

**ORIGINAL**

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

FEDERAL TRADE COMMISSION  
RECEIVED

## BACKGROUND

On March 14, 2007, [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Defendants answered the complaint on April 9, 2007, asserting that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

regulatory scheme set forth in the [Public Utility] Code by the General Assembly of

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extinguished. Indeed, because it is a final judgment on the merits, dismissal under Fed. R. Civ. P. 41(b) is

amongst the same parties, the District Court's order precludes the FTC's claims in the

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

The PUC found that the efficiencies that the transaction would yield would be passed back in large part to the customer base through the PUC's regulatory rate-making structure. The PUC, of course, is in a position to know the impact of its own administrative proceedings and powers. As a result of the rate case stay out (an agreement that Equitable entered into as a condition of approval of the transaction with the PUC that, if the transaction goes forward, Equitable and Peoples will not initiate proceedings to raise their rates until 2009)

the vast majority of customers will avoid having a rate increase until late 2009. Without the stay-out agreement, both companies would in the near term seek, and obtain PUC approval for, a rate increase to address their current revenue deficiencies. But another way, if the FTC approves

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

Customers that purchase natural gas that is distributed over the companies' networks also will benefit directly from the efficiencies in gas supply and distribution that would be realized if the transaction goes forward. PUC regulations require the companies to supply gas

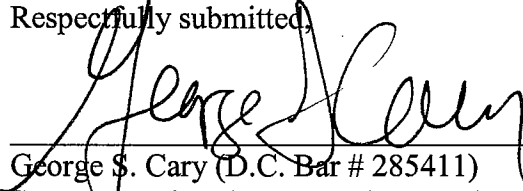
to revisit whether these efficiencies would benefit consumers, as found by the PUC, before proceeding with this adjudication.

### CONCLUSION

In light of these compelling circumstances, the Commission should withdraw the matter from litigation to consider, without the *ex parte* constraints of adjudicative proceedings, “whether or not the public interest warrants further litigation.” Rule 3.26(c). It likewise should do so to spare the Commission, its staff, and the parties the extraordinary distraction and expense of litigating the case on the antitrust merits where the District Court has ruled forcefully and

Dated: May 16, 2007

Respectfully submitted,

  
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*The Peoples Natural Gas Company*



**CERTIFICATE OF SERVICE**

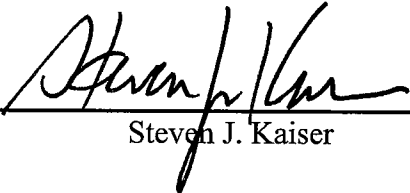
I HEREBY certify that copies of the foregoing RESPONDENT'S MOTION TO THE COMMISSION TO REMOVE MATTER FROM ADJUDICATION were served on the following persons this 16<sup>th</sup> day of May, 2007 as indicated below.

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\_\_\_\_\_  
Steven J. Kaiser

## Exhibit A

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

FEDERAL TRADE COMMISSION,

Plaintiff,

07cv0490

**ELECTRONICALLY FILED**

v.

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

Defendants,

and

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

Amicus Curiae.

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

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

halt an intra-state acquisition of defendant Peoples Natural Gas Company ("Peoples Gas") by

defendant Equitable Resources, Inc. ("Equitable Gas") that was recently approved by the PUC.<sup>1</sup>



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

On March 21, 2006, Equitable Resources, Inc. ("Equitable Gas") filed a



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

[REDACTED]

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

activities, including safety standards, regulation of rates, competition, services and facilities, and the enforcement of the Code. 66 Pa.C.S. §§ 501, 1101-1102. In particular, the PUC is the state administrative agency specifically empowered by the General Assembly to regulate defendants in this case, and the PUC, in fact, has considered the joint application for approval of the merger of

Equity Gas and Peoples Gas, and has expressed its view on the merger of the two companies.

Historically there was a time in which the PUC encouraged “gas-on-gas” competition in the 1980s and 1990s. Later, end-users of natural gas (generally, large industrial consumers) were able to acquire natural gas from producers and transport the natural gas supply via the interstate natural gas distribution system. This process was accelerated by a Pennsylvania statute, entitled the “Natural Gas Choice and Competition Act” (66 Pa. C.S. §§ 2201-2212 (effective July 1,

1999)), permitting all customers (i.e., large industrial and commercial customers, as well as retail customers) to acquire natural gas from independent suppliers which would be transported by their local natural gas distribution company. See also 66 Pa.C.S. § § 2204(a)<sup>4</sup> and 2203(2).

~~As part of this new statute, the Commission established a PUC~~



particular, as applied to the case herein, the PUC since the passage of the National Gas Competition Act of 1999 consistently has determined that "gas-on-gas" distribution competition in overlapping service territories is "wasteful and a duplication of fixed distribution facilities."

See PUC Opinion and Order of April 13, 2007 at 56.) Section 2210 of the Code further grants the PUC authority to reject any acquisition, transfer of assets, or reorganization finding of

The express grant of statutory authority by the General Assembly to the PUC is set forth

in Chapter 11 of the Code, which in most relevant part states as follows:

such application by the commission, evidenced by a certificate of public

~~staff, defendants, elected representatives, and others; briefing by those in favor and those~~

opposing the Joint Petition for Settlement followed; a complete evidentiary hearing was held  
before an Administrative Law Judge who, in an 86 page Initial Decision, recommended to the

The PUC in regard to the anti-competitive issues, as stated earlier, determined that the elimination of gas-on-gas distribution competition is not anti-competitive under the factual record presented, finding that gas-on-gas distribution competition is not economical and less efficient than retail gas supply competition. See PUC Opinion and Order of April 13, 2007 at

53-54. The PUC analyzed the transaction's market impact on gas-on-gas competition on the

**E. Standards of Review of the Motion to Dismiss**

In deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court accepts the well-pleaded factual allegations of the complaint as true and dis-

therefrom in favor of the plaintiff. Armstrong Surgical Center, Inc. v. Armstrong County Memorial Hospital, 185 F.3d 154, 155 (3d Cir. 1999). A claim should not be dismissed for failure to state a claim unless it appears beyond a doubt that the non-moving party can prove no set of facts in support of its allegations which would entitle it to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Marshall-Silver Construction Co. v. Mendel, 894 F.2d 593, 595 (3d Cir. 1990).

In making this determination, the court must construe the pleading in the light most favorable to the non-moving party. Budinsky v. Pennsylvania Dept. of Environmental

the legal standard to be rather straightforward. The two-part legal test is as follows: (1) does the

Commonwealth of Pennsylvania actively supervise that

place of competition?, and (2) does the Commonwealth of Pennsylvania actively supervise that policy? California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). See also Parker v. Brown, 317 U.S. 341 (1943); A.D. Bedell Wholesale Co. v. Phillip Morris, Inc., 263 F.3d 239, 254 (3d Cir. 2001); Yeager's Fuel, 22 F.3d at 1265.

As stated in the Yeager's Fuel case, the United States Court of Appeals for the Third Circuit, 22 F.3d at 1265 (quoting from FTC v. Tigor Title Ins. Co., 504 U.S. 621, 633 (1992)).

A.D. Bedell, 263 F.3d 239, 259.

**G. Clearly Articulated Policy to Displace Competition**

The first prong of the test is satisfied in that the General Assembly has articulated and affirmatively expressed a state policy to displace competition with pervasive regulation. The

PUC, a creature of the General Assembly of the Commonwealth of Pennsylvania, has been

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



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.<sup>5</sup>

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.” FTC  
Brief at 3. While this statement may be true on some theoretical level, the real world application

association may have standing solely as the representative of its members and members.

cause of action if its members are suffering immediate or threatened injury as a result of the

the rates in tariffs that the electric utility must file under state law; more pointedly, since PUC had heard complaints about the RTS rate and responded to "inquiries from the legislature and protests by fossil fuel dealers" thus deciding that both programs served energy conservation and load management purposes): North Star Steel Texas, Inc. v. Entergy Gulf States, Inc. 33

F. Supp. 21 557 566 571/9 D. Tex. 1009 (2001) 11 11 T. 11/11

report regarding funding for community organizations and the Hardship Fund, a report notifying the PUC within 30 days of Equitable Gas's adoption of the gas accounting methodology and historical meter production methodologies of Peoples Gas, detailed periodic submissions explaining the impact of the elimination of any supply contract on Equitable Gas's projected gas costs, and identification in Equitable Gas's next base rate case of specific accounts into which entries have been made to record all Acquisition Premium and Transactions Costs transactions. See PUC Opinion and Order of April 13, 2007 at 85-86.

As the Court of Appeals for the Third Circuit stated in the Yeager's Fuel case, active state

involvement is the "precondition for immunity from federal law" which requires that state

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 inapplicable to the Commission's actions.

[REDACTED]