

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

FEDERAL TRADE COMMISSION, )

Plaintiff-Appellant, )

v. )

DOMINION RESOURCES, INC. )

No. 07-2499

Appeal from the United States

DOMINION RESOURCES, INC., )

District Court for the Western

pursuant to Fed. R. Ann. P. 8(a) and 3d Cir. I.A.R. 8.1 and 27.7 to enjoin pending

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.

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

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

§ 2210(b).

During the proceedings before the PLIC, a wide variety of parties intervened

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

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*





*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

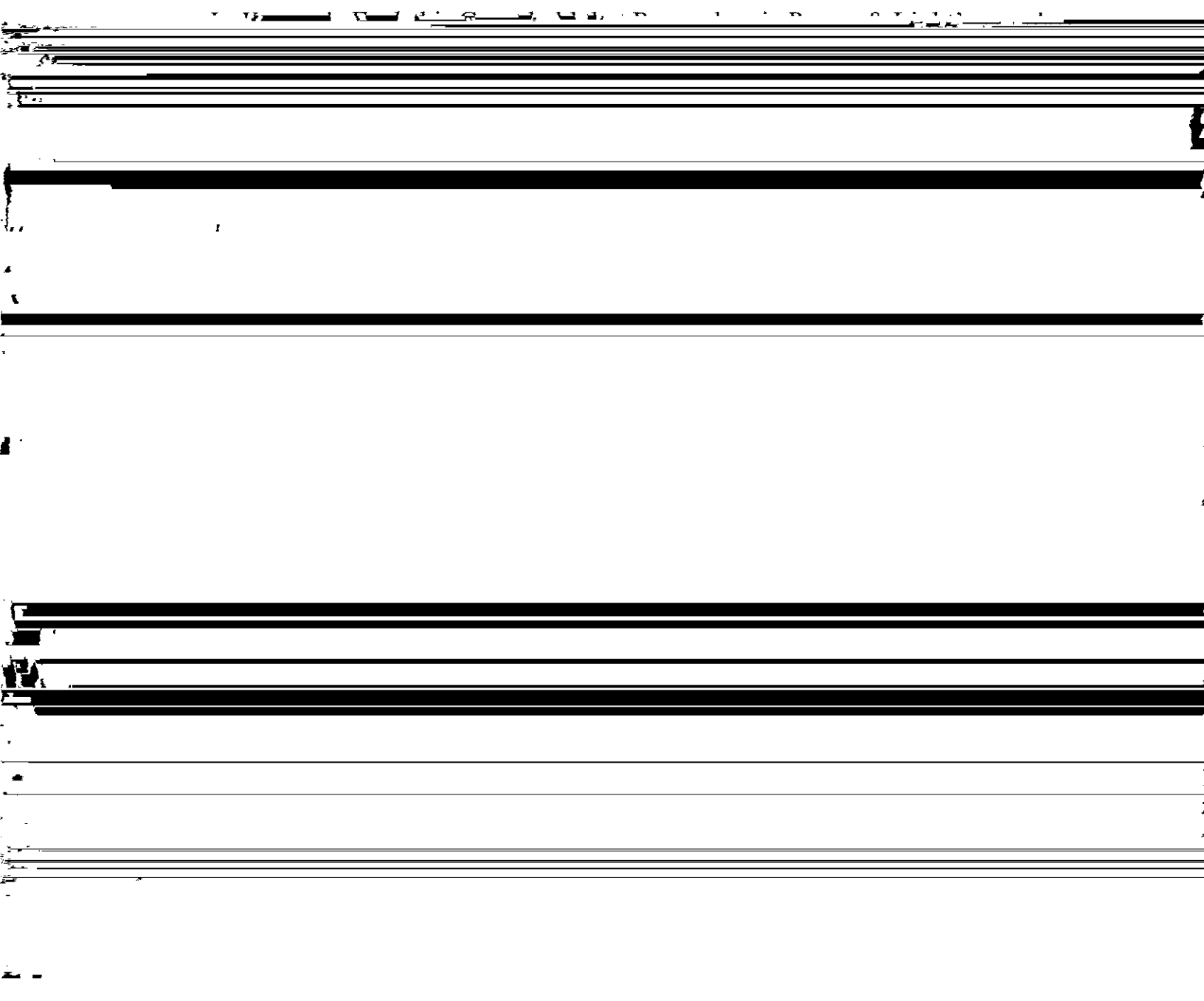
the acquisition is anticompetitive).

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

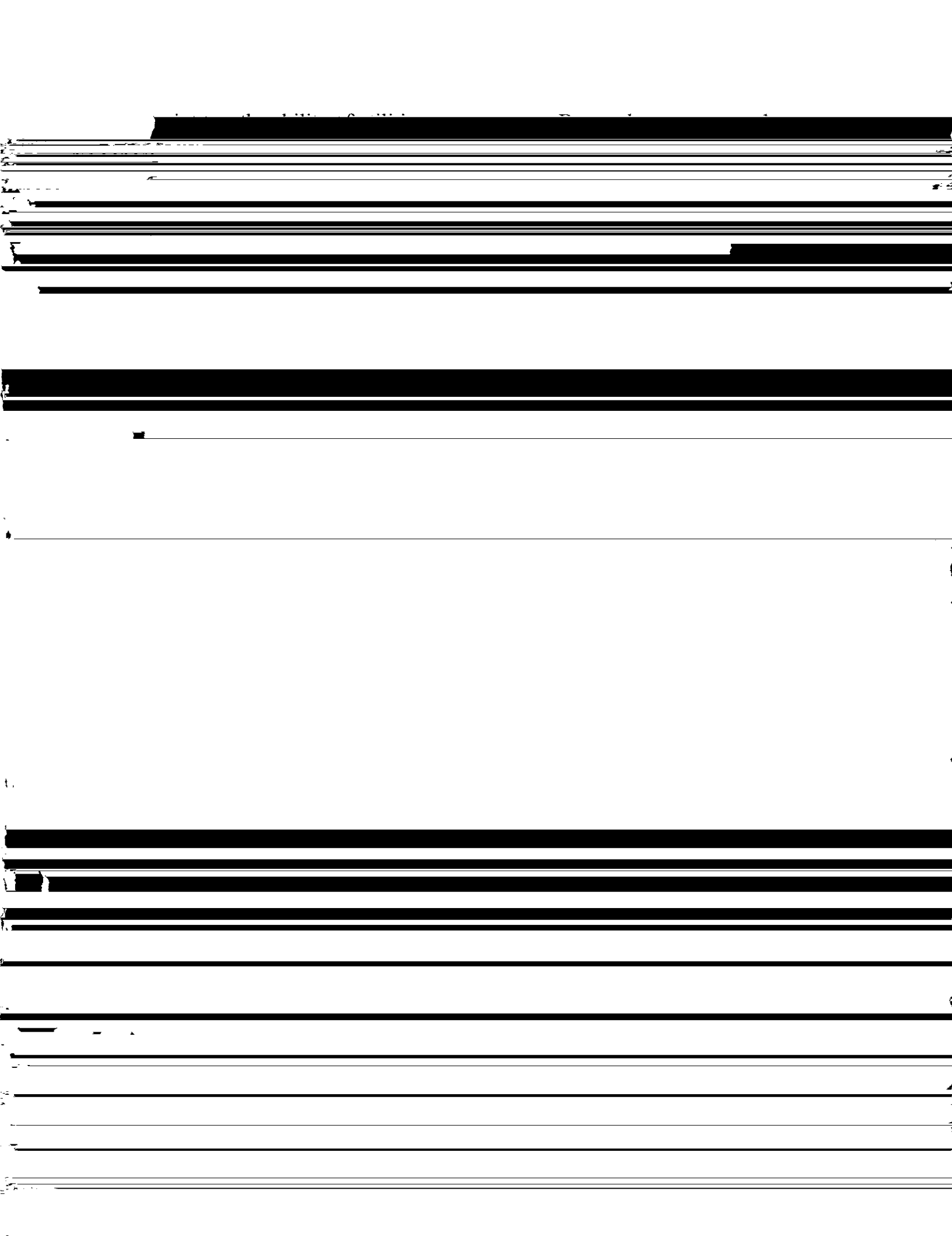
decision, was to equate an ostensibly “comprehensive” state regulatory scheme (*see*

Opin. at 13) with a state policy to displace the type of competition that is at issue

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.



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



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

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



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



*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

**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

<sup>8</sup> ~~the injunction that allows the adjudication of the merits before the parties are~~

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, the public interest in preserving a free-competitive economy cannot be

“frustrated by any private interest.” *United States v. Imperial Dredging Co.*, 319 F.

**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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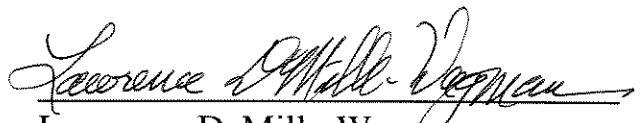
## CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2007, I served a copy of the foregoing

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