

**UNITED STATES OF AMERICA
BEFORE THE 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.,)
 a corporation,)
)
DOMINION RESOURCES, INC.,)
 a corporation,)
)
CONSOLIDATED NATURAL GAS COMPANY,) **Docket No. 9322**
 a corporation,)
)
and)
)
THE PEOPLES NATURAL GAS COMPANY,)
 a corporation.)

**ORDER DENYING WITHOUT PREJUDICE RESPONDENTS’
MOTION TO REMOVE MATTER FROM ADJUDICATION**

On May 16, 2007, respondents Equitable Resources, Inc., Dominion Resources, Inc., Consolidated Natural Gas Company, and The Peoples Natural Gas Company (“Respondents”) moved, pursuant to Rule 3.26(c) of the FTC’s Rules of Practice, 16 C.F.R. § 3.26(c), to remove this matter from adjudication in order to afford the Commission the opportunity to decide whether or not the public interest would be served by continuing this administrative litigation. Complaint Counsel filed a timely objection to the motion on May 18, 2007, and Respondents filed a reply on May 21, 2007.

We note that Respondents have not sought, and Rule 3.26(c) does not contemplate, an immediate determination of whether the Commission would continue its merger challenge in administrative litigation following a conclusive loss of its action for preliminary injunction in federal court. Accordingly, the Commission focuses here on whether removal from adjudication – with the primary purposes of enabling *ex parte* discussions with the parties about the merits of the case and avoiding duplication of litigation resources while the appeal is pending – is desirable and appropriate.

Having considered the parties' arguments, in light of the Commission's policy underlying Rule 3.26(c) and the current posture of the federal court litigation, the Commission hereby denies Respondents' motion without prejudice.

1. Background. On March 1, 2006, Equitable Resources, Inc. executed an agreement to acquire the capital stock of The Peoples Natural Gas Company from the Consolidated Natural Gas Company, a subsidiary of Dominion Resources, Inc. On March 14, 2007, the Commission issued an administrative complaint, alleging that Equitable's acquisition of Peoples would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. On April 9, 2007, Respondent Equitable and Respondents Dominion, Consolidated Natural Gas, and Peoples respectively filed answers to the complaint, respectively asserting the defenses, *inter alia*, that the actions challenged in the Commission's complaint were immunized from liability – and that the claims in the complaint were barred – by the state action doctrine. On April 11, 2007, Complaint Counsel moved to strike the Respondents' state action defenses.

On April 13, 2007, the Commission filed a complaint and motions for a temporary restraining order and a preliminary injunction against Respondents in the Federal District Court for the Western District of Pennsylvania, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), seeking to prevent the merger, and thereby maintain the *status quo*, during the pendency of the administrative proceeding. At the hearing on the temporary restraining order, the court scheduled briefing and argument on a motion to dismiss the complaint based on state action grounds.

On April 16, 2007, the Commission issued an order staying further briefing on Complaint Counsel's motion to strike. On April 24, 2007, the Commission issued a scheduling order, after a scheduling conference with the parties, setting forth discovery and other deadlines for the administrative litigation.

On May 14, 2007, the district court granted Respondents' motion to dismiss the complaint on state action grounds. On May 16, 2007, the Commission filed an emergency motion for an injunction pending appeal in the district court, which was denied on May 21, 2007. On May 18, the Commission filed a notice of appeal of the district court's judgment and, on May 21, 2007, an emergency motion for an injunction pending appeal. On May 24, 2007, the Commission issued an Order Staying Discovery pending the Commission's resolution of Respondents' Motion to Remove Matter from Adjudication. Today, the Commission has issued a further scheduling order, in light of the current posture of the case.

2. Respondents' Motion to Remove Matter from Adjudication. Respondents argue that this matter should be removed from adjudication, pursuant to Rule 3.26(c), on grounds that, in light of the district court's dismissal of the complaint, the Commission should consider whether further administrative litigation is in the public interest. Respondents state that the Commission would benefit from the opportunity to discuss with the parties the asserted efficiencies and benefits that the transaction would entail, without being constrained by the rules

governing *ex parte* contacts during the pendency of administrative litigation. Respondents also argue that the Commission should reconsider its decision to block the transaction before the parties expend further time and resources in litigation.

Complaint Counsel objects to the motion on the ground that it is premature because Rule 3.26(b) contemplates the filing of such a motion after (1) the Commission has forgone its right to seek reconsideration or to appeal a district court ruling denying preliminary injunctive relief; or (2) a court of appeals has denied preliminary injunctive relief. Complaint Counsel asserts that denial of the motion would not prevent Respondents from sharing with the Commission their arguments on the benefits of the transaction, and from substantiating these arguments with evidence produced in discovery in the administrative litigation.

3. Discussion. By its terms, Rule 3.26 contemplates that the Commission need not withdraw a matter from adjudication while litigation on the preliminary injunction, including appellate proceedings, is pending. The Federal Register notice accompanying the Rule made this clear:

[T]he procedures become available when a district court denies the Commission preliminary injunctive relief and (a) all opportunity has passed for the Commission to seek reconsideration of the district court's denial or to appeal it to a court of appeals, and the Commission has neither sought reconsideration of the denial nor appealed it, or (b) a court of appeals has denied preliminary injunctive relief. Thus, these mechanisms will not be available while the Commission might seek reconsideration by the district court or appeal the denial to a court of appeals.

60 Fed. Reg. 39640, 39641 (Aug. 3, 1995) (footnote omitted). Consistent with that discussion, as Complaint Counsel point out, Rule 3.26(b), 16 C.F.R. § 3.26(b), provides, in relevant part, that a motion [under either Rule 3.26(c) or Rule 3.26(d)] “must be filed within fourteen (14) days after . . . (2) A court of appeals has denied preliminary injunctive relief.” (emphasis added). When the Commission issued the administrative complaint, it found reason to believe that the merger may substantially lessen competition, in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. The district court's decision has not altered the Commission's view that its challenge to the merger is in the public interest. The Commission has appealed the district court's dismissal of the complaint, and has sought an emergency injunction pending appeal. In these circumstances, Respondents' motion is procedurally premature.

In any event, the Commission has determined that withdrawal from administrative adjudication would not be appropriate from a public interest perspective. As the Commission has previously stated, a challenge to a merger in administrative litigation may be in the public interest despite the fact that the Commission has not succeeded in obtaining judicial intervention to prevent its consummation. 60 Fed. Reg. at 39641. Moreover, the state action issue that is the subject of the FTC's Third Circuit appeal is an important legal issue generally, and an issue of great interest to the Commission.

At this stage of the proceedings, the principal effect of withdrawing the case from adjudication would be to remove the bans on *ex parte* communications. Before the Commission issued the administrative complaint, the Respondents submitted lengthy white papers to the Commission setting forth their views on competition and efficiencies and, of course, Respondents take the opportunity in their current motion to again share their views on efficiencies. Respondents also remain free to make their arguments on the record in the administrative litigation. For example, in their reply brief, Respondents state that, if the instant motion is denied, they intend to file a motion to dismiss on *res judicata* grounds. The Commission sees no compelling need for *ex parte* communications with the parties at this point.

Accordingly,

IT IS ORDERED THAT the motion is denied without prejudice.

By the Commission, Commissioner Harbour not participating.

Donald S. Clark
Secretary

ISSUED: May 30, 2007