

District Court Denies FTC Effort to Block Pennsylvania Gas Utility Merger

A Federal Trade Commission complaint seeking to enjoin the merger of public utility companies was dismissed by a federal district court in Pittsburgh on the ground that the state action doctrine barred the FTC's antitrust claims. *Federal Trade Comm'n v. Equitable Resources, Inc., et. al.*, Case 2:07-cv-00490-AJS (W.D. Pa., May 14, 2007). The dismissal is the third failed action in a row brought by the federal antitrust agencies to enjoin mergers. The court's decision provides valuable guidance on a key defense to federal challenges to a merger brought by public utilities.

The transaction at issue in *Equitable Resources* involved several Pennsylvania gas companies seeking to effect an intra-state acquisition of another gas utility. The deal was reviewed and approved by the Pennsylvania Public Utility Commission (PUC), a state agency created by the Pennsylvania legislature. After holding several hearings and collecting evidence on the matter, the PUC determined that the transaction was in the best interest of nearly 600,000 Pennsylvania residents and gas customers, and granted approval.

Subsequent to PUC approval of the deal, the FTC filed a motion for preliminary injunction in district court. The FTC argued that the acquisition would harm competition relating to 500 "gas-on-gas" customers (large industrial and commercial customers) and would destroy competition for gas-on-gas distribution, resulting in higher prices.

The court rejected these arguments, holding that the state action doctrine prevented any action by the FTC. The court determined that the Pennsylvania legislature had clearly articulated an intention to displace competition among utility companies with regulations by the PUC, and that any aggrieved party would have the right to bring an action in state court pursuant to the regulatory scheme. The court further determined that the PUC had a continuing oversight function, and would actively supervise the state policy of delegating competition issues in utilities to the PUC.

The court's ruling is a relatively straightforward application of the state action doctrine, which preempts antitrust suits based on activities that are approved and regulated by the states. The decision is an important reminder that regulated industries have valid antitrust immunity defenses, including state action defenses, against federal merger review.

The ruling also underscores the emphasis that the FTC places on energy mergers. In addition to the *Equitable Resources* matter, the FTC has been granted a temporary restraining order, and is now seeking a preliminary injunction to prevent the merger between Western Refining, Inc., and Giant Industries, Inc.

If you would like more information on this issue, or to discuss an approach that your organization has received in relation to this investigation, please contact any of the following:

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The *Equitable Resources* decision also demonstrates the difficulty in winning a preliminary injunction in merger cases. In 2004, the FTC failed to block Arch Coal, Inc.'s, proposed acquisition of all the assets of Triton Coal Company, L.L.C., from New Vulcan Coal Holdings, L.L.C., when the district court in the District of Columbia denied a preliminary injunction to prevent the merger. Also in 2004, the Department of Justice failed to enjoin Oracle Corporation from acquiring, directly or indirectly, the whole or any part of the stock of PeopleSoft, Inc., when the district court in the Northern District of California denied the government's motion for a preliminary injunction. Each of these transactions was cleared because the respective courts ruled that the agencies had failed to prove likely anticompetitive effects.

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