UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch

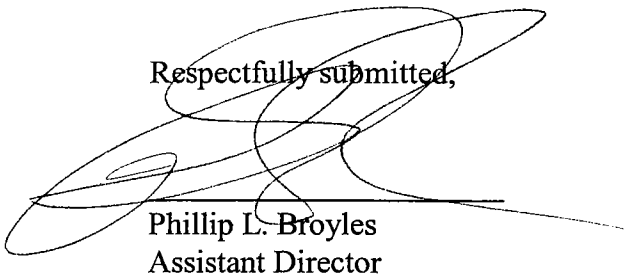
In the Matter of	
EQUITABLE RESOURCES, INC.,	
DOMINION RESOURCES, INC.,	Docket No. 9322
CONSOLIDATED NATURAL GAS COMPANY,	PUBLIC
and	
THE PEOPLES NATURAL GAS COMPANY,	
Respondents.	

ERRATA SHEET TO COMPLAINT COUNSEL'S BRIEF IN SUPPORT OF ITS MOTION TO STRIKE THE AFFIRMATIVE DEFENSE OF STATE ACTION

Complaint Counsel hereby file an errata sheet to correct errors in the Complaint Counsel's Brief in Support of its Motion to Strike the Affirmative Defense of State Action and exhibits for the Brief, which were filed April 11, 2007. The brief and exhibits should be corrected by replacing the originally submitted brief and exhibits with the attached corrected brief and exhibits. The attached spreadsheet shows the changes made.

Dated: April 17, 2007

Respectfully submitted,



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COMPLAINT COUNSEL'S ERRATA SHEET FOR CITATIONS			
CITATIONS	**PAGE**	**CORRECTION**	**CORRECTED**
Glaberson v. Comcast Corp., 2006 Trade Cas. (CCH) ¶ 75,531 (E.D. Pa. 2006)	vi, 22	Added "-2."	*Glaberson v. Comcast Corp.*, 2006-2 Trade Cas. (CCH) ¶ 75,531 (E.D. Pa. 2006)
15 P.S. § 3541 (repealed 1988)	ix, 15 n.14	Replaced P.S. with PA. STAT. ANN. Added (West 1967).	15 PA. STAT. ANN. § 3541 (West 1967)(repealed 1988)
15 P.S. § 3542 (repealed 1988)	ix, 15 n.15	Replaced P.S with PA. STAT. ANN. and 3542 with 3543. Added (West 1967).	15 PA. STAT. ANN. § 3543 (West 1967)(repealed 1988)
66 Pa. C.S.A. § 1102(3)	ix, 22 n.28	Added (a).	66 Pa. C.S.A. § 1102(a)(3)
Order Denying Petition of the Office of Trial Staff for the Commencement of an Investigation of Competitive Practices Between Natural Gas Distribution Companies at 8 (Oct. 6, 2005) (Pa. P.U.C. No. P-000052160) (citing Answer of The Peoples Natural Gas Company).	3	Add "- 9."	Order Denying Petition of the Office of Trial Staff for the Commencement of an Investigation of Competitive Practices Between Natural Gas Distribution Companies at 8 - 9 (Oct. 6, 2005) (Pa. P.U.C. No. P-000052160) (citing Answer of The Peoples Natural Gas Company).
Slip op. at 19-22.	14 n.19	Replace Slip op. with *Id.*	*Id.* at 19-22.
Phonetele, Inc. v. AT&T, 664 F.2d 716 (9th Cir. 1981)	22 n.30	Added ", 737."	*Phonetele, Inc. v. AT&T*, 664 F.2d 716, 737 (9th Cir. 1981)

COMPLAINT COUNSEL'S ERRATA SHEET FOR CITATIONS (continued)			
CITATIONS	**PAGE**	**CORRECTION**	**CORRECTED**
428 U.S. at 595-96	28	Replaced 595-96 with 596.	428 U.S. at 596
94 F. Supp. 2d at 410 (citations omitted)	32	Replaced 94 F. Supp. 2d with *Id.*	*Id.* at 410 (citations omitted)
Patrick v. Burget, 486 U.S. at 106	33	Replaced 106 with 101.	*Patrick v. Burget,* 486 U.S. at 101

COMPLAINT COUNSEL'S ERRATA SHEET FOR QUOTATIONS			
QUOTATIONS	**PAGE**	**CORRECTION**	**CORRECTED**
"foreseeable"	10	Delete quotation marks.	foreseeable
"actively supervised by state itself."	30	Added single quotation mark before "actively" and after "supervised."	"'actively supervised' by state itself."
The mere presence of some state involvement or monitoring does not suffice.	31	Added single quotation mark before "The" and after "suffice."	'The mere presence of some state involvement or monitoring does not suffice.'

COMPLAINT COUNSEL'S ERRATA SHEET FOR EXHIBITS	
EXHIBITS	**CORRECTION**
CX 0001	Failed to label Complaint Counsel's Exhibit List with CX0001.
CX 0004	Failed to include the full text of 15 PA. STAT. ANN. § 3543 (West 1967)(repealed 1988).

PUBLIC

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9322

In the Matter of

EQUITABLE RESOURCES, INC.

Patricia V. Galvan
Michael H. Knight
Michael J. Bloom
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Geoffrey M. Green
Neil W. Averitt
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April 11, 2007

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CONSOLIDATED NATURAL GAS COMPANY,	)	**PUBLIC**
and	)	
THE PEOPLES NATURAL GAS COMPANY,	)	
Respondents.	)	

BRIEF OF COMPLAINT COUNSEL
IN SUPPORT OF ITS MOTION TO STRIKE
THE AFFIRMATIVE DEFENSE OF STATE ACTION

Respondent Equitable Resources, Inc. ("Equitable") plans to acquire The Peoples Natural Gas Company from Dominion Resources, Inc. (collectively, "Dominion"). On March 15, 2007, the Federal Trade Commission filed an administrative complaint alleging that the acquisition of Dominion violates Section 5 of the Federal Trade Commission ("FTC") Act, 15 U.S.C. § 45 (2000), and Section 7 of the Clayton Act, 15 U.S.C. § 18 (2000), by eliminating competition between the only natural gas distribution companies serving certain nonresidential customers in

western Pennsylvania.[1] Respondents answered on April 9, 2007, asserting, *inter alia,* that federal antitrust review of their proposed merger is barred by the state action doctrine. Complaint Counsel now move that the Commission strike Respondents' affirmative defense of state action as insufficient as a matter of law. There is no plausible set of facts under which the doctrine would be applicable in this matter.

The state action doctrine provides a narrow defense to federal antitrust review for private parties: (1) carrying out a clearly articulated and affirmatively expressed state policy that displaces competition with regulation; and (2) whose activity in carrying out that policy is actively supervised by the state itself. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (setting forth the two-pronged analysis for private parties claiming state action protection). The doctrine is designed to accommodate conflicting policies of the state and federal governments. It suspends federal antitrust enforcement in deference to state sovereignty in cases where the state has clearly acted to displace competition to pursue other regulatory goals.

Here, however, it is apparent on the face of the statutes that govern natural gas utility mergers in Pennsylvania that there is no such conflict between jurisdictions. State and federal laws equally value competition in utility service, and equally condemn anticompetitive mergers between utility companies. The federal government fosters competition in the Clayton Act and the FTC Act, and the Commonwealth of Pennsylvania fosters competition in the Natural Gas

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[1] If allowed, the proposed merger would end competition between Equitable and Dominion, leaving nonresidential customers in many overlap areas subject to monopoly service. This class of customers includes some of the largest institutions in the Pittsburgh area, including hospitals, schools, churches, and apartment buildings. A price rise to these customers is likely in turn to force an increase in the prices they charge to their own customers.

Choice and Competition Act of 1999, 66 Pa. C.S.A. §§ 2201-2212 (2007). This Pennsylvania law codifies the longstanding policy of the Commonwealth to safeguard competition where it exists between natural gas distributors such as Equitable and Dominion – a policy that Dominion has acknowledged in the past.[2] Far from displacing competition, the Act requires the Pennsylvania Public Utility Commission ("PUC") to examine the competitive effects of a proposed merger between natural gas distributors and explicitly prohibits the approval of any merger found to be anticompetitive. 66 Pa. C.S.A. § 2210. Moreover, the statute clearly indicates that the Pennsylvania legislature, in providing for the review of natural gas mergers, did not intend to "restrict the right of any party to pursue any other remedy available to it." 66 Pa. C.S.A. § 2210(c).

In the absence of divergent policies, and in the absence of any clear intent by the Commonwealth to displace federal merger review, there is no basis for upholding the state action defense. State and federal agencies can properly review the transaction in accordance with their own particular standards and procedures.

Not surprisingly, both Pennsylvania governmental offices that have reviewed the proposed transaction – the Attorney General's Office and the PUC – concluded that state review is not exclusive with regard to the federal antitrust laws and that the state action defense does not apply.[3] After analyzing the Natural Gas Choice and Competition Act, the Chief Counsel to the

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[2] *See* Order Denying Petition of the Office of Trial Staff for the Commencement of an Investigation of Competitive Practices Between Natural Gas Distribution Companies at 8-9. (Oct. 6, 2005) (Pa. P.U.C. No. P-000052160) (citing Answer of The Peoples Natural Gas Company).

[3] Letter from James A. Donahue, III, Chief Deputy Attorney General, Antitrust (continued...)

PUC concluded that the PUC's review process is not exclusive and does not pre-empt FTC review.[4] The Antitrust Section of the Commonwealth Attorney General's Office agrees with this construction of the Natural Gas Choice and Competition Act. In a letter addressing the Equitable/Dominion acquisition, the Antitrust Section concluded that the Act:

> is not the type of displacement of competition with regulation which would warrant the application of the state action doctrine. Actually, it is the opposite – the displacement of regulation with competition. Federal courts have denied the application of the state action doctrine where the relevant state policy is designed to foster competition. *County of Stanislaus v. Pacific Gas & Electric Co.*, 1994 WL 706711, 22 (E.D. Cal. 1994); *Anheuser-Busch, Inc. v. Goodman*, 745 F. Supp. 1048, 1052 (M.D. Pa. 1990). The goal of the Natural Gas Choice and Competition Act is to promote competition. 66 Pa.C.S.A. § 2204(g); § 2203(2).[5]

In sum, the Commission should strike Respondents' state action defense because Pennsylvania has neither clearly articulated, nor affirmatively expressed, a policy authorizing anticompetitive mergers between natural gas distribution companies (under *Midcal* prong one).

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[3] (...continued)
Section, Commonwealth of Pennsylvania, to Bohdan R. Pankiw, Chief Counsel, Pennsylvania Public Utility Commission (Nov. 14, 2006) (hereinafter referred to as "Donahue Letter"); Letter from Bohdan R. Pankiw, Chief Counsel, Pennsylvania Public Utility Commission, to Barbara Adams, General Counsel, Commonwealth of Pennsylvania (Oct. 13, 2006) (hereinafter referred to as "Pankiw Letter").

[4] The Chief Counsel, Bohdan R. Pankiw, pointed specifically to § 2210(c) of the Act, which preserves the rights to pursue "other remedies." 66 Pa.C.S.A. § 2210(c). He concluded that "[t]his language tends to undercut the view that the Commission's review of the Dominion acquisition would be exclusive." Pankiw Letter at 2. The PUC formally took a position similar to their Chief Counsel – that its review of a merger did not preclude a subsequent private (or governmental) antitrust action or create a state action defense – in its amicus brief filed in *City of Pittsburgh v. West Penn Power Co.* Amicus Brief Pennsylvania Public Utility Commission Relating to Defendants' Motions to Dismiss Complaint, *City of Pittsburgh v. West Penn Power Co.*, Civ. No. 97-1772 (W.D. Pa. Nov. 18, 1997). The court ultimately found that plaintiff lacked standing, and did not address the state action issue. *City of Pittsburgh v. West Penn Power Co.*, 993 F. Supp. 332 (W.D. Pa. 1997), *aff'd*, 147 F.3d 256 (3rd Cir. 1998).

[5] Donahue Letter at 2.

But if the Commission concludes that such a policy has been clearly articulated and affirmatively expressed, it should find that Pennsylvania does not adequately supervise anticompetitive mergers between natural gas distribution companies (under *Midcal* prong two).

I. THE *PARKER* STATE ACTION DOCTRINE SHIELDS ANTICOMPETITIVE CONDUCT FROM FEDERAL ANTITRUST SCRUTINY ONLY WHEN THE CONDUCT IS IN FURTHERANCE OF A CLEARLY ARTICULATED STATE POLICY TO DISPLACE COMPETITION AND WHEN THE CONDUCT IS ACTIVELY SUPERVISED BY THE STATE

Pennsylvania's statutory scheme governing natural gas utility mergers does not meet the rigorous legal standards for state action immunity as articulated by the U.S. Supreme Court, and thus the state action defense must be denied as a matter of law.

A. The Standard of Review

The Commission may strike from any pleading any "insufficient defense." *Cf.* Fed. R. Civ. P. 12(f). A motion to strike can be a useful means of removing "unnecessary clutter" from a case, which may serve to expedite the proceedings. *See Heller Fin., Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1294 (7th Cir. 1989). The Commission should strike an affirmative defense if the Respondents could not prove any set of facts in support of the defense that would defeat the complaint. *See Williams v. Jader Fuel Co., Inc.*, 944 F.2d 1388, 1400 (7th Cir. 1991); *Reis Robotics USA, Inc. v. Concept Industries, Inc.*, 462 F. Supp. 2d 897, 905 (N.D. Ill. 2006).[6]

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[6] The leading antitrust treatise advises that state action issues can often be disposed of on the pleadings. Phillip E. Areeda & Herbert Hovenkamp, I *Antitrust Law* ¶ 222b at 388 (2d ed. 2000):

> Briefly, state authorization is generally interpreted by an objective test that looks at the language of the authorizing statute; if other evidence is needed, it can be gleaned from legislative histories or state judicial decisions. Active supervision, when it is required, is usually examined by looking at the supervisory structure

(continued...)

For purposes of this motion, the Commission should assume that the merger of Equitable and Dominion will result in reduced competition and higher prices for natural gas distribution services. *See Electrical Inspectors, Inc. v. New York Board of Fire Underwriters*, 145 F. Supp. 2d 271, 276 (E.D.N.Y. 2001). Further, in construing the state action doctrine, the Commission should heed to the principle – affirmed by the Supreme Court – that implied exemptions from the antitrust laws are disfavored, and that the *Parker* doctrine must be construed narrowly. *Federal Trade Comm'n v. Ticor Title Ins.*, 504 U.S. 621, 636 (1992).

B. The *Parker* State Action Doctrine

The Supreme Court first articulated the state action doctrine in *Parker v. Brown*, 317 U.S. 341 (1943).[7] This case upheld California's Agricultural Prorate Act against a Sherman Act challenge, upon finding that the legislation clearly intended to restrict competition among agricultural commodities growers. The Court concluded that the Sherman Act did not bar a state, acting through its legislature, from undertaking actions that yield anticompetitive results. The Court based its holding on the recognition that, under a dual system of government, the state is "sovereign, save only as Congress may constitutionally subtract from [its] authority." *Id.* at 351. The Court could discern in the language and legislative history of the Sherman Act no intent to

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[6] (...continued)
created in the relevant statutes or state administrative or judicial decisions, although occasionally inquiry will have to be made into the details of agency oversight.

[7] "The state-action doctrine is sometimes referred to as 'Parker-immunity.' But as the Fifth Circuit has cautioned, states are not 'immune' from antitrust laws, but rather are exempted from them." *Capital City Cab Service, Inc. v. Susquehanna Area Regional Airport Authority*, 470 F. Supp. 2d 462, 467 n.5 (M.D. Pa. 2006) (*citing Surgical Care Ctr. of Hammond, L.C. v. Hospital Serv. Dist. No. 1*, 171 F.3d 231, 234 (5th Cir. 1999) (*en banc*)).

restrain the activities of "a state or its officers or agents" in those particular circumstances in which the subject activities were "directed by [the state] legislature."[8] *Id.* at 350-51.

The state action doctrine limits the reach of the antitrust laws, and thus safeguards the traditional role of the states in regulating local commerce in the interest of the safety, health, and well-being of local communities. *See Parker*, 317 U.S. at 362. The *Parker* decision did not determine whether or to what extent the defense would apply to the activities of private parties acting pursuant to state law, but did issue the following warning: "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351. In other words, state sovereignty notwithstanding, there are limits upon the state's authority to empower private parties to act in a manner that would otherwise contravene the federal antitrust laws.

In *Midcal*, a unanimous Supreme Court established a two-prong test to determine when anticompetitive conduct engaged in by private parties is entitled to state action immunity. First, the challenged restraint must be undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition in favor of regulation. *Midcal*, 445 U.S. at 105. Second, the anticompetitive conduct must be actively supervised by the state. *Id.*; *accord Ticor*,

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[8] The Supreme Court has determined that a state legislature or state supreme court acting in its legislative capacity is "the sovereign itself," whose conduct is exempt from liability under the Sherman Act without need for further inquiry. *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984). In contrast, subordinate political subdivisions, including state regulatory boards, "are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985) (a municipality is not the sovereign); *see Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 62-63 (1985) (state Public Service Commission "acting alone" could not shield anticompetitive conduct from antitrust scrutiny); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791-92 (1975) (state bar association, a state agency for certain purposes, was not entitled to state action exemption).

504 U.S. at 633 (1992); *South Carolina State Board of Dentistry*, FTC No. 9311, slip op. at 15 (July 30, 2004). These two requirements established in *Midcal* are examined in greater detail below.

C. The "Clear Articulation" Requirement

In applying the clear articulation standard, courts must be careful to distinguish between a legislative intent to *displace* competition, and a legislative intent to *supplement* competition. Only the former can be the basis for the state action defense. "The fact of the matter is that States regulate their economies in many ways not inconsistent with the antitrust laws," *Ticor*, 504 U.S. at 635-36, and without intending thereby to provide an antitrust immunity. *Id.* at 636-37. Proper application of the clear articulation requirement "ensures that antitrust law will not be set aside unless the state does in fact intend to displace competition." *TEC Cogeneration Inc. v. Florida Power & Light Co.*, 76 F.3d 1560, 1568 n. 22 (11th Cir. 1996).[9]

When reviewing state utility regulation, courts often discern a legislative policy to regulate monopoly power where it exists, and at the same time to safeguard competition where, as here, multiple firms operate or are capable of operating. For example, in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the state action defense was asserted by an electric utility that distributed free light bulbs to customers. The utility was pervasively regulated by the Michigan

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[9] *See also Columbia Steel Casting Co. v. Portland General Electric Co.*, 111 F.3d 1427, 1436 (9th Cir. 1996) ("The state-action doctrine cloaks anticompetitive conduct with antitrust immunity only if the state's intent to displace competition with regulation is 'clearly articulated and affirmatively expressed as state policy.'") (*quoting Midcal*, 445 U.S. at 105); Phillip E. Areeda & Herbert Hovenkamp, I *Antitrust Law* ¶ 221d at 363 (2d ed. 2000) ("Even strong regard for state policy would require antitrust immunity *only* if that were the state's wish – that is, if the state intended in some sense to displace the antitrust laws from a certain area of activity.") (emphasis in original).

Public Service Commission, and the agency authorized the utility to recover the costs of the light bulbs as part of the company's electricity rates. *Cantor*, 428 U.S. at 581. The *Parker* defense was nevertheless rejected, because the State had not affirmatively articulated a policy to displace competition with regard to the distribution of light bulbs. *Id.* at 598.

Although the legislature need not follow any particular formula in expressing its intent to displace competition, it must be clear that the state contemplates such an outcome. *See Town of Hallie*, 471 U.S. at 43. It follows that general or neutral legislative authorizing language will not be construed to grant authority to undertake anticompetitive action. *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982). For example, state legislatures commonly authorize businesses incorporated under state law to make acquisitions; states do not thereby authorize acquisitions that unreasonably lessen competition. *See Northern Securities Co. v. United States*, 193 U.S. 197, 345-46 (1904).[10] More generally, a state's grant of ordinary corporate powers is not to be construed as authority for that entity to engage in anticompetitive

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[10] In *Northern Securities*, railroads attempting to consummate an anticompetitive merger through a holding company defended on the grounds that the holding company was not prohibited by its charter from acquiring the stock of the railroads. The Court rejected this argument, recognizing that when enacting its corporation laws and authorizing the acquisition of stock, the state did not intend to permit anticompetitive transactions:

> It is proper to say in passing that nothing in the record tends to show that the State of New Jersey had any reason to suspect that those who took advantage of its liberal incorporation laws had in view, when organizing the Securities Company, to destroy competition between two great railway carriers engaged in interstate commerce in distant States of the Union.

193 U.S. at 345.

activity. *First American Title Co. v. DeVaugh*, ___ F.3d ___, 2007-1 Trade Cas. (CCH) ¶ 75,604 (6th Cir. 2007).[11]

An intention to displace competition may be inferred only where the challenged conduct is the kind of program or action that the legislature authorized, and the suppression of competition is the foreseeable result of the legislative authorization. *Town of Hallie*, 471 U.S. at 41-44; *Yeager's Fuel v. Pennsylvania Power & Light*, 22 F.3d 1260, 1266-67 (3d Cir. 1994). In *Southern Motor Carriers*, for example, the Court considered whether the *Parker* doctrine applied to common carrier rate bureaus that engaged in collective rate-making permitted by state public service commissions. *Southern Motor Carriers*, 471 U.S. at 50. The Court found a policy to displace competition because the state statutes in question either explicitly permitted collective rate-making, *id.* at 63, or otherwise plainly contemplated an "inherently anticompetitive rate-setting process." *Id.* at 64. An anticompetitive effect is said to be foreseeable when it would "ordinarily or routinely" result from the authorizing legislation. *South Carolina Board of Dentists*, slip op. at 22-23.

Numerous cases have held that if the policy of the authorizing legislation does not contemplate competitive harm – if the legislation is fully consistent with antitrust principles – then a defense under the *Parker* doctrine may not be maintained.[12] And most certainly, where the

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[11] *See also* Phillip E. Areeda & Herbert Hovenkamp, I *Antitrust Law* ¶ 225b4 at 453-55 (2d ed. 2000).

[12] *See, e.g., DeVaugh*, 2007-1 Trade Cas. (CCH) ¶ 75,604 (6th Cir. 2007); *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 442 F.3d 410, 441 (6th Cir. 2006); *Michigan Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 534 (6th Cir. 2002); *California ex rel. Lockyer v. Mirant Corp.*, 266 F.Supp. 2d 1046, 1056 (N.D. Cal. 2003) ("If the state policy does not conflict with the goal of the federal antitrust laws, there is no need to apply (continued...)

state has expressly disavowed an intention to authorize anticompetitive conduct, the state action exemption is unavailable. An explicit articulation of the state's pro-competition policy was present, for example, in *California CNG, Inc. v. Southern California Gas Co.*, 96 F.3d 1193 (9th Cir. 1996). A California utility provided commercial fleet operators with low-priced natural gas fueling stations at prices that were subsidized by utility ratepayers. State law authorized utilities to operate fueling stations at ratepayer expense, subject to certain conditions. *Id.* at 1197. Among these conditions was that the programs must not "interfere with the development of a competitive market." *Id.* at 1199. The legislation did not confer state action immunity because, given this proviso, there was no clearly articulated state policy to allow anticompetitive conduct. *Id.* at 1203.

In sum, the critical question under prong one of the state action defense is whether the sovereign itself has acted to displace competition. In order to evidence such a decision sufficiently, the state law must articulate a public policy that intrinsically departs from competitive norms. In the absence of a state policy to displace competition, the actions of a regulated private actor – even conduct that is expressly authorized by a state agency – does not constitute state action for purposes of the federal antitrust laws.

D. The "Active Supervision" Requirement

State supervision must be sufficient to ensure that a private party's anticompetitive action is shielded from antitrust liability only when "the State effectively has made [the challenged] conduct its own." *Patrick v. Burget*, 486 U.S. 94, 106 (1988).

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[12] (...continued)
the doctrine at all."); *McCaw Personal Communications, Inc. v. Pacific Telesis Group*, 645 F.Supp 1166, 1172 (N.D. Cal. 1986).

> While a state may substitute its own regulatory program in place of the competitive market, principles of federalism and state sovereignty do not empower a state simply to displace the federal antitrust laws and then abandon the market at issue to the unsupervised discretion of non-governmental actors. Accordingly, to qualify for the state action exemption from the antitrust laws, a challenged restraint effectuated by such actors not only must accord with a clearly articulated state policy to displace competition, but also must be actively supervised by the state.

In the Matter of Kentucky Household Goods Carriers Ass'n, (FTC No. 9309) slip op. at 8-9; *see also Midcal*, 445 U.S. at 105.

The standard for active supervision is a rigorous one. To sufficiently supervise, "[a] state official or agency must have ascertained the relevant facts, examined the substantive merits of the private action, and assessed whether the private action comports with the underlying statutory criteria established by the state legislature in a way sufficient to establish the challenged conduct as a product of deliberate state intervention rather than private choice." *In the Matter of Kentucky Household Goods Carriers Ass'n*, slip op. at 10-11. As the Court noted in *Ticor*, "[f]or states which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the state is responsible for the [anticompetitive conduct] it has sanctioned and undertaken to control." *Ticor*, 504 U.S. at 636.

When the anticompetitive conduct at issue is ongoing, so must be the supervision. "Timeliness in particular is an ongoing concern; if the private conduct is to remain in place for an extended period of time, then periodic state reviews of that private conduct using current economic data are important to ensure that the restraint remains that of the State, and not of the private actors." Analysis of Proposed Consent Order to Aid Public Comment in *Indiana Household Goods and Warehousemen, Inc.*, FTC File No. 021-0115 at 6 (2003), *available at*

http://www.ftc.gov/os/2003/03/indianahouseholdmoversanalysis.pdf. Periodic state review of private conduct is particularly important when the private conduct is the merger of previously competing businesses. Section 7 of the Clayton Act makes unlawful anticompetitive effects whenever they arise, and liability may extend well beyond consummation. *See, e.g., United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957) (the legality of an acquisition under Section 7 can be determined at "any time when the acquisition threatens to ripen into a prohibited effect"); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 241 (1975) (the term "acquisition" in Section 7 includes "both the purchase of rights in another company and the retention of those rights" and thus violation continues each day that the acquired assets are retained). Accordingly, the state must actively supervise the potential anticompetitive conduct of the merged firm in the post-merger environment. *See North Carolina ex rel. Edmisten v. P.I.A. Asheville*, 740 F.2d 274, 278 (4th Cir. 1984) (active supervision of a merger is not present where the state statute "in no way attempts to monitor the conduct" of the merged firm).

In its Analysis of Proposed Consent Order to Aid Public Comment in *Indiana Household Goods and Warehousemen, Inc.*, FTC File No. 021-0115 (2003), the Commission evaluated the active supervision requirement in the context of collective rate-setting by household movers in Indiana. *Id.* at 5. While recognizing that there is "no single procedural or substantive standard that the Supreme Court has held a State must adopt," the Commission identified three "specific elements of an active supervision regime that it will consider in determining whether the active supervision prong of state action is met in future cases." *Id.* These criteria are "(1) the development of an adequate factual record, including notice and opportunity to be heard; (2) a written decision on the merits; and (3) a specific assessment – both qualitative and quantitative –

of how the private action comports with the substantive standards established by the state legislature." *Id.*[13]

In sum, active supervision requires the state to examine the challenged conduct to ensure that it comports with the standards of the state's regulatory regime. Where, as in the case of a merger, the potential for anticompetitive harm is ongoing the state must provide ongoing supervision. Only then can the underlying conduct of non-governmental actors accurately be deemed conduct of the state itself that is exempt from liability under the federal antitrust laws.

II. PENNSYLVANIA HAS NOT CLEARLY ARTICULATED A POLICY AUTHORIZING NATURAL GAS DISTRIBUTION COMPANIES TO CONSUMMATE ANTICOMPETITIVE MERGERS

Respondents' state action defense relies on the premise that the Commonwealth of Pennsylvania has clearly articulated a policy authorizing natural gas distribution companies to consummate mergers that eliminate competition to the detriment of consumers. In truth, however, Pennsylvania has long pursued a policy of promoting competition between rival natural gas companies. And in truth, anticompetitive natural gas company mergers are expressly prohibited by state law.

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[13] *See also In the Matter of Kentucky Household Goods Carriers Association, Inc.*, (FTC No. 9309) (2005), in which a unanimous Commission struck down a collective rate-setting scheme adopted by an association of Kentucky movers. Although the conduct was expressly permitted under Kentucky law, and thus met the first prong of *Midcal*, the Commission found the State's supervision inadequate for a variety of reasons. *Id.* at 19-22. These included the failure of the Kentucky Transportation Cabinet to (1) develop and implement a formula or methodology for determining whether the collective rates complied with statutory standards; (2) obtain underlying cost and revenue data from which to make an assessment of the rates; and (3) employ appropriate procedural elements – such as public input, hearings, and written decisions – in making its review. *Id.* at 17-18.

Competition between the merging firms and their predecessors dates back to the original grant of overlapping charters by the state in the late 1800s. In permitting charters with overlapping territories under the Natural Gas Companies Act of 1885,[14] the state expressly rejected the concept of exclusivity, stating that "neither this act nor any other shall be so construed as to . . . give color to any claim of exclusive right . . . ."[15] The original overlapping charters remain in place, and the Pennsylvania Public Utility Commission ("PUC") has long pursued a policy of supporting this competition.[16] Dominion itself has acknowledged this policy, asserting in a recent PUC proceeding that it is and has been the Commonwealth's and the PUC's

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[14] 15 PA. STAT. ANN. § 3541 (West 1967)(repealed 1988) (the current Public Utility Code at 66 Pa. C.S.A. § 103(a) grandfathered the nonexclusive charter provisions granted by the Natural Gas Companies Act of 1885).

[15] 15 PA. STAT. ANN. § 3543 (West 1967)(repealed 1988). Thus, "the 1885 act appeared to open the field of natural gas supply to free competition . . . ." *Equitable Gas Co. v. Apollo Gas Co.*, A.L.J. Initial Decision at 50-51, Nos. C-844028; C-844035, (Pa. P.U.C. Aug. 2, 1988)

[16] The Public Utility Commission recently acknowledged its policy of "encouraging competition in the gas industry," noting further that:

> The result of this policy encouraging competition in the natural gas industry was the western Pennsylvania gas wars – customer/territorial disputes that erupted among gas distribution companies with contiguous service territories. Western Pennsylvania with its overlapping gas company service territories provided a perfect arena for such competition.

Pennsylvania Public Utility Commission, Report to the General Assembly on Competition in Pennsylvania's Retail Natural Gas Supply Market at 10 (Oct. 2005) (hereinafter cited as "1995 PUC Competition Report").

longstanding policy to approve and encourage free and open competition among natural gas distribution companies that have overlapping service territories.[17]

A. The Natural Gas Choice and Competition Act Does Not Evidence a Policy to Authorize Anticompetitive Mergers

Pennsylvania's preference for effective competition between natural gas distributors was affirmed most recently in the Natural Gas Choice and Competition Act.[18] Central to the present motion, the Act prohibits anticompetitive mergers between natural gas utilities. The statute conveys this direction to the Public Utilities Commission in the following language:

> (a) General rule. – In the exercise of authority the commission otherwise may have to approve mergers or consolidations involving **natural gas distribution companies** or natural gas suppliers . . . the commission shall consider:
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> (1) Whether the 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 the benefits of a properly functioning and effectively competitive **retail natural gas market**.
>
> * * *
>
> (b) Procedure. – . . . If the commission 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 the benefits of a properly functioning and effectively competitive **retail natural gas market**, the commission shall not approve such proposed merger, consolidation, acquisition or disposition, except upon such terms and conditions as it finds

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[17] Order Denying Petition of the Office of Trial Staff for the Commencement of an Investigation of Competitive Practices Between Natural Gas Distribution Companies at 8 (Oct. 6, 2005) (Pa. P.U.C. No. P-000052160) (citing Answer of The Peoples Natural Gas Company).

[18] 66 Pa. C.S.A. §§ 2201-2212 (2007).

necessary to preserve the benefits of a properly functioning and effectively competitive retail natural gas market.

66 Pa. C.S.A. § 2210 (emphasis added).

Here then is the plain meaning of the statute: The PUC is directed to examine mergers involving "natural gas distribution companies." The PUC must evaluate whether the merger is likely to result in "anticompetitive conduct" or the "unlawful exercise of market power." And, if the PUC cannot remedy these consequences, then the PUC "shall not approve such merger."[19]

In the face of this clear legislative instruction, how can Respondents suggest that Pennsylvania policy authorizes anticompetitive mergers between natural gas distribution companies? Respondents will, we expect, ask the Commission to set aside the plain meaning of the statute, and to engage in an esoteric search for a deeper message. The argument starts with the observation that the price paid by a Pennsylvania consumer to obtain natural gas is made up of two components, the price of natural gas supply service and the price of natural gas distribution service.[20] According to Respondents, Section 2210 is concerned only with mergers that harm natural gas supply service competition. Consumers who are victimized by a merger that results in supracompetitive natural gas distribution prices are thus wholly unprotected by this statute.

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[19] Subsection (a)(2) of Section 2210 directs the PUC to consider, in addition to a merger's competitive impact, its effects on the employees and the unions of the merging firms. Arguably, the PUC may block a pro-competitive merger that will harm employees. However, subsection (b) makes clear that the PUC may only approve a merger when it has no adverse competitive effects – without regard to its implications for employees.

[20] Natural gas supply refers to selling the commodity. Natural gas distribution refers to moving the commodity (*e.g.*, to the home or business of the consumer).

Respondents' preferred reading of Section 2210 is implausible for several reasons. First, the Legislature instructs the PUC to review the competitive effects of any merger of "natural gas distribution companies." It is most reasonable to suppose that the purpose of this review is to consider the effects of such a merger on the natural gas distribution service market, the market in which such firms are primarily active. Second, the term "natural gas supply" – the linchpin of Respondents' argument – does not appear in Section 2210. Instead, the PUC is tasked with protecting the "retail natural gas market." Respondents choose to read the phrase "retail natural gas market" as referring only to the natural gas supply services market. But the term "retail natural gas supply services" is expressly defined in the statute. Had the Pennsylvania Legislature intended that merger review under Section 2210 focus only on supply competition, it easily could have employed the defined phrase ("natural gas supply services") that lay so conveniently at hand. Its choice of a different term – the more inclusive "retail natural gas market" – provides strong evidence that the new term has a different meaning.[21]

Third, and most critically, the protected category of consumers for purposes of Section 2210, the group that is assured of a competitive marketplace, is "retail gas customers." The term "retail gas customer" is defined in Section 2202 of the Natural Gas Choice and Competition Act to mean a "direct purchaser of natural gas supply services *or* natural gas

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[21] *See Smith v. Pennsylvania DOT*, 740 A.2d 284, 286 (Pa. Commwlth. 1999) (court deemed it important that one statutory section used the general term "person" rather than the more limited term "driver" that was defined earlier in the act); *see also Pietrafesa v. First American Real Estate Information Services*, 2007 U.S. Dist. LEXIS 15785, 18-19 (N.D.N.Y. 2007) (where the term "consumer" is defined in the statute, the use of a different term signifies that a different meaning is intended).

distribution services . . . ."[22] Therefore, in connection with either service – gas supply or gas distribution – anticompetitive mergers are proscribed.

Note that under Respondents' interpretation of the statute, the "retail natural gas market" will consist of consumers of supply services and consumers of distribution services, but sellers of supply services only. This makes no economic sense and no practical sense. There is no reason to conclude that this is what the Legislature intended.[23]

"It is well settled that when the language of a statute is clear and unambiguous, the statute must be interpreted in accordance with its plain and common usage." *Commonwealth v. Burnsworth*, 543 Pa. 18, 24, 669 A.2d 883, 886 (Pa. 1995). Moreover, where the legislature uses different terminology in different parts of a statute, such as referring to an "effectively competitive retail natural gas market" in Section 2210, while referring to "effective competition for natural gas supply services" in Section 2204(g), it provides strong evidence that each term is intended to have a different meaning. *See* 66 Pa.C.S. § 2204(g); 1 Pa.C.S. § 1921(a); *Pantuso Motors, Inc. v. CoreStates Bank, N.A.*, 568 Pa. 601, 608, 798 A.2d 1277, 1282 (Pa. 2002) ("Whenever possible, statutes must be constructed so as to give effect to every word.").[24] The

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[22] 66 Pa. C.S.A. § 2202 (emphasis added).

[23] There is no real mystery in the term "retail natural gas market." This is the market that serves "retail gas customers." "Retail gas customers" purchase services from both "natural gas suppliers" and "natural gas distribution companies." A natural gas merger is therefore prohibited if it has an anticompetitive effect in the provision of either supply services or distribution services. This plain reading of Section 2210 entails none of the anomalies that arise in connection with the tendentious interpretation favored by Respondents.

[24] *See also Hey v. Springfield Water Co.*, 207 Pa. 38, 56 A. 265 (1903) (court deemed it a "very significant fact" that the legislature intended rights in the first paragraph of a statute to be exercised only by corporations "now in existence," whereas the next paragraph (continued...)

tenet that different words convey different meanings is especially significant where the legislature fails to employ a defined term, such as "natural gas supply services," in a particular section of a statute.

In the Initial Decision in this case, the PUC's Administrative Law Judge ("ALJ") properly treated Section 2210 as central to his analysis of the merger – and read it to require an assessment of the effects of the proposed merger upon distribution competition. The ALJ recited the provisions of Section 2210 at the start of the opinion along with the other relevant legal standards for decision,[25] and again when substantively evaluating the transaction: "When evaluating the consolidation of two natural gas distribution companies, the Commission must consider whether the proposed consolidation is likely to result in anticompetitive or discriminatory conduct, which will prevent retail gas customers from obtaining the benefits of a properly functioning and effectively competitive retail natural gas market. 66 Pa. C.S. § 2210."[26] The ALJ then proceeded under this standard to consider how the merger would affect, not just supply competition, but also "gas-on-gas" distribution competition.[27] Although Complaint Counsel disagree with the ALJ's conclusions concerning the competitive effects of this merger, for purposes of the present motion it is important that the ALJ recognized that the Section 2210 standard is applicable to competition for *distribution*, and carried out his analysis accordingly.

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[24] (...continued)
omitted the restrictive words and gave different powers to "any corporation").

[25] *In re Equitable Resources, Inc.*, No. A-122250F5000 at 19 (Pa. P.U.C. Feb. 5, 2007).

[26] *Id.* at 67.

[27] *Id.* at 66-68.

In sum, the Pennsylvania Legislature, in enacting Section 2210, contemplated and intended that only pro-competitive natural gas utility mergers would be permitted. As discussed above, this explicit articulation of the Legislature's pro-competition policy defeats the state action defense. *See California CNG*, 96 F.3d 1193 (where private parties act pursuant to a state policy authorizing only pro-competitive conduct, the state action defense is not available); *Surgical Care Center of Hammond*, 171 F.3d at 235 (state statute authorizing a public hospital to form joint ventures so as to compete "equally" with private hospitals does not authorize anticompetitive joint ventures); *United States v. Title Ins. Rating Bureau*, 700 F.2d 1247, 1253 (9th Cir. 1983) (no intent to displace competition where authorizing statute provides: "Nothing in this article is intended to prohibit or discourage reasonable competition . . ."); *Reazin v. Blue Cross & Blue Shield of Kansas*, 663 F. Supp. 1360, 1419 (D. Kan. 1987) (no intent to displace competition where authorizing statute provides: "Nothing in the . . . act is intended to prohibit or discourage reasonable competition . . .").

B. Pennsylvania's Certificate of Public Convenience Requirement Does Not Evidence a Policy to Authorize Anticompetitive Mergers

While the Natural Gas Choice and Competition Act by itself demonstrates that Pennsylvania has not clearly articulated a policy authorizing anticompetitive mergers of natural gas distribution companies, the same conclusion emerges from Pennsylvania's general statutes governing utility mergers. The Commonwealth's Public Utility Code permits the merger of natural gas distribution companies, but subject to conditions that include prior approval by the PUC.[28] There is nothing "inherently anticompetitive" about empowering a state agency to review

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[28] 66 Pa. C.S.A. § 1102 of the Public Utility Code provides in pertinent part:
(continued...)

mergers.[29] The mere fact that a state regulatory agency has authority to review and approve private conduct is not sufficient to preclude federal antitrust review. For example, in *Cantor*, the Supreme Court concluded that the utility's free light bulb policy, although approved by the state regulator, was subject to antitrust scrutiny. 428 U.S. at 598. In *Glaberson v. Comcast Corp.*, 2006-2 Trade Cas. (CCH) ¶ 75,531 (E.D. Pa. 2006), the district court concluded that a transaction that had been "approved by government authorities at the federal, state, and local levels" was subject to antitrust scrutiny. These are two of several cases that reject the state action defense even though the challenged conduct has been approved by a state agency.[30] If, as

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[28] (...continued)

§ 1102. Enumeration of acts requiring certificate

(a) General rule – Upon the application of any public utility and the approval of such application by the commission, evidenced by its certificate of public convenience first had and obtained, *and upon compliance with existing laws*, it shall be lawful:

* * *

(3) For any public utility or affiliated interest of a public utility . . . to acquire from, or transfer to, any person or corporation . . . by any method or device whatsoever, including the sale or transfer of stock, and including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service.

66 Pa. C.S.A. §1102(a)(3) (emphasis added).

[29] *Cf. Southern Motor Carriers*, 471 U.S. at 64 (rate setting by administrative agency is "inherently anticompetitive").

[30] *See also Phonetele, Inc. v. AT&T*, 664 F.2d 716, 737 (9th Cir. 1981); *United States v. Rochester Gas & Electric Corp.*, 4 F. Supp. 2d 172, 176 (W.D.N.Y. 1998); *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 1995-1 Trade Cas. (CCH) ¶ 71,034 (E.D. Pa. 1995); *AT&T v. IMR Capital Corp.*, 888 F. Supp. 221, 239 n. 9 (D. Mass. 1995); *United States v. Pacific Southwest Airlines*, 358 F. Supp. 1224, 1230 (C.D. Cal. 1973).

Respondents claim, there is a Pennsylvania policy to displace competition, it cannot be found in the mere existence of a procedure for agency review of mergers. It must instead be located in the substantive conditions that the Legislature has established before that merger may proceed.

Section 1102 of the Public Utility Code specifies two prerequisites for the merger of natural gas distribution companies and other utilities. First, the parties must obtain from the PUC a Certificate of Public Convenience ("CPC"); this is the agency review mechanism referenced above. Second, the parties must otherwise comply with existing law.[31] In substance then, PUC review is one screen deliberately layered atop all other legal requirements relevant to a prospective utility merger, *e.g.*, tax law, securities law, environmental law.[32] Among the legal requirements applicable to a proposed merger – and left undisturbed by Section 1102 – is compliance with federal antitrust law as well as Pennsylvania's common law of antitrust. *In re Rodriguez*, 587 Pa. 408, 414-15, 900 A.2d 341, 345 (2003) (When interpreting state statutes, "we

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[31] This principle actually appears in two places in the Public Utility Code. First, as quoted above, Section 1102(a) specifies that compliance with existing laws is a prerequisite to a lawful merger. In addition, Section 103 of the Public Utilities Act provides generally for the continuation of existing law. *See* 66 Pa. C.S.A. § 103(a) ("Except as otherwise specifically provided in this part, it is the intention of this part to continue existing law."). Section 103(c) further provides that remedies shall be cumulative. *See* 66 Pa. C.S.A. § 103(c) ("Except as otherwise provided in this part, nothing in this part shall abridge or alter the existing rights of action or remedies in equity or under common or statutory law of this Commonwealth, and the provisions of this part shall be cumulative and in addition to such rights of action and remedies.").

[32] *Cf. Joint Application for Approval of the Merger of GPS, Inc. with First Energy Corp.*, Pennsylvania Public Utility Commission, 2001 Pa. PUC LEXIS 22 *33 (April 23, 2001) (this transaction is subject to shareholder approval, approval of the companies' registration statements and proxy by the Securities and Exchange Commission, Federal Energy Regulatory Commission approval, FTC/Department of Justice determination of compliance with the Hart-Scott-Rodino Antitrust Improvements Act, Federal Communications Commission approval of license transfers, Nuclear Regulatory Commission approval of the merger, and New York State Public Service Commission approval of the merger).

must assume that the General Assembly understands the legal landscape upon which it toils, and we, therefore, expect the General Assembly to state clearly any intent to redesign that landscape.").[33]

The courts of Pennsylvania have long recognized that agreements in restraint of trade are unlawful. *Collins v. Main Line Board of Realtors*, 452 Pa. 342, 304 A.2d 493 (1973) (collecting cases). In *Collins*, the Pennsylvania Supreme Court held that Pennsylvania's common law doctrine governing restraints of trade should be interpreted in accord with Section 1 of the Sherman Act. 452 Pa. at 349, 304 A.2d at 496.[34] A merger that is likely to harm competition is an unreasonable restraint of trade within the meaning of Section 1, and accordingly a violation of Pennsylvania law as well. *See, e.g., United States v. First National Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964); *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1281 (7th Cir. 1990) ("We doubt whether there is a substantive difference today between the standard for judging the lawfulness of a merger challenged under Section 1 of the Sherman Act and the standard for judging the same merger challenged under Section 7 of the Clayton Act.").

Given that Sections 1102 and 1103 do not pre-empt state antitrust law, it follows that there is no state authorization to displace competition in connection with the merger of natural

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[33] *See also March v. Philadelphia & West Chester Traction Co.*, 285 Pa. 413, 415 (1926) ("We have repeatedly said, and it is especially applicable in the instant case, that a statute should be so interpreted that 'it will accord, as nearly as may be, with the theretofore existing course of the common law.'"); *Todora v. Jones & Laughlin Steel Corp.*, 304 Pa. Super. 213, 219-20, 450 A.2d 647, 650 (1982) ("Our Supreme Court has held that in the absence of an express declaration, the law presumes that a statute is not intended to change the common law."), *aff'd*, 356 Pa. 349, 52 A.2d 205 (1947).

[34] *See also Huberman v. Warminster Township*, 1981 Pa. D. & C. 3d 312, 1981 Pa. Dist. & Cnty. Dec. LEXIS 511 (C. P. Bucks County 1981) (Sherman Act embodies Pennsylvania's common law doctrine concerning restraints of trade).

gas distribution companies. The applicability of Pennsylvania antitrust law to utility mergers defeats Respondents' state action defense.[35]

Even if one focuses solely on the requirements for issuance of a CPC, here too there is no clear articulation of a state policy to displace competition in the merger context. Pursuant to Section 1103(a), the application for a CPC may be granted by the PUC only if it finds or determines "that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public." 66 Pa. C.S.A. § 1103(a).[36] None of these conditions is incompatible with the preservation of effective competition. The legislative policy reflected in these particular statutory provisions is therefore neutral on the question of whether utilities are permitted to consummate anticompetitive mergers. This policy of neutrality is an insufficient basis for the state action defense. *Cf. City of Boulder*, 455 U.S. at 55-56; *Lockyer*, 266 F. Supp. 2d at 1056 ("If the state policy does not conflict with the goal of the federal antitrust laws, there is no need to apply the [state action] doctrine at all.").

On this issue, the closest precedent is *McCaw Personal Communications*, 645 F. Supp. 1166. Plaintiff alleged that the merger of Pacific Telesis and Communications Industries would lessen competition in the electronic paging market in violation of Section 7 of the Clayton Act.

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[35] When a state's antitrust laws are applicable to the challenged conduct, it follows that a state policy to displace competition is not present, and that the *Parker* defense must be rejected. *See Cedarhurst Air Charter, Inc. v. Waukesha County*, 110 F. Supp. 2d 891, 893-94 (E.D. Wisc. 2000); *Ehlinger & Assoc. v. Louisiana Architects Ass'n*, 989 F. Supp. 775, 785-86 (E.D. La. 1998), *aff'd*, 167 F.3d 537 (5th Cir. 1998); *United States v. Title Ins. Rating Bureau*, 517 F. Supp. 1053, 1059 (D. Az. 1981), *aff'd*, 700 F.2d 1247 (9th Cir. 1983).

[36] The Supreme Court of Pennsylvania has held that the proponent of a merger has the burden to show that the merger will affirmatively promote the public interest. *City of York v. Pennsylvania Public Utility Commission*, 449 Pa. 136, 141, 295 A.2d 825, 828 (1972).

645 F. Supp. at 1168. The California Public Utilities Commission had previously reviewed the acquisition, and upon finding that the transaction was in the public interest, permitted the transaction to go forward. *Id.* at 1171. The merging parties asserted that the merger was now immune from antitrust review per the state action doctrine. *Id.* at 1172. The court rejected this defense, explaining that PUC review under a public interest standard does not evidence the state's intent to displace competition with regulation:

> Pacific has made no showing that the State of California, through the PUC's review of acquisitions in the telecommunications field, intends to displace competition. Rather, given the antitrust component of the public interest standard applied by the PUC, it appears that California's intention was to foster competition rather than displace it. The state has not determined as a matter of policy that the conduct challenged by [plaintiff] – the acquisition of a competitor – is to be insulated from competition or competitive concerns. To the extent the State as sovereign has expressed an opinion at all, it is merely to assure that such acquisitions are in the public interest. Thus, the clear intention to authorize anticompetitive activity that existed in *Southern Motor Carriers* simply is not present here. Pacific's claim of state action immunity thus does not meet the first prong of the *Midcal* test . . .

Id.

As the Pennsylvania Public Utility Code does not itself evidence a policy to displace competition, Respondents may examine how the PUC has actually interpreted and implemented its authority to review utility mergers. If one is searching for a policy to displace competition, this too is a dry hole. As part of its assessment of whether a proposed merger is in the public interest, the PUC considers the likely effect of the transaction upon competition (similar to the test applied in *McCaw).*[37] The PUC has never asserted that it has the authority to approve an

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[37] *See, e.g., Joint Application of PECO Energy Co. And Public Service Electric and Gas Co. for Approval of the Merger of Public Service Enterprise Group, Inc. with and into Exelon Corp.*, 2006 Pa. PUC LEXIS 2 (Feb. 1, 2006); *Joint Application of Bell Atlantic Corp.* (continued...)

anticompetitive merger. And as best we can determine, the PUC has never approved a merger that it judged to be anticompetitive. In this regard, Section 2210 (discussed in the previous section) may be viewed as a codification of long-standing state policy to preclude anticompetitive mergers involving natural gas utilities.

C. State Regulation of Natural Gas Distribution Companies Does Not Evidence a Policy to Authorize Anticompetitive Mergers

We anticipate that Respondents will claim that Pennsylvania regulation of the natural gas distribution industry forecloses application of the federal antitrust laws. This argument is inconsistent with the policy underlying the state action doctrine, as well as the state action case law, and should be rejected. As the Supreme Court observed in another context: "Even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry." *National Gerimedical Hosp. & Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 389 (1981).

In applying the clear articulation prong of the *Midcal* test, courts ask whether the specific restraint that is challenged by the plaintiff (here, an anticompetitive merger) has been clearly articulated and affirmatively authorized as state policy. In this way, the court gauges whether it is the state's intent to permit the conduct at issue in the case. It is not sufficient to show that the state has determined to displace competition in some other aspects of Respondents' business. To the contrary, Respondents must show that the state intended to permit anticompetitive mergers, for it is the state's prerogative to determine which "discrete parts of the economy" should be

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[37] (...continued)
and GTE Corp. for Approval of Agreement and Plan of Merger, 1999 Pa. PUC LEXIS 86 (Nov. 4, 1999).

subject to antitrust enforcement, and which should be subject to regulation in lieu of competition. *See Ticor*, 504 U.S. at 632-33. The Commonwealth of Pennsylvania may choose to displace competition with regard to some conduct by regulated entities, but not other conduct by the same entities. *Patrick v. Burget*, 486 U.S. at 101 ("the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies"); *Cantor*, 428 U.S. at 594-95 n. 31. Stated differently, the state may impose an extensive regime of regulation upon utilities without thereby forfeiting the protection against anticompetitive mergers that is afforded by the federal antitrust laws.

Even if we assume pervasive state regulation in this instance, we know of no case in which the Supreme Court upheld the state action defense solely on those grounds. In *Cantor*, previously discussed, the Supreme Court declined to uphold the state action defense in connection with an electric utility's distribution of free light bulbs, despite the state's pervasive regulation of the defendant. The Court explained: "There is no logical inconsistency between requiring [a public utility] to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy." 428 U.S. at 596. The very same analysis applies here. There is no inconsistency between a broad policy of rate regulation and at the same time maintaining competition (prohibiting anticompetitive mergers) where multiple suppliers exist.

Numerous lower courts have similarly rejected the pervasive regulation argument. For example, *Yeager's Fuel* involved a dispute between fuel oil dealers (plaintiffs) and an electric utility (defendant) over who would supply heat to Pennsylvania homeowners. 22 F.3d at 1263.

Plaintiffs alleged that the electric utility employed various marketing practices that violated the federal antitrust laws: (i) offering consumers a special rate for installation of high-efficiency electric heating systems; (ii) offering developers cash grants and other incentives for each new home in which an electric heat pump was installed; and (iii) in some cases, conditioning the availability of incentive offers upon the developer agreeing that the entire development will consist of only electrically heated units. *Id.* The electric utility was regulated by the state in a manner no less pervasive than the gas distribution company litigants here. Still, the Third Circuit did not award the electric utility blanket immunity from antitrust liability. Instead, each of the challenged practices was evaluated separately by the court – in each instance, looking for state authorization to engage in the challenged practice and foreseeable competitive harm in connection with that authorization, despite the pervasive regulatory scheme. The state action defense was upheld as to marketing practices (i) and (ii). *Id.* at 1273. Marketing practice (iii), the "all-electric development agreements," was unrelated to any statutory policy and therefore subject to antitrust scrutiny. *Id.* at 1270.[38]

If the pervasive regulation argument had merit, then there would be no federal antitrust enforcement in utility industries, or for other companies that are extensively regulated by the states. The reality is quite the opposite. Allegations that regulated utilities have acted to

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[38] *See Yeager's Fuel v. Pennsylvania Power & Light Co.*, 1995-1 Trade Cas. (CCH) ¶ 71,034, 1995 U.S. Dist. LEXIS 7972 at *2 n.2 (E.D. Pa. 1995). Following remand from the Third Circuit, plaintiff filed an Amended Complaint asserting a new and fourth claim. Again, pervasive regulation was not sufficient to establish a state action defense. The court focused on the specific marketing practice being challenged, and concluded that the practice was not authorized by a clear and affirmative policy to displace competition. *Id.* at *4-17. *See also Susquehanna Area Regional Airport Authority*, 470 F. Supp. 2d 462, 2006 U.S. Dist. LEXIS 85555 at *23 ("The Third Circuit has been careful to avoid equating broad delegations of power with foreseeability of anticompetitive conduct in the state-action doctrine context.").

eliminate competition or exclude competitors are subject to antitrust review when the specific conduct challenged by the plaintiff is not sufficiently authorized by the state. *E.g.*, *Columbia Steel Casting Co.*, 111 F.3d at 1437 ("the state did not approve the displacement of competition with territorial monopolies in the Portland market with the clarity required by *Midcal*"); *Consolidated Gas Co. v. City Gas Co.*, 880 F.2d 297, 300 (11th Cir. 1989) ("The mere fact that City Gas is regulated does not automatically exempt it from compliance with federal antitrust provisions."), *on reh'g en banc*, 912 F.2d 1262 (11th Cir. 1990), *vacated and remanded*, 499 U.S. 915 (1991), *on remand*, 931 F.2d 710 (11th Cir. 1991); *Phonetele, Inc.*, 664 F.2d 716; *Rochester Gas*, 4 F. Supp. 2d 172; *IMR Capital Corp.*, 888 F. Supp. 221 ("There is, therefore, nothing about the mere fact that a public utility is regulated by a state to suggest that the state has a policy of encouraging any particular anti-competitive practices by the utility, or of discouraging competition at all, as required by the first element of the *Midcal* test."); *AT&T v. North American Industries of NY, Inc.*, 783 F. Supp. 810 (S.D.N.Y. 1992) (rejecting pervasive regulation argument).

In sum, pervasive regulation does not constitute, and is not a substitute for, a clearly articulated state policy that authorizes anticompetitive mergers.

III. THE STATE REGULATORY SCHEME, AS CARRIED OUT BY THE PUC, IS INSUFFICIENT TO ACTIVELY SUPERVISE THE POTENTIAL ANTICOMPETITIVE CONDUCT OF THE MERGED FIRM

As set forth above, where private parties seek to claim state action immunity they must show that their allegedly anticompetitive conduct not only is authorized by a clearly articulated and affirmatively expressed state policy, but also that it is "'actively supervised' by the state itself." *Midcal*, 445 U.S. at 105. Accordingly, even if Pennsylvania somehow were found to

have clearly articulated a policy displacing competition in favor of regulation with regard to mergers between natural gas companies, Respondents still must show that the state will actively supervise their conduct before immunity can be granted. Under *Midcal* and its progeny, however, the existing state scheme is insufficient to provide adequate active supervision over the conduct of the merged firm.

A. Where States Allow For the Displacement of Existing Competition Through Private Action, Courts Require Stringent Supervision Over Potentially Anticompetitive Conduct

When existing competition is eliminated as a direct result of private actions that carry out a purported state policy, courts require ongoing state oversight to meet the active supervision test. For example, in *P.I.A. Asheville,* the issuance of a Certificate of Need ("CON") approving a merger of psychiatric hospitals under state law was insufficient to afford immunity where the state did not "monitor the use of the acquisition." 740 F.2d at 278. Even where some state oversight is provided, courts require that it amount to comprehensive, ongoing involvement to be sufficient. Thus, in *New York v. Saint Francis Hospital*, 94 F. Supp. 2d 399 (S.D.N.Y. 2000), two hospitals were denied state action immunity for the formation of a potentially anticompetitive joint venture, even though some aspects were reviewed and approved in the course of CON applications.

> The [Department of Health's] approval of the Mid-Hudson establishment CON and [its] failure to object to the 'trades' and the 'Fairness Formula' does not constitute the kind of 'comprehensive, ongoing involvement' that justifies antitrust immunity. The 'active supervision' prong requires that the State 'exercise ultimate control over the challenged anticompetitive conduct.' 'The mere presence of some state involvement or monitoring does not suffice.' Defendants fail to point to any continuing state involvement in their allocation of health care services after the Mid-Hudson establishment CON was approved. . . . Defendants further admit that the State has not reviewed its joint negotiations with third-party payers.

Id. at 410 (citations omitted).[39]

Even where the state itself creates monopoly power by granting exclusive contracts it must closely oversee the conduct of the monopolist. In *Electrical Inspectors v. Village of East Hills*, 320 F.3d 110 (2d Cir. 2002), the Second Circuit reviewed active supervision in the context of a grant of exclusive rights to one firm to conduct government-required electrical inspection services within a municipality. Addressing the requirement, the Court noted that the "Village 'may not confer antitrust immunity' – including immunity from such charges of monopolization – 'on private persons by fiat.' Unless the Village maintains 'ultimate control' over the monopoly it created, 'there is a real danger that [the defendant] is acting to further [its] 'own interests, rather than the governmental interests of the State.'" *Id.* at 127 (citations omitted). With regard to allegations that the defendant had engaged in "poor service and retaliatory threats" pursuant to its state-authorized exclusive position, the Court remanded the case for further consideration of the active supervision issues. *Id.* at 128. The Court noted, however, that "the Village's mere 'negative option' to replace the [firm] at any time is alone likely inadequate supervision." *Id.* (citations omitted).[40]

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[39] *See also Consolidated Gas Co. of Florida v. City Gas Co. of Florida*, 665 F. Supp. 1493 (S.D. Fla. 1987) (state did not sufficiently supervise territorial allocation where review was undertaken "after a hearing, *only* when someone complains to [the state] or petitions for review of the agreement"), *aff'd*, 880 F.2d 297 (11th Cir. 1989), *on reh'g en banc*, 912 F.2d 1262 (11th Cir. 1990), *vacated and remanded*, 499 U.S. 915 (1991), *on remand*, 931 F.2d 710 (11th Cir. 1991). Because there was "no evidence that the FPSC has established any standards for the creation of territorial agreements or that territorial agreements are reviewed on a regular basis in the absence of a petition by a party or utility customer for reconsideration," the court found that the second prong of *Midcal* had not been met. *Id.* at 1532.

[40] In *Englert v. City of McKeesport*, 637 F. Supp. 930 (W.D. Pa. 1986), the Western District of Pennsylvania found insufficient supervision in a similar grant by a municipality of (continued...)

At a minimum, active supervision in this case would require *regular review* not only of the pricing of the merged firm, but also of other practices that may result in competitive harm in order to ensure that they comport with the state's policies. *Midcal*, 445 U.S. at 106 (state officials must engage in a "pointed reexamination" of private conduct). In addition, it requires that the state be able to eliminate practices of which it disapproves. *Patrick v. Burget*, 486 U.S. at 101 ("state officials [must] have and exercise power to review particular anticompetitive acts of private parties and *disapprove those that fail to accord with state policy*") (emphasis added). Because Pennsylvania will not adequately supervise the conduct of the merged entity, the state action defense cannot apply.

B. The Prevailing Legislative Scheme and Merger Settlement Proposal Are Insufficient to Provide Adequate State Supervision Over the Monopoly That Would Be Created

Pennsylvania's regulatory scheme is insufficient to provide the level of active supervision required under *Midcal*. The cases discussed in sections III.A. and I.D. above require that the state "have and exercise ultimate authority" over the challenged anticompetitive conduct. *Patrick v. Burget*, 486 U.S. at 101 (*quoting Southern Motor Carriers*, 471 U.S. at 51). When that conduct is a merger, the supervision required is over the potentially anticompetitive conduct of the merged firm. While the PUC will continue to regulate Equitable in the post-merger world as it does other natural gas distribution companies, including approving maximum rates to be charged and providing for the adjudication of certain customer disputes/complaints, there are

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[40] (...continued)
exclusive rights to perform electrical inspections, even though the city exercised control over standards, methods and/or practices employed by the private company in its inspections but maintained no control over the private party's fees. *Id.* at 933.

myriad means by which the merger could lead to the exercise of market power that would remain unsupervised, or under-supervised, by the state. For example, the merger may well lead to the elimination of discounting, service declines, or the discontinuation of contractual terms favorable to consumers, all outside the scope of normal PUC regulation. Consumers may in this way be harmed by conduct that hardly would seem to accord with any state policy, but that would appear to be beyond the current scope of the state oversight.

Title 52 of the Pennsylvania Code, 52 Pa. Code § 1.1 *et seq.* (2007), sets forth general terms of regulation for public utilities, and describes the standards and procedures to be followed by natural gas companies in conducting a variety of activities, such as filing tariffs, reporting service interruptions, investigating customer complaints, and the like. While these general regulations cover a wide swath of utility activity, they are far from comprehensive in terms of governing the potential anticompetitive effects of the proposed merger.

For example, distribution contracts typically contain an array of non-regulated or only partially-regulated terms, including discounted rates, contract length, and service requirements. Competition between Equitable and Dominion in these respects has resulted in better terms for customers. These improvements have occurred despite regulations that would allow for less. In some instances, the new terms improve upon regulation (such as when rates below the maximum tariff rate are negotiated or firms compete to develop service reputations). At other times, they bring benefits entirely outside the scope of regulation (such as when a utility offers a long-term contract, or makes performance guarantees in order to win a commercial account).

Post-merger, both kinds of benefits may be eliminated. Recognizing that the legislative scheme of supervision would be insufficient to protect against even the most obvious

anticompetitive effects (imposition of higher rates, degradation of service) a number of objectors entered into short-term settlements with the merging parties in an attempt to mitigate potential competitive harm. As part of proposed settlement agreements before the PUC, the merging parties have agreed not to seek higher rate tariffs before January 1, 2009, and have committed to maintain service quality (at least in the short-term) through the imposition of a Service Quality Index ("SQI") that sets goals for service performance in seven categories. Although these settlement terms impose greater obligations than state regulations, they are temporary in nature, expiring at the companies' next base rate proceeding. *See Equitable Resources, Inc.*, No. A-122250F5000 at 69-72. Thus, there is no mechanism to ensure that the merged entity will remain committed to these higher levels of service. In short, the merged firm may be able to exploit its market power in numerous ways that are not actively supervised by the state.

IV. PUC APPROVAL OF THE PROPOSED MERGER DOES NOT PRE-EMPT FEDERAL JURISDICTION

Respondents may assert that even if the requirements of the state action defense are not established, PUC review and approval of the proposed merger still precludes the FTC from bringing a cause of action under Section 7 of the Clayton Act. The claim is that Pennsylvania law somehow pre-empts the federal antitrust laws, and that the PUC's jurisdiction over the proposed transaction is exclusive. As detailed below, this argument is without merit.

Under the Supremacy Clause contained in Article VI of the Constitution, when a state law conflicts with the federal law, or where the state law "stands as an obstacle" to the accomplishment of Congress' full objectives, it is the state law that is pre-empted. *Silkwood v.*

Kerr-McGee Corp., 464 U.S. 238, 248 (1984). Conversely, it is a "truism that States may not pre-empt federal law." *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990).[41]

Of course, a federal statute may provide for reverse pre-emption, in whole or in part. *See Genord v. Blue Cross & Blue Shield of Michigan*, 440 F.3d 802 (6th Cir. 2006) (discussing state law pre-emption of the federal antitrust laws as applied to the insurance industry, as expressly authorized by the McCarran Ferguson Act). But in the case of state-regulated utilities, Congress has not authorized states to pre-empt federal antitrust review, except as provided by the state action doctrine. Congress has not authorized states simply to displace the federal antitrust laws, so as to leave a state agency as the final and exclusive arbiter of whether or not a transaction is anticompetitive.

Recognizing the narrow scope of the state action doctrine, and consistent with the requirements of the Supremacy Clause, numerous courts have held that the mere fact that a state regulatory agency has reviewed and approved private conduct is not sufficient to preclude federal antitrust review.[42]

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[41] In *Adams Fruit*, the Supreme Court considered whether an exclusive remedy provision in the Florida workers' compensation law precluded migrant workers from invoking a private right of action under a federal law whose coverage overlapped with that of the state law. The Supreme Court expressly rejected the "reverse preemption principle," explaining that states are not empowered to withdraw federal remedies by establishing state remedies as exclusive. Instead, the general rule is that "Federal legislation applies in all States, and in cases of conflict between federal law and the policies purportedly underlying some state regulatory schemes, the scope of federal law is not curtailed." *Id.* at 648. *See also United States v. Murphy*, 96 F.3d 846, 848 (6th Cir. 1996) ("Quite simply, there is no conceivable constitutional basis for invalidating federal legislation on the ground that the conduct criminalized is also criminalized by state legislation. Such a proposition is extraordinary, and, we think, meritless.").

[42] *See Cantor*, 428 U.S. 579 (state agency approval of light bulb exchange program did not foreclose federal antitrust review); *Phonetele,* 664 F.2d 716*; Glaberson*, 2006-2 Trade

(continued...)

At a bare minimum, before the Commission even considers deferring to PUC review of the proposed merger of Equitable and Dominion Peoples, it should examine carefully the following question: Did the Commonwealth of Pennsylvania intend that the PUC's jurisdiction should be exclusive? The answer is clearly "No." Section 2210 of the Natural Gas Choice and Competition Act, in addition to directing the PUC to disapprove an anticompetitive merger of natural gas distribution companies, instructs that: "Nothing in this section shall restrict the right of any party to pursue any other remedy available to it." This is a clear signal that the state legislature did not conceive of the PUC as the exclusive arbiter of the permissibility of a proposed merger of natural gas distribution companies. The statute contemplates that the Pennsylvania Attorney General may challenge this merger under state antitrust law. A private party that is injured by the merger may pursue state and federal remedies. And of course the Federal Trade Commission is free to exercise its Congressionally mandated authority under the Clayton Act.[43]

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[42] (...continued)
Cas. (CCH) ¶ 75,531; *Lockyer*, 266 F. Supp. 2d at 1056 (upholding antitrust challenge to acquisition approved by state PUC because state policy was not to foster anticompetitive conduct); *Rochester Gas*, 4 F. Supp. 2d at 176 ("The fact that the New York Public Service Commission had approved the contract at issue does not mean that the State had authorized, and shielded from federal law, allegedly anticompetitive behavior."); *Yeager's Fuel, Inc.*, 1995-1 Trade Cas. (CCH) ¶ 71,034; *IMR Capital Corp.*, 888 F. Supp. at 239 n. 9 (approval of tariff does not mean that provisions thereof are the product of state policy); *McCaw Personal Communications*, 645 F. Supp. at 1172 (PUC review of acquisition designed to foster competition, rather than to displace it); *Pacific Southwest Airlines*, 358 F. Supp. 1224.

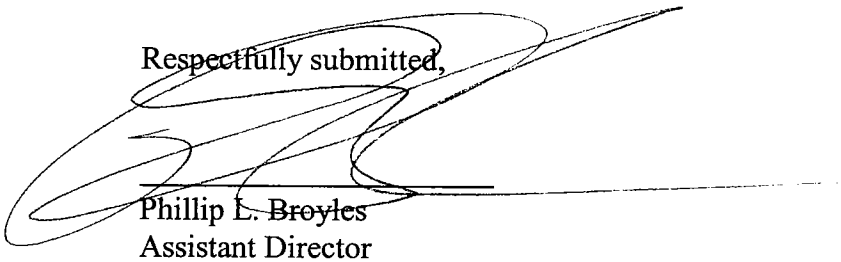
[43] *See* Pankiw Letter; Donahue Letter, *supra* note 3 and accompanying text.

V. CONCLUSION

For the reasons set forth herein, Complaint Counsel's motion to strike the affirmative defense of state action should be GRANTED.

Dated: April 11, 2007

Respectfully submitted,



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Complaint Counsel's Exhibit List Equitable, D.9233 April 17, 2007	
CX Number	**Document Description**
0001	Complaint Counsel's Exhibit List
0002	Equitable Gas Co. v. Apollo Gas Co., Dkt. Nos. C-844028; C-844035, Initial Decision of Administrative Law Judge (Aug. 2, 1988)
0003	In re Equitable Resources, Inc., No. A-122250F5000 (Pa. P.U.C. February 5, 2007)
0004	15 P.S. § § 3541, 3543
0005	Amicus Brief of Pennsylvania Public Utility Commission Relating to Defendants' Motions to Dismiss Complaint, *City of Pittsburgh v. West Penn Power Co.*, Civ. No. 97-1772 (W.D. Pa. Nov. 18, 1997)
0006	Order Denying Petition of the Office of Trial Staff for the Commencement of an Investigation of Competitive Practices Between Natural Gas Distribution Companies (Oct. 6, 2005) (Pa. P.U.C. No. P-000052160)
0007	Letter from James A. Donahue, III, Chief Deputy Attorney General, Antitrust Section, Commonwealth of Pennsylvania, to Bohdan R. Pankiw, Chief Counsel, Pennsylvania Public Utility Commission (Nov. 14, 2006)
0008	Letter from Bohdan R. Pankiw, Chief Counsel, Pennsylvania Public Utility Commission, to Barbara Adams, General Counsel, Commonwealth of Pennsylvania (Oct. 13, 2006)
0009	Pennsylvania Public Utility Commission, Report to the General Assembly on Competition in Pennsylvania's Retail Natural Gas Supply Market (Oct. 2005)

for damages now pending in any court of this commonwealth. 1869, April 24, P.L. 93, § 1.

Renumbered from section 1333 of this title.

Historical Note

This act directly supplements Act 1857, March 11, P.L. 77, section 3501 et seq. of this title.

It repealed section 11 of the act of 1857, and substituted the provisions of the text therefor.

Constitutional Provisions

Const. art. 1, § 10 prohibits taking of private property for public use without authority of law and without just compensation being first made or secured.

Cross References

Certificate of public convenience required, see section 1124 of Title 66, Public Service Companies.

Condemnation proceedings by water company, see section 3248 et seq. of this title.

Eminent domain proceedings,

Generally see section 1—101 et seq. of Title 26, Eminent Domain.

Corporations, see section 3021 et seq. of this title.

Notes of Decisions

Library references

Gas ⇐14.50.
Waters and Water Courses ⇐195.
C.J.S. Gas §§ 38, 39.
C.J.S. Waters § 309.
P.L.E. Gas § 11.
P.L.E. Waters § 173.

1. Proceedings for assessment of damages

Where the owners of land claimed ownership of the waters of a brook appropriated by a gas and water company, their claim of ownership must be first heard by viewers. Lackawanna Mills v. Scranton Gas & Water Co., 120 A. 814, 277 Pa. 181, 1923.

In petition asking for appointment of viewers to assess damages sustained by reason of taking of the waters of a stream by a gas and water company, that no mention was made in the resolution of the company of the specific quantity of water appropriated, or of the rights claimed by petitioners, did not prevent the approval of petitioners' application to have damages assessed. Id.

On petition by landowners for the assessment of damages for the appropriation of waters from a brook, failure to file a bond in the name of those injured was not material. Id.

Petitioners for the assessment of damages for appropriation of water from a brook claiming under the same assignor may properly join in prayer for relief, and the rights of each will be considered separately. Id.

ARTICLE IV.—NATURAL GAS COMPANIES

Cross References

Applicability of general law to corporations under this article, see sections 1003, 1004 and 1006 of this title.

Injury to pipes and property of company, see section 3787 of Title 18, Crimes and Offenses.

§ 3541. Formation and general powers

Corporations may be formed in the manner mentioned herein by the voluntary association of five or more persons, or as otherwise provided

herein, for the purpose of producing, dealing in, transporting, storing and supplying natural gas to such persons, corporations or associations, within convenient connecting distance of its line of pipe, as may desire to use the same, upon such terms and under such reasonable regulations as the gas company shall establish, and when so formed, each of them, by virtue of its existence as such, shall have the following powers:

First. To have succession by its corporate name for the period limited by its charter, and when no period is limited thereby, perpetually, subject to the power of the General Assembly, under the Constitution of the Commonwealth.

Second. To maintain and defend judicial proceedings.

Third. To make and use a common seal, and alter the same at pleasure, and have a capital stock, not exceeding five million dollars, divided into shares such as each company may determine.

Fourth. To produce, mine, own, deal in, transport, store and supply natural gas, for either light, heat or both, or other purposes, and have all the rights and privileges necessary or convenient therefor.

Fifth. To hold, acquire, purchase, take, receive, maintain, lease, own and use, mortgage, sell, and transfer such real and personal property including pipes, tubing, tanks, office and such other machinery, devices or arrangements, situated in or out of this Commonwealth, as the purposes of the corporation require, to purchase, take, acquire, own, hold and use, the rights, franchises, property and privileges of any other natural gas company incorporated under the laws of this Commonwealth or of any other state or commonwealth, so that all the property rights, powers, franchises and privileges, then by law vested in such other corporation, shall be transferred to and vested in the corporation purchasing, taking, or acquiring the same, and to have and possess the right also to enter upon, take and occupy such lands, easements and other property as may be required for the purpose of laying its pipes for transporting and distributing gas.

Sixth. To appoint and remove such subordinate officers and agents as the business of the corporation requires and to allow them suitable compensation.

Seventh. To make by-laws, not inconsistent with the law, for the election and regulation of its directors and officers, the management of its property, the regulation of its affairs and the subscription, collection and transfer of its stock. 1885, May 29, P.L. 29, § 1; 1939, June 24, P.L. 869, § 1.

Renumbered from section 1981 of this title.

Historical Note

Sections 20 and 22 of this act, relative to the plugging of abandoned wells, were repealed by section 8 of Act 1921, May 17, P.L. 912. Section 21 imposed a penalty for violations of section 20 and became obsolete or inoperative with the repeal of that section. Sections 1 to 7 of the act of 1921 are sections 4 to 10 of Title 58, Oil and Gas.

Prior to the 1939 amendment the fifth paragraph of this section provided: "To hold, purchase, maintain, lease, mortgage, sell, and transfer such real and personal property, including pipes, tubing, tanks, office and such other machinery, devices or arrangements, as the purposes of the corporation requires, and the right also to enter upon, take and occupy such lands, easements and other property as may be required for the purpose of laying its pipes for transporting and distributing gas."

As enacted by Act 1885, May 29, P.L. 29, § 1, this section contained a paragraph designated "VIII" reading as follows: "To enter into any obligation necessary to the transaction of its ordinary affairs."

Cross References

Approval by public utility commission, requirement, see section 1121 of Title 66, Public Service Companies.

Corporations generally, see section 1301 et seq. of this title.

Gas and water companies, see section 3501 et seq. of this title.

Pipe line companies, see section 3351 et seq. of this title.

Purposes and powers generally, corporations, see section 3012 of this title.

Regulation, see 15 U.S.C.A. § 717 et seq.

Transportation and supply of natural gas as a public use, see section 3547 of this title.

Notes of Decisions

Library references

Gas ⇔5.
C.J.S. Gas § 7.
P.L.E. Gas § 2.

1. In general

Fact that a company is authorized to supply natural gas in a certain township does not impose on it the duty to supply gas to every individual in the township. United Natural Gas Co. v. Pennsylvania Public Utility Commission, 33 A.2d 752, 153 Pa.Super. 252, 1943.

When a company is empowered by special charter to buy, maintain or manage in its own name or otherwise any public or private work which may tend or be designed to improve, increase, facilitate or develop trade, travel, transportation and conveyance of freight, live stock, passengers, or other traffic, it may engage in the production, distribution and supply of natural gas. Carothers v. Philadelphia Co., 12 A. 314, 118 Pa. 468, 1888.

2. Incorporation, organization and franchises

A corporation for the supply of natural gas could not be incorporated under Act 1874, April 29, P.L. 73 (incorporated in this title). Emerson v. Com., 108 Pa. 111, 1885; Sterling's Appeal, 2 A. 105, 111 Pa. 35, 56 Am.Rep. 246, 1886.

A natural gas company, organized under Act 1874, April 29, P.L. 73 (incorporated in this title), supplying a borough with natural gas, which accepts the provisions of this act, and continues to supply the borough with gas, and is consolidated under Act 1901, May 29, P.L. 349 (now supplied) with another company, having a right to serve the borough with restrictions as to price, may serve the borough with gas under its franchise, notwithstanding such restrictions where the latter company had never availed itself of the right to furnish the gas. Punxsutawney Borough v. T. W. Phillips Gas & Oil Co., 85 A. 1003, 238 Pa. 23, 1913.

That the stock of a gas company was acquired by the owners of the stock of another company, and that the proceeds of its product, after payment of expenses, were turned into the treasury of the latter company, does not extinguish the former company's individual franchise or rights. Id.

An application under this act cannot be refused, nor can the governor require as a condition of granting it a statement limiting the powers asked for, merely because those powers may conflict with the exclusive rights of another gas company. Citizens' National Gas Co., Op. Atty.Gen., 9 C.C. 290, 1890.

3. Regulation

This act does not exempt natural gas companies from the reasonable police regulations of boroughs as to the use of borough streets, Edgewood Borough v. Scott, 29 Pa.Super. 156, 1905; but a natural gas company will not be enjoined from using the streets of a borough for its pipes, on the ground that the pipes are defective, when it does not appear that they constitute a public nuisance. Butler Borough's Appeal, 6 A. 708, 5 Cent.Rep. 669, 1886.

A natural gas company, organized under the laws of Pennsylvania, which supplied gas under a special contract to another natural gas company, which in turn served a municipality within the first company's field of supply, is a public service company and subject to the provisions of the Public Service Company Law with respect to the sale of natural gas to the other company. People's Natural Gas Co. v. Public Service Commission of Commonwealth of Pennsylvania, 79 Pa.Super. 560, 1922.

4. Conflicting franchises

A gas company organized under a special act, with the exclusive right to furnish manufactured gas for light to the citizens of a municipality, has no exclusive right as against a natural gas company, incorporated under this act to supply natural gas for lighting purposes to the citizens of the same municipality. Warren Gas Light Co. v. Pennsylvania Gas Co., 20 A. 101, 161 Pa. 510, 1894, affirming 13 C.C. 310; and a natural gas company organized under this act, which has supplied a borough and its inhabitants with natural gas for illuminating purposes, is not prevented from continuing to do so by the incorporation of a gas company under Act 1874, April 29, P.L. 73 (incorporated in this title), though under section 1384 (repealed) of this title, the latter company may have had the exclusive privilege to manufacture gas for light only. Hagan v. Fayette Gas-Fuel Co., 21 C.C. 503, 46 Pitts. 229, 1898.

5. Leases

Clause V does not authorize a natural gas company, by lease or other contracts, to turn over to another company, its entire plant for a long period; and such a lease or contract cannot be made without special authority conferred by charter or statute. Stowe v. Citizens' Natural Gas Co., 23 C.C. 273, 1898.

6. Taxation

Company organized under this act, for purpose of producing and dealing in natural gas, is not vender or dealer within contemplation of Act 1899, May 2, P.L. 184 (incorporated in Title 72, Taxation and Fiscal Affairs), and is not subject to mercantile tax. Allegheny Heat Co. v. Mercantile Appraiser, 3 Corp. 44, 63 Pitts. 421, 1915.

§ 3542. Subscription and contents of charter and certificate

The charter of such intended corporation must be subscribed by five or more persons, three of whom, at least, shall be citizens of this Commonwealth, who shall certify in writing to the Governor:

First. The name of the corporation.

Second. The place or places where natural gas is intended to be mined for and produced or received, the place or places where it is to be supplied to consumers, the general route of its pipe line or lines and branches, the location of its general office.

Third. The term for which said corporation is to exist, which may be limited as to time, or be perpetual.

Fourth. The names and residences of the subscribers, and the number of shares subscribed by each.

Fifth. The number of its directors, and the names and residences of those chosen directors for the first year.

Sixth. The amount of its capital stock, and the number and par value of shares into which divided. 1885, May 29, P.L. 29, § 2; 1929, March 27, P.L. 72, § 1.

Renumbered from section 1982 of this title.

Cross References

Corporations generally, see section 1204 of this title.

Notes of Decisions

1. Territory included in charter

A natural gas company cannot include in its charter territory in an adjoining state. United Natural Gas Co., Op.Dep. Atty.Gen., 1 C.C. 468, 1886.

§ 3543. Notice of application for charter; requisites of certificate; presentation, approval and recording

Notice of the intention to apply for any such charter shall be published one time in at least two newspapers, one of which shall be a newspaper of general circulation and the other the legal newspaper, if any, designated by the rules of court for the publication of legal notices; otherwise, in two newspapers of general circulation printed in the county named in the charter of said corporation; and if more than one county is named in the charter, then in at least one newspaper of general circulation printed in each such county named: Provided, That where there is but one newspaper of general circulation published in the county or counties publication of notice in such newspaper shall be sufficient. Notice shall be published at least three days prior to the day fixed in the advertisement for the presentation of the application to the Governor, and shall set forth briefly the character and object of the corporation to be formed, and the intention to make application therefor, and the places where its business in its various branches is to be conducted. The certificate to the Governor shall state that ten per centum of the capital stock named therein has been paid in cash to the treasurer of the intended corporation, and the name and residence of the treasurer shall be therein given; said certificate shall be acknowledged by at least three of the subscribers thereto, before the recorder of deeds of the county in which its principal office is situate,[1] and the subscribers shall also make and subscribe an oath or affirmation before him, to be endorsed on the certificate, that the statements contained therein are true; the certificate so endorsed, accompanied with proof of publication of notice as heretofore provided, shall then be produced to the Governor of the Commonwealth,

who shall examine the same, and, if he finds it to be in proper form and within the purpose named herein, shall approve thereof and endorse his approval thereon and direct letters patent to issue in the usual form incorporating the subscribers and their associates and successors into a body politic and corporate, in deed and in law, by the name chosen; and the certificate shall be recorded in the office of the Secretary of the Commonwealth, in a book to be by him kept for that purpose, and he shall forthwith furnish to the Auditor General an abstract therefrom showing the name, location, amount of capital stock, and name and address of the treasurer of the corporation. The original certificate with all of its endorsements shall then be recorded in the office for recording deeds in and for each of the counties named therein, and from thenceforth, the subscribers thereto and their associates and successors, shall be a corporation for the purposes and upon the terms named in said certificate: Provided, That neither this act nor any other shall be so construed as to confer, authorize or give color to any claim of exclusive right in any corporation, howsoever formed, dealing in any way or for any purpose in natural gas. 1885, May 29, P.L. 29, § 2; 1929, March 27, P.L. 72, § 1.

[1] Acknowledgement before a notary public or justice of the peace authorized by Act 1925, April 7, P.L. 188, § 1, see section 102 of this title.

Renumbered from section 1083 of this title.

Cross References

Notice and application generally, see section 3010 of this title.

Notes of Decisions

1. Construction and application

Notice of an intention to apply for an enlargement of territory, under section 3516 of this title need not be advertised according to this section. Pennsylvania Gas Co., Op.Dep.Atty.Gen., 1 C.C. 181, 1880.

§ 3544. Renewal of charters; fees and bonus

Corporations created under the act of General Assembly entitled "An Act to provide for the incorporation and regulation of natural gas companies," approved May twenty-ninth, one thousand eight hundred and eighty-five,[1] the charters whereof are about to expire by lapse of time from their own limitation, may be rechartered or the charters thereof renewed, under the provisions of said act by preparing, having approved and recorded the certificate named in the second section of said act.[2] In addition to the requirements provided in said act for a new corporation, the certificate for a recharter shall state the fact that it is a renewal of the former charter, naming the corporation and the date of its first charter. It shall also be accompanied with a certificate, under the seal of the corporation, showing the consent of at least a majority in interest of such corporation to such recharter. It shall also state the

CERTIFICATE OF SERVICE

I, Robert E. LaRocca, hereby certify that on **April 17, 2007**:

I caused twelve (12) hard copies of the attached **Errata Sheet to Complaint Counsel's Brief in Support of its Motion to Strike the Affirmative Defense of State Action** to be served by hand delivery and one (1) copy by electronic mail upon the following person:

Office of the Secretary
Federal Trade Commission
H-135
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

I caused one (1) copy of the **Errata Sheet to Complaint Counsel's Brief in Support of its Motion to Strike the Affirmative Defense of State Action** to be served by electronic mail and followed with one (1) copy by US mail delivery, first class postage prepaid, to the following persons:

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