ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of,	
EQUITABLE RESOURCES, INC., a corporation,	
DOMINION RESOURCES, INC., a corporation,	**Docket No. 9322**
CONSOLIDATED NATURAL GAS COMPANY, a corporation,	**PUBLIC**
and	
THE PEOPLES NATURAL GAS COMPANY, a corporation.	

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.[1] 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

[1] 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 24th day of May, 2007 as indicated below.

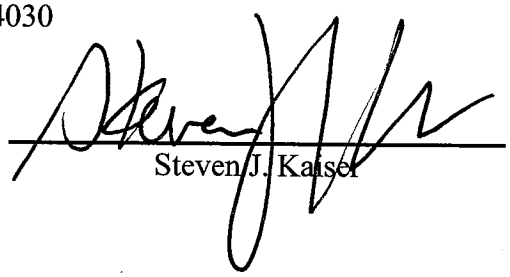
Complaint Counsel (by electronic mail and by first class mail, postage prepaid)

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
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Direct: 202.974.1554 | Gen: 202.974.1500 | Fax: 202.974.1999
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"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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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,	)	**PUBLIC**
and	)	**[DRAFT – FOR COUNSEL REVIEW ONLY]**
THE PEOPLES NATURAL GAS COMPANY,	)	
Respondents.	)	

JOINT MOTION TO STAY ADMINISTRATIVE PROCEEDING

Complaint Counsel and the Respondents jointly move to stay the above-captioned administrative proceeding, 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.

On April 13, 2007, the Commission filed a complaint in federal district court under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), seeking to enjoin Equitable Resources, Inc. from acquiring The Peoples Natural Gas Company from Dominion Resources, Inc. and Consolidated Natural Gas Company, pending the outcome of this

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.

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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., CONSOLIDATED NATURAL GAS COMPANY, and THE PEOPLES NATURAL GAS COMPANY, Respondents.	Docket No. 9322 [DRAFT - FOR COUNSEL REVIEW ONLY]

[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

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

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

07cv0490
ELECTRONICALLY FILED

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

Defendants.

MEMORANDUM OPINION DENYING PLAINTIFF FTC'S MOTION FOR AN INJUNCTION (DOC. NO. 73)

Introduction and background.

This Court held, on May 14, 2007, that to grant the FTC's motion for a preliminary injunction (doc. no. 3) "would cause public harm and harm to many other interested parties by substantially delaying, and for all practical purposes barring the implementation of the PUC's determination that the transaction is in the public interest." Memorandum Opinion (doc. no. 70), at 4. Said proposed injunction would have interfered with and abrogated the statutory duty of the PUC to protect the interest of the public in Pennsylvania. Id.

The FTC now comes before the Court seeking an injunction pending appeal pursuant to Fed.R.Civ.P. 62(c), which places it in the position of requesting the very relief, pending appeal, that this Court has just decided it is not entitled to receive. Although Rule 62(c) recognizes that such apparently anomalous relief may sometimes be appropriate, the party seeking such relief is, not surprisingly, deemed to bear a very heavy burden of persuasion. See Fullmer v. Michigan Dep't. of State Police, 207 F.Supp.2d 663, 664 (E.D. Mich. 2002) (because Rule 62(c) factors for

equitable relief pending appeal are same factors the court considers in deciding whether to grant a preliminary injunction, an applicant seeking a stay will have more difficulty establishing the first factor, likelihood of success on the merits, due to the difference in procedural posture; a party seeking such relief must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal, not merely the possibility of success on the merits); United States v. Texas, 523 F.Supp. 703, 723 (D.C.Tex.1981) (since stay of decisions granting equitable relief pending appeal interrupts ordinary process of judicial review and postpones relief for prevailing party, stay of equitable order is extraordinary device that should be sparingly granted); Wright Miller and Kane, 11 Fed. Prac. & Proc. Civ.2d § 2904 (burden of meeting the Rule 62(c) standard for stays and injunctions pending appeal is a heavy one). The FTC has not met this heavy burden in this case.

On May 14, 2007, this Court issued a Memorandum Opinion and an Order of Court (docs. no. 70, 71) dismissing Plaintiff FTC's complaint in equity and its motion for preliminary injunction on the basis of the state action immunity doctrine, holding as follows:

> This Court grants the Motion to Dismiss (doc no. 18) because the PUC's approval of the transaction qualifies for state action immunity. See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Parker v. Brown, 317 U.S. 341 (1943). Further, the granting of the requested preliminary injunction would cause public harm by substantially delaying, and for all practical purposes barring, the implementation of the PUC's determination (PUC Opinion and Order, dated April 13, 2007) that the transaction is in the public interest. Said proposed injunction thus would interfere and abrogate the statutory duty of the PUC to protect the interest of the public in Pennsylvania.

Memorandum Opinion (doc. no. 71), at 4.

Pending before the Court is the Motion of the Federal Trade Commission for an Injunction Pending Appeal Pursuant to Fed.R.Civ.P. 62(c) or, in the Alternative, an Injunction Pending Resolution by the Court of Appeals of an Emergency Motion for an Injunction (doc. no. 73). Defendants, Equitable Resources, Inc, Dominion Resources, Inc., Consolidated Natural Gas Company, and the Peoples Natural Gas Company, have filed a response in opposition to the requested injunctive relief pending appeal (doc. no. 75). For the reasons to follow, the Court will deny the FTC's motion for an injunction pending appeal.

The Court will not recount the factual background at length, as the United States Court of Appeals for the Third Circuit will have this Court's full analysis and recitation before it in due course.[1] To summarize, the FTC sought preliminary injunctive relief to halt an intra-state merger-acquisition between public utilities who supply gas to residential and commercial customers in Pennsylvania, Peoples Natural Gas Company ("Peoples Gas") by defendant Equitable Resources Inc. ("Equitable Gas"). The proposed merger-acquisition had recently been approved by the Pennsylvania PUC, after substantial and extensive documentation, hearings, and fact findings by Administrative Law Judge John H. Corbett, Jr. (the "ALJ") and by the PUC's subsequent Opinion and Order of April 13, 2007, finding the transaction to be in the public interest after the PUC's studied consideration of a myriad of facts and circumstances surrounding the proposed transaction and its impact upon customers, the utilities, employees and commerce.

As this Court explained:

> Pennsylvania has a unique situation in that in a few locales there are two (2)

[1] The FTC filed a Notice of Appeal (doc. no. 74) with the Court of Appeals for the Third Circuit on May 16, 2007, and has filed (or intends to file, if its motion in this Court is denied) a motion for injunction pending appeal with the Court of Appeals.

> gas distribution systems. This "gas-on-gas" distribution competition herein permits approximately 500 industrial and commercial customers to negotiate substantially lower prices from the currently separate Equitable Gas and Peoples Gas. In evaluating and approving the transaction, the PUC found that the benefit of gas-on-gas distribution competition to these 500 customers caused increased prices to the other 600,000 plus customers (primarily retail customers), and in the exercise of the PUC's statutory authority after consideration of a host of statutory considerations, concluded that this limited, and solely intra-state, gas-on-gas distribution competition was inefficient, and that the elimination of said competition through the proposed transaction would produce greater overall efficiencies, eliminate costly duplication, and be in the public interest, including the interest of the 600,000 plus customers who would be impacted.

Memorandum Opinion (doc. no. 70), at 3.

Standards for Injunctions Pending Appeal.

Rule 62(c) of the Federal Rules of Civil Procedure provides that, when "an appeal is taken from an interlocutory or final judgment . . . denying an injunction," a court, in its discretion, "may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." The party seeking an "order suspending, modifying, restoring, or granting an injunction while an appeal is pending" must "ordinarily move first in the district court" for such relief. Fed.R.A.P. 8(a)(1)(C).

Referring to the rules that "govern the power of district courts and courts of appeals to stay an order pending appeal", the United States Supreme Court in Hilton v. Braunskill, 481 U.S. 770, 776 (1987), listed four factors for courts to consider in deciding whether to issue a stay pending an appeal: (1) whether the applicant for stay has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent the requested relief; (3) whether issuance of the stay will substantially injure the other parties

interested in the proceeding; and (4) the public interest. These Hilton factors are, essentially, the familiar four factors considered in deciding whether to grant a preliminary injunction in the first instance, and are equally applicable to a request for stay of a granted injunction pending appeal as to requests for an injunction pending appeal when injunctive relief has been denied by the district court. See e.g. In re Lewis Jones, Inc., 369 F.Supp. 111 (E.D.Pa. 1973) ("There are four prerequisites for the issuance of an injunction pending appeal pursuant to Rule 62(c): (1) the moving party must make a strong showing that it is likely to prevail on the merits of its appeal; (2) the moving party must establish that it will suffer irreparable injury if the injunction is denied; (3) other parties must not be substantially harmed if the injunction is issued; and (4) the issuance of the injunction must not be contrary to the public interest."); Clark v. U.S. Bank Nat'l Ass'n, 2004 WL 2591239, *2 (E.D.Pa. 2004) ("standard for obtaining an injunction pending appeal is identical to the standard for granting a preliminary injunction"), quoting Walker v. O'Bannon, 487 F.Supp. 1151, 1161 (W.D.Pa.), aff'd 624 F.2d 1092 (3d Cir. 1980) ("factors which the Court must consider on a motion for injunction pending appeal are: '(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? (4) Where lies the public interest? . . .' ") (citations omitted).

Moreover, as the FTC notes in its Motion for Injunction at 2, this Court stated in O'Bannon that "[p]roper judgment on this motion entails a balancing of those [Hilton] elements

and no one factor determines the outcome." O'Bannon, 487 F.Supp. at 1161. The district court should evaluate and weigh each of the several factors "in light of the individualized considerations relevant" to the case at hand. Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 658 (3d Cir. 1991).

The Court will analyze the FTC's motion for an injunction in light of these standards:

Likelihood of Success on Appeal.

The FTC asserts that the latter three Hilton factors so greatly favor an injunction pending appeal that it only need show that its appeal demonstrates a "substantial case on the merits," rather than "a probability of success" on the merits. The Court disagrees with the FTC's basic premise for application of this lightened standard for obtaining an injunction pending appeal, but even if the Court applies the more liberal test, the Court finds that the FTC appeal does not present a substantial case on the merits.

In granting defendants' Motion to Dismiss (doc. no. 18), this Court reasoned as follows in its Memorandum Opinion of May 14, 2007 (doc. no. 70). First, the Court found the application of the "state action immunity" standard to be "rather straightforward" and not in dispute: "(1) does the Commonwealth of Pennsylvania have a clearly articulated and affirmative policy of regulation in place of competition?, and (2) does the Commonwealth of Pennsylvania actively supervise that policy?" Memorandum Opinion (doc. no. 70), at 12, citing, among other cases, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) and Parker v. Brown, 317 U.S. 341 (1943).

After reviewing the process by which the Pennsylvania General Assembly adopted and the Pennsylvania PUC implemented the certification of public convenience/ approval process for

proposed mergers acquisitions and other transactions between public utilities, Memorandum Opinion (doc. no. 70), at 4-10, the Court found both prongs had been demonstrated. As to the first prong, the Court found that the General Assembly "articulated and affirmatively expressed a state policy to displace competition with pervasive regulation . . . by detailed and specific Code provisions" directing the PUC, in explicit and comprehensive terms, to implement its policies and to evaluate and review transactions between public utilities on a public interest standard. Memorandum Opinion (doc. no. 70), at 13. The Public Utility Code clearly articulated a "comprehensive and pervasive governmental regulatory scheme" that was intended by the General Assembly "to take the place of free market competition." *Id.*

This Court explained in its Memorandum Opinion (doc. no. 70) as follows:

> The General Assembly did not simply give the PUC a blank check or a general grant of unfettered authority, with the PUC "writing" the regulations/ Code provisions -- on the contrary, the General Assembly wrote the "Code" and its policy determinations are explicitly set forth in the Code. It is true that, in considering whether to approve any "mergers or consolidations involving natural gas distribution companies or natural gas suppliers or the acquisition or disposition of assets or securities," the PUC must consider whether "the 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 the benefits of a properly functioning and effectively competitive retail natural gas market." 66 Pa.C.S. § 2210(a)(1). However, the fact that the Code and the PUC regulatory scheme directs that the PUC evaluate potential anticompetitive consequences does not undercut the fact that the General Assembly has replaced free market competition with regulation.
>
> Additionally, Section 2210 charges the PUC with considering the "effect of the proposed merger, consolidation, acquisition or disposition on the employees of the natural gas distribution company and on any authorized collective bargaining agent representing those employees," 66 Pa.C.S. § 2210(a)(2), and other provisions of the Natural Gas Choice and Competition Act command the PUC to consider a wide range of other factors the General Assembly deemed important to its decisions, including "consumer protection"

> regarding residential billing practices; the integrity of the distribution systems and reliability of service, which comprises adequacy of supply ("taking into account peak and seasonal demands, as well as isolated market areas and system operation contingencies") and security ("designing, maintaining and operating a system so that it can safely handle extreme conditions as well as emergencies"); ensuring that low-income retail gas customers are able to afford natural gas service; and employee transition concerns and other employee related obligations (i.e., notices regarding lay offs and terminations). 66 Pa.C.S. §§ 2202 - 2207.
>
> The PUC certainly considered the effect of the proposed elimination of gas-on-gas distribution competition in approving the Joint Petition for Settlement, but that was *only one* of the *many* statutory factors considered by the PUC; other factors considered and weighed included job creation and maintaining of the existing work force, the adequacy of the supply of gas if the proposal was approved, the operational practices of the companies involved, enhanced use of Pennsylvania gas, and synergistic cost savings. PUC Opinion and Order of April 13, 2007.
>
> Following the General Assembly's regulatory scheme as mandated by the Code, the PUC ruled herein on an intra-state transaction, in which a few customers will lose the benefits of current competition, but where the public as a whole will benefit, by not subsidizing said "competition," and by receiving the benefits of a more efficient gas distribution systems.

Memorandum Opinion (doc. no. 70), at 13-15 (emphasis added).

As to the second prong of the state action immunity test, the General Assembly also ensured appropriate and active supervision of the state policy by the PUC, see 66 Pa.C.S. §§ 1301, 1302, 1307(f), 1308(d), 1309(a), 1317(c) & (d), 1218(a), (b) & (e), and § 2203 (1), and it is obvious that the PUC takes this responsibility very seriously, in that it conditioned the merger-acquisition on its continued monitoring and supervision of the transaction as it moves forward. That is, following the General Assembly's regulatory scheme expressed by the Code, the PUC "explicitly retained ongoing oversight authority and control over the merged public utilities, and included conditions in its Order approving the proposed transaction" requiring progress reports

by Equitable Gas over various aspects of the transaction and its impact on a variety of corporate, organizational and individual citizens of the Commonwealth of Pennsylvania. Memorandum Opinion (doc. no.), at 16-18, citing PUC Opinion and Order of April 13, 2007 at 85-86.

As this Court stated in its Conclusion:

> The General Assembly of the Commonwealth of Pennsylvania has clearly articulated, in the Code and the Natural Gas Choice and Competition Act, a policy to disfavor and displace free market competition in favor of a pervasive regulatory scheme, and has endowed the PUC with broad authority to implement its legislative prerogatives and policies, including requiring the PUC to issue certificates of approval for proposed mergers, consolidations, acquisitions or other dispositions of natural gas distribution companies. The General Assembly also has directed the PUC to take a very active role in supervising public utilities, including natural gas distribution companies; and in this particular matter, the PUC explicitly retained jurisdiction to continue to actively monitor and review the approved merger transaction.
>
> The federal antitrust laws are obviously important to the proper functioning of the free market system in this Nation, and so is the role of the FTC, which no doubt has acted zealously and in good faith to further its mandate to enforce those laws. However, the FTC must defer to the Pennsylvania General Assembly and the PUC which is implementing the Public Utility Code in this case, since the state action immunity doctrine insulates the PUC's approval of the merger between Equitable Gas and Peoples Gas from federal antitrust scrutiny, for the reasons stated above, consistent with the principles of federalism and precedents of the United States Supreme Court and the United States Court of Appeals for the Third Circuit. The FTC's complaint under antitrust laws against the private actors who have sought and received a certificate of public convenience from the PUC for their merger transaction, therefore, must be dismissed.

Memorandum Opinion (doc. no. 70), at 18-19.

After reconsideration of the moving papers and briefs, and of the pending motion for an injunction pending appeal and the response thereto, the Court finds that the FTC cannot demonstrate a substantial issue on the merits of the state action immunity doctrine.

Irreparable Injury to Movant.

The FTC asserts, in conclusory fashion, that if the merger-acquisition goes through and is substantially completed before the Court of Appeals for the Third Circuit hears and resolves its appeal, it will be difficult to "unscramble the eggs" of the merger transaction if, ultimately, the Court of Appeals agrees with its position that the federal antitrust laws have been or will be violated and that the FTC's authority should trump the PUC's authority in this case.

The FTC's assertion is non-specific and does not spell out why or how the merger will be irrevocable, i.e., unable to be divested, and although it appears that the merger-acquisition may be executed between Equitable Gas and Peoples Gas at any time, the PUC must give subsequent approvals down the road before the merger can be integrated. The FTC has already filed its Notice of Appeal and a motion for injunction pending appeal in that Court, and the Court of Appeals for the Third Circuit is quite capable of moving quickly to resolution of both the motion and the appeal.

The Court will assume that denial of the motion for injunction pending appeal harms the FTC's interests in terms of its ability to assert its authority as the champion of federal antitrust laws, but it has not demonstrated with any specificity that the harm would be irreparable.

Harm to Other Interested Parties; The Public interest.

The PUC's Opinion and Order, dated April 13, 2007 discusses all of the private and public interests implicated by the merger throughout, and that discussion shows much overlap exists between the interests of defendants and all the interested parties – of which there were many who have participated in the PUC approval process – and the public interest. The PUC's 87 page opinion was all about the public interests and the interests of the other interested parties,

and this Court finds it most appropriate to grant Chevron- like deference to the PUC's deliberations and weighing of the private and public interests in the certificate of public convenience/ approval process it so painstakingly undertook.

This Court must note that, although the second prong of the Rule 62(c) standard looks to the harm to the movant, the interests of the movant herein, the FTC, is necessarily a public interest, albeit, from the perspective of the federal antitrust watchdog. Thus the second prong is not completely separable from the third and fourth prongs, because the FTC ostensibly is acting in what it deems to be in the public interest. Since the PUC takes the opposite view, after extensive hearings, public comment, evidence taking, argument and briefing, and has found the merger-acquisition to be manifestly in the public interest and in the interest of the majority of interested parties, it is tempting to view the FTC's interest in stopping the merger-acquisition as, essentially, protection of its administrative "turf."

FTC argues that 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. While this statement may be true on some theoretical level, the real world implications are that the FTC is attempting to stop a transaction which the PUC has found to be in the overall public interest of the citizens of the Commonwealth of Pennsylvania. In other words, the practical effect of granting the pending Motion for an Injunction (doc. no. 73) would be to grant the FTC's initial request for preliminary injunction to stop the merger transaction which the Pennsylvania PUC has determined is in the public interest. The FTC has not met its heavy burden of convincing this Court that it should not defer to the Pennsylvania General Assembly and its PUC, and let the approved merger-acquisition transaction take its course.

Conclusion.

Therefore, applying the test for Rule 62(c) injunctions pending appeal, and based upon this Court's analysis in its Memorandum Opinion Granting Defendants' Motion to Dismiss (doc. no. 70), the requested injunction is DENIED, since (a) the FTC is not likely to succeed on the merits of its appeal, (b) there will be not be irreparable harm to the FTC without the injunction, (c) the granting of the injunction would cause harm to the over 600,000 plus customers who, the PUC has determined, will benefit from this merger, and (d) the public interest would be harmed by the granting of the requested injunction.

Finally, the FTC continually and inaccurately labels the merger as "anti-competitive," which it is not. Further, the FTC stated that this Court "suggest[ed]" that "the PUC may permit an anti-competitive merger," which it did not. The merger benefits 600,000 plus customers and may disadvantage approximately 500 customers - - that is not an anti-competitive merger. The FTC is incorrectly stating that this merger would cause "likely and actual consumer harm." Doc. No. 73 at 8. On the contrary, the requested injunction not only would deny significant benefits to these 600,000 plus customers, but as a practical matter, would kill the merger.

For all of the foregoing reasons, the Court will deny the Motion of the Federal Trade Commission for an Injunction Pending Appeal Pursuant to Fed.R.Civ.P. 62(c) or, in the Alternative, an Injunction Pending Resolution by the Court of Appeals of an Emergency Motion for an Injunction (doc. no. 73) by separate order.

SO ORDERED this 21st day of May, 2007.

s/ Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: All Registered ECF Counsel and Parties

EXHIBIT C

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