

# ORIGINAL

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



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)  
**In the Matter of,** )  
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)  
**EQUITABLE RESOURCES, INC.,** )  
**a corporation,** )  
)  
**DOMINION RESOURCES, INC.,** )  
**a corporation,** )  
)  
**CONSOLIDATED NATURAL GAS** )  
**COMPANY,** )  
**a corporation,** )  
)  
**and** )  
)  
**THE PEOPLES NATURAL GAS** )  
**COMPANY,** )  
**a corporation.** )  
\_\_\_\_\_ )

Docket No. 9322

PUBLIC

**RESPONDENTS' REPLY TO COMPLAINT COUNSEL'S OBJECTION TO**  
**RESPONDENTS' MOTION TO THE COMMISSION**  
**TO REMOVE MATTER FROM ADJUDICATION**

Respondents Equitable Resources, Inc. ("Equitable"), Dominion Resources, Inc., Consolidated Natural Gas Company, and The Peoples Natural Gas Company ("Peoples") (collectively, "Respondents") hereby reply to Complaint Counsel's objection to removing this matter from litigation.

**ARGUMENT**

Removing this matter from adjudication pending the FTC's appeal to the Third Circuit of the dismissal of its preliminary injunction suit would serve at least two significant purposes. First, it would give the Commission the opportunity to decide whether the public interest would be served by continuing the adjudication. Second, and of at least equal

importance, it would allow the FTC and the parties to avoid needless expenditures of resources to litigate the identical state action immunity issue in the administrative proceedings as is now on appeal to the Third Circuit and to avoid the unnecessary litigation of the antitrust merits while the appeal is pending. If this matter is not removed from adjudication or otherwise stayed, the expedited schedule that has been entered by the Commission would require extensive, wasteful pretrial proceedings at the same time the appeal is pending. Preparing a Section 7 case on this schedule will necessarily require the expenditure of millions of dollars by the FTC and the parties.

Complaint Counsel is wrong that the motion to remove from adjudication is premature. Rule 3.26 does *not* require appeals to be exhausted before a motion under Rule 3.26(c) can be brought or before a matter may be removed from adjudication. Rather, Rule 3.26(b) provides that a motion under Rule 3.26(c) “must be filed within fourteen (14) days” of the time for appealing a denial of a motion to dismiss has passed, not that it may not be filed sooner. Such a motion *may* be filed at any time “after a court has denied preliminary injunctive relief.” Rule 3.26(a). Filing a motion for removal from adjudication before the expiration of the appeal period merely provides Complaint Counsel with an opportunity to object, which renders removal from adjudication a decision to be made by the Commission, rather than an automatic ministerial act by the Secretary. Rule 3.26(c).

Complaint Counsel is also wrong that the district court’s dismissal of the FTC’s complaint does not have preclusive effect on the FTC’s claims while an appeal is pending. *S. Pac. Commc’ns Co. v. Am. Tel. & Tel.*, 740 F.2d 1011, 1018 (D.C. Cir. 1984) (“[T]he federal rule and the rule in this circuit is that collateral estoppel may be applied to a trial court finding even while the judgment is pending on appeal.”); *see also Ross v. Board of Ed. of Township High*

*School Dist. 211*, No. 06-2060, 2007 WL 1374863, \*4 (7th Cir. May 11, 2007) (“In particular, the fact that an appeal was lodged does not defeat the finality of the judgment.”); *Commodities Export Co. v. U.S. Customs Serv.*, 957 F.2d 223, 228 (6th Cir. 1992) (“The preclusive effect of the [Court of International Trade’s] jurisdictional determination is not lessened by the fact that [plaintiff] has appealed that determination to the Federal Circuit, for it is well established that a final trial court judgment operates as *res judicata* while an appeal is pending.”); *Webb v. Voirol*, 773 F.2d 208, 211 (8th Cir. 1985) (“[C]ourts repeatedly have held that the pendency of an appeal does not destroy the finality of a judgment for the purpose of applying the doctrine of collateral estoppel.”); *Cohen v. Superior Oil Corp.*, 90 F.2d 810, 811-812 (3d Cir. 1937) (pendency of an appeal does not prevent a judgment from being *res judicata*); *In re Kaiser Aluminum Corp.*, No. 06-247-JJF, 2007 WL 962922, \*4 & n.4 (D. Del. March 29, 2007) (affirming Bankruptcy Court’s giving preclusive effect to FERC decision on utility rates even though FERC decision was on appeal to the Ninth Circuit); *Commercial Union Assurance Co. v. Pucci*, 523 F. Supp. 1310, 1318 (W.D. Pa. 1981) (“Although the [defendants] have not yet decided whether to take an appeal from the judgment of the court of common pleas, we need not delay further the entry of this opinion and order because the pendency of an appeal would not affect the finality of the judgment for the purpose of applying the doctrine of collateral estoppel.”). Should the Commission deny Respondent’s motion to remove the matter from adjudication, Respondents intend to move to dismiss the matter on *res judicata* grounds under Rule 3.26(d).

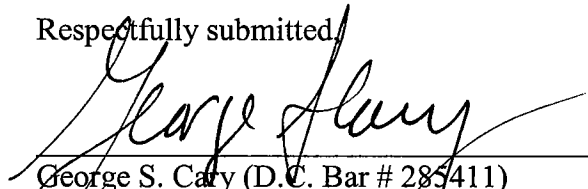
### CONCLUSION

Complaint Counsel offers no legitimate reason why this matter should remain in litigation given the dismissal of its claims on state-action immunity grounds by the district court and the FTC’s now-pending appeal. The FTC, the parties, the public, and the federal judiciary

would be far better served letting the appellate process run through to a definitive conclusion. Otherwise, the FTC and the Third Circuit will be considering the same issues, on the same facts, at the same time. Absolutely no purpose is served by such wasteful and duplicative proceedings, which would be contrary to fundamental, well-established principles of fairness, efficiency, and judicial economy. As stewards of the public trust, the Commission should therefore remove this matter from litigation to prevent such an unfair, wasteful, and nonproductive enterprise.<sup>1</sup>

Dated: May 21, 2007

Respectfully submitted,



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The Peoples Natural Gas Company*

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<sup>1</sup> Should the circumstances change, the Commission could always put the matter back into adjudication.

**CERTIFICATE OF SERVICE**

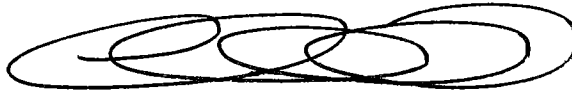
I HEREBY certify that copies of the foregoing RESPONDENTS' REPLY TO COMPLAINT COUNSEL'S OBJECTION TO RESPONDENTS' MOTION TO THE COMMISSION TO REMOVE MATTER FROM ADJUDICATION were served on the following persons this 21st day of May, 2007 as indicated below.

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Christopher Leahy