

ORIGINAL

UNITED STATES OF AMERICA

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

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 un-

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.

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

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

Dated: May 24, 2007

Respectfully submitted,

**CERTIFICATE OF SERVICE**

I HEREBY certify that copies of the foregoing RESPONDENT'S MOTION TO THE  
COMMISSION TO REVIEW MATTERS [REDACTED]

following persons this 24<sup>th</sup> 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

**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 "Tanya Price" <TPRICE@ftc.gov>

Patricia V." <PGALVAN@ftc.gov>

Subject RE: Equitable. D9322

Thank you both.

Phill Broyles  
Assistant Director  
Mergers III  
202-326-2805  
202-326-2100



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

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  
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>

"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."

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  
(202) 326-3555

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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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

**PUBLIC**


**[DRAFT – FOR COUNSEL  
REVIEW ONLY]**

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

---



Respectfully submitted,

\_\_\_\_\_  
Patricia V. Galvan, Esq.

\_\_\_\_\_  
George S. Cary, Esq.

Federal Trade Commission

Class Counsel, Case 9:11-cv-00011-FTD

**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: \_\_\_\_\_

Secretary

## **EXHIBIT B**



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

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

07cv0490

**ELECTRONICALLY FILED**

FOUNTAIN RESOURCES INC DOMINION

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

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

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

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

Pending before the Court is the Motion of the Federal Trade Commission for an

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 duty to protect the public interest.

consideration of a host of statutory considerations, concluded that this limited, and solely intrastate, gas-on-gas distribution competition is in the public interest.

interested in the proceeding and (4) the public interest. These factors are

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

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.**

proposed mergers acquisitions and other transactions between public utilities, Memorandum

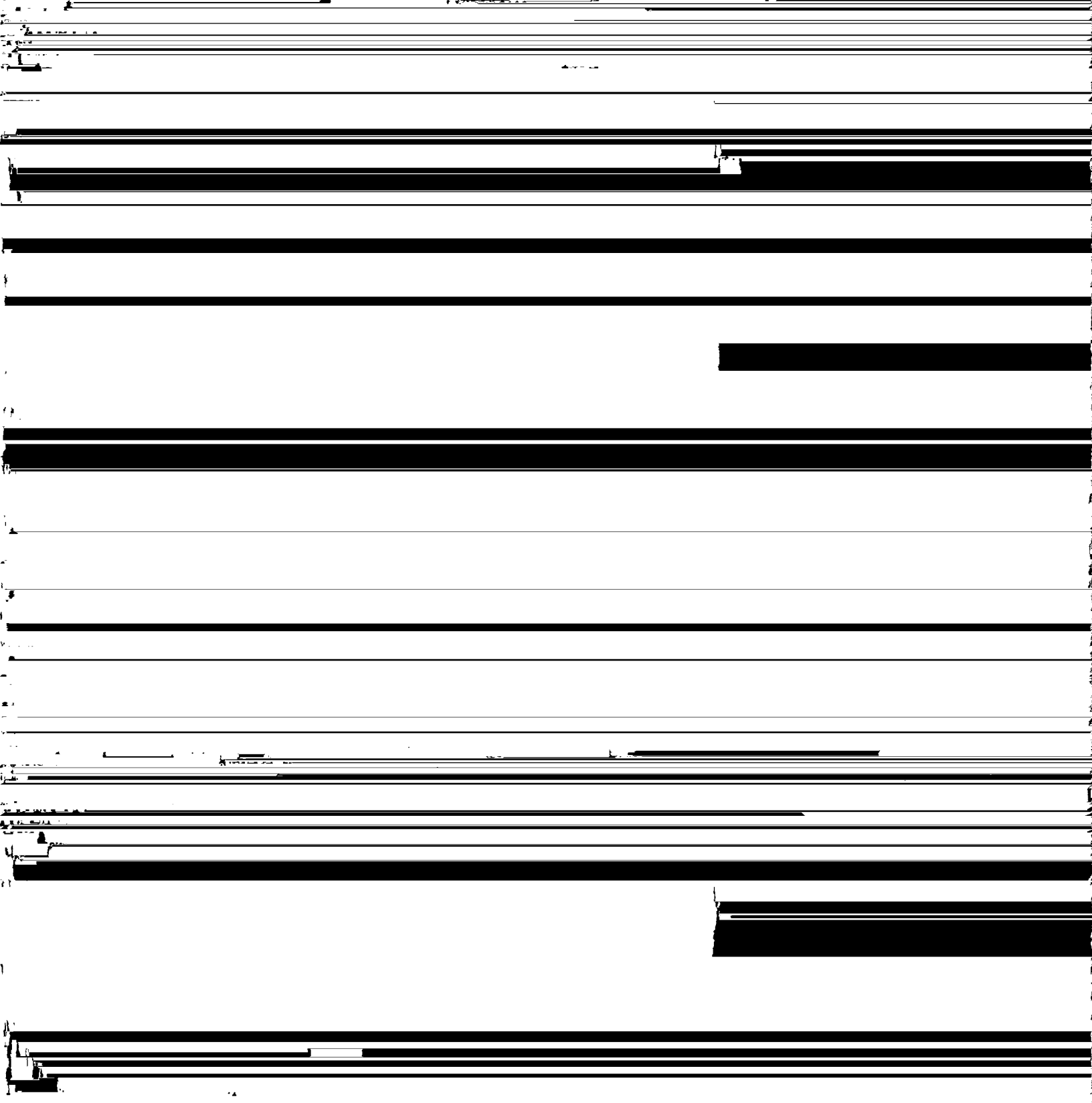
Opinion (doc. no. 70), at 13. The Public Utility Code clearly articulated a

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 not . . .

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





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**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

and this Court finds it most appropriate to grant Chevron- like deference to the PUC's

**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

by the granting of the requested injunction.

## **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.,     )

CONSOLIDATED NATURAL GAS COMPANY,     )

and     )

Docket No. 9322

[DRAFT - FOR COUNSEL  
REVIEW ONLY]

\_\_\_\_\_  
Respondents.     )

PROPOSED ORDER STAYING ADMINISTER LETTER PROCEEDINGS

Dear Commission:

[REDACTED]

ISSUED:

[REDACTED]

Secretary