. at 13-14. Instead, the court makes a stunning concession: “on some theoretical level,” the court observed, “the public interest review of proposed utility mergers that the legislature has entrusted to the PUC is not in conflict with the policy of the federal antitrust laws.” *See* Opin. at 15. Having made this concession, the court should have rejected the state action defense, and denied the motion to dismiss because, if the PUC’s review of the acquisition “is not in conflict with the policy of the federal antitrust laws,” then Pennsylvania cannot possibly have articulated a clear policy to displace competition. *See Cantor*, 428 U.S. at 596 (no state action exemption where there is no “necessary conflict” between the state laws and the antitrust laws). In light of the court’s concession, its decision to grant the

motion to dismiss constitutes a clear error of law.<sup>5</sup>

b. Had the court below properly focused on whether Pennsylvania law actually expresses a policy to displace the sort of competition that will be lost if this acquisition goes forward, it would have found that no such policy exists. On the contrary, the general requirement of a showing of public convenience and necessity for mergers, set forth at 66 Pa. Cons. Stat. § 1102, is independent of, and fully consistent with, subjecting acquisitions to the separate screen of the antitrust laws.

Another provision of Pennsylvania law, a provision that the district court conspicuously ignored, shows conclusively that Pennsylvania has no policy to displace the competition that is lost when competitors merge. In particular, although the court recognized that 66 Pa. Cons. Stat. § 2210(a)(1) requires the PUC to consider whether an acquisition will have an anticompetitive effect, Opin. at 6, 13, 14, it ignored the true impact of § 2210(b). According to the court, that section “grants the PUC authority to reject any acquisition, transfer of assets, or merger upon a finding of discriminatory or anti-competitive effects.” Opin. at 7. In fact, however, that section does not just authorize the PUC to reject an anticompetitive acquisition, it

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<sup>5</sup> The Attorney General of Pennsylvania, in his *amicus* brief submitted below in opposition to the motion to dismiss, similarly concluded that “state policy, as expressed in [the state statutes], is in harmony with the goals of the federal antitrust laws.” Brief of *Amicus Curiae* Commonwealth of Pennsylvania, filed Apr. 26, 2007, at 2.

requires a rejection:

If the [PUC] finds, after hearing, that a proposed merger, consolidation, acquisition or disposition is likely to result in anticompetitive or discriminatory conduct, including the unlawful exercise of market power, which will prevent retail gas customers from obtaining benefits of a properly functioning and effectively competitive retail natural gas market, the [PUC] *shall not approve such proposed merger, consolidation, acquisition or disposition* except upon such terms and conditions as it finds necessary to preserve the benefits of a properly functioning and effectively competitive retail natural gas market.

§ 2210(b) (emphasis added). Because Pennsylvania requires the PUC to reject an anticompetitive acquisition (unless the acquisition is modified in some way to protect competition), Pennsylvania has acted to preserve, not displace, competition when the PUC reviews acquisitions. The district court's failure to understand the significance of, or even address, § 2210(b) completely undermines its contention that Pennsylvania "has articulated and affirmatively expressed a state policy to displace competition with pervasive regulation." *See* Opin. at 13.

c. The FTC's contention that, with respect to this acquisition, Pennsylvania has no clearly articulated policy to displace competition does not, as the district court incorrectly supposed, attack the correctness of the PUC's determinations under state law -- a matter that might appropriately be addressed by reviewing state courts. Opin. at 15-16. Rather, once again, the court's focus on such state procedures reflects its misunderstanding of the careful balance between state and federal interests that the

Supreme Court has struck in its state action rulings.<sup>6</sup> If it is clear that there is a state policy that displaces competition with respect to a particular issue, then application of that policy to particular facts is indeed a matter of state law. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 372 (1991). But a court evaluating a state action defense must *first* address the antecedent issue -- whether such a state policy exists, under *federal* standards of “clear articulation.” The district court skipped that crucial first step.

If the district court’s preferred approach -- restricting any issue touching on state law interpretation to state forums -- were adopted, the essential question under the state action doctrine might well not be resolved at all. The court below ignored the fact that the question presented in state court review proceedings is fundamentally different from that undertaken by an antitrust court applying the state action doctrine. The state court reviewing a state administrative action such as the one at issue here is concerned only with the ultimate propriety of that action under state law, in light

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<sup>6</sup> Footnote 5 of the court’s opinion makes its error of law particularly apparent. *See* Opin. at 15 n.5. The court mistakenly believed that the FTC had argued that the application of part one of the *Midcal* test depends upon whether a specific transaction has an anticompetitive impact. But the FTC argued nothing of the sort. Clear articulation depends upon the acts of the legislature. If Pennsylvania had a clearly articulated policy to displace competition with respect to acquisitions of public utilities (instead of its actual policy, which prohibits anticompetitive acquisitions), then (assuming part two of the *Midcal* test was also met) the acquisition would be exempt from antitrust scrutiny regardless of whether the acquisition has any anticompetitive impact.

of whatever standard of review is prescribed. This will often include deference to the administrative body's interpretation of state law.<sup>7</sup> Such analysis is appropriate as a matter of administrative law, but would entirely miss the pivotal inquiries under the federal antitrust state action doctrine -- *i.e.*, that the policy in question be "clearly expressed" by the state itself.

**2. The district court erred in holding that Pennsylvania would actively supervise the acquisition**

The district court also erred with respect to its analysis of the second part of the *Midcal* test. To pass this second part of the test, state supervision must be sufficient to ensure that a private party's anticompetitive action is shielded from antitrust liability only when "the State effectively has made [the challenged] conduct its own." *Patrick v. Bourget*, 486 U.S. 94, 106 (1988). In particular, this part of the test is met only if Pennsylvania has the ability to, and actually will, supervise the conduct that may lead to consumer harm. *See, e.g., A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F.3d 239, 262 (3d Cir. 2001) (state oversight of tobacco settlement agreement insufficient to provide state action exemption "because the States' supervision does not reach the parts of the [agreement] *that are the source of the*

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<sup>7</sup> Indeed, the court below repeatedly lapsed into such deference -- wholly inappropriate in light of the issue before it -- by focusing on the public interest determination of the PUC, rather than the policy choices of the Pennsylvania legislature. *See, e.g.,* Opin. at 9, 15.

*antitrust injury*” (emphasis added)).

In this case, the FTC alleged that the acquisition would result in antitrust injury through the elimination of customer discounts and incentives to builders and developers, and through a decline in the quality of customer service. D.1. In its opinion, the district court concluded that “[i]t is obvious that the PUC is taking an active, hands-on approach to monitoring the transaction on an ongoing basis going forward.” Opin. at 18. But the “monitoring” that the court identified consists solely of requirements that Equitable file reports regarding a litany of specific aspects of its “operational practices,” such as “modifications to its data interface system,” or “funding for community organizations.” See Opin. at 17-18. The court identifies nothing indicating that the PUC will monitor the elimination of discounts and other favorable contractual terms currently driven by competition, or any postmerger degradation in the quality of service offered to customers who currently reap the benefits of competition. Thus, because the court did not find that the PUC would monitor the potentially anticompetitive aspects of the acquisition, it erred when it concluded that the second part of the *Midcal* test had been met.

Because the court incorrectly concluded that both parts of the *Midcal* test had been satisfied, the FTC is likely to succeed on the merits of its appeal.

### **III. THE FTC WILL BE IRREPARABLY HARMED SHOULD A STAY PENDING APPEAL BE DENIED**

If this injunction is denied, the defendants will be free to consummate the acquisition on May 21, 2007.<sup>8</sup> The FTC, and the public,<sup>9</sup> would then be irreparably deprived of the principal relief Congress envisioned by enacting the premerger notification law, 15 U.S.C. § 18a, and Section 13(b) of the FTC Act -- *i.e.*, a preliminary injunction that allows the adjudication of the merits *before* the parties are allowed to “scramble the eggs” by completing the challenged transaction. Following consummation, it will be difficult for this Court subsequently to provide effective relief if the FTC prevails. This Court could reinstate the FTC’s preliminary injunction action -- but it is not clear what relief would be available in that proceeding if the acquisition has already been consummated. The FTC may also be effectively foreclosed from obtaining adequate relief if the transaction is ultimately found to be illegal in the FTC’s administrative proceeding. This is so because divestiture would be the only possible relief, yet it has historically proven difficult in certain circumstances to determine how to split an ongoing operation into two viable

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<sup>8</sup> During the district court proceedings, defendants undertook a commitment not to consummate the transaction without providing the FTC with three business days’ notice prior to doing so. On May 16, upon being informed that the FTC intended to file a motion for injunction pending appeal, defendants’ counsel provided such notice.

<sup>9</sup> The FTC acts in furtherance of the public interest. 15 U.S.C. § 45(b).

commercial entities when attempting to construct and enforce a divestiture order after the fact. *See, e.g., FTC v. P.G. Indus., Inc.*, 798 F.2d 1500, 1508-09 (D.C. Cir. 1986); *FTC v. Warner Communications Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984). The inherent potential deficiency of post-merger divestiture orders is the very reason Congress gave the FTC authority to seek pre-consummation injunctive relief in cases such as this. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001). Moreover, the effectiveness of post-acquisition divestiture would depend on whether an alternative buyer could be found that would satisfy both the PUC and the FTC (*i.e.*, one that not only will be in a position to restore the competition eliminated by the transaction but also will not raise competitive problems of its own), which at this point is very much an open question.

#### **IV. DEFENDANTS WILL NOT BE IRREPARABLY HARMED BY THE ENTRY OF AN INJUNCTION PENDING APPEAL**

Defendants would not be irreparably harmed by any delay caused by an injunction. If the injunction is granted, the FTC would agree to reasonable expedition of the appeal before this Court. Accordingly, any incremental delay occasioned by the grant of injunctive relief will cause little, if any, harm. The small impact this delay would have on defendants' plans is far outweighed by the substantial public interest in maintaining free, open, and competitive markets. "Whatever inconvenience the delay in consummating the proposed acquisitions may cause the

defendants, the public interest in preserving a free-competitive economy cannot be outweighed by any private interest.” *United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530, 543 (W.D. Pa. 1963); *see also Heinz*, 246 F.3d at 726 (court rejected defendants’ claim of irreparable harm, observing that “[i]f the merger makes economic sense now, the [defendants] have offered no reason why it would not do so later”).

#### **V. AN INJUNCTION PENDING APPEAL IS IN THE PUBLIC INTEREST**

Denial of an injunction pending appeal would undermine the strong public interest in effective enforcement of the antitrust laws by denying the public the benefit of full and complete relief should the FTC ultimately prevail. Moreover, as the FTC has alleged in its complaints in this case and in the administrative proceeding, substantial harm to competition will likely occur during the pendency of this appeal, the administrative proceeding, and any subsequent appeals. *See* D.48 at 11-14. As the FTC has alleged, as a direct result of the elimination of competition with Dominion Peoples, Equitable intends to raise prices following the acquisition.

## CONCLUSION

For the reasons stated above, the FTC requests that the Court grant an injunction pending an appeal of the district court's order granting defendants' motion to dismiss.

Respectfully submitted,

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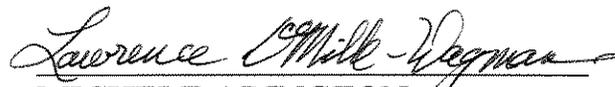
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Dated: May 18, 2007

## CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2007, I served a copy of the foregoing papers by electronic mail and first class mail to the following:

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