

Interlocutory Orders, etc.

IN THE MATTER OF
EQUITABLE RESOURCES, INC. ET AL.

Docket No. 9322 – Order, April 24, 2007

SCHEDULING ORDER

In accordance with Federal Trade Commission rule 16 C.F.R. § 3.21(b), a Scheduling Conference with Complaint Counsel and counsel for Respondents was held April 20, 2007, at 11 a.m. before the Federal Trade Commission. By order of the Commission, Commissioner J. Thomas Rosch presided over the Scheduling Conference. The parties' positions on the discovery schedule and other matters were described in a Joint Case Management Statement submitted to the Commission on April 19, 2007, and a Revised Joint Case Management Statement submitted to the Commission on April 24, 2007.

1. Initial Disclosures. Complaint Counsel and Respondents shall fully comply with 16 C.F.R. § 3.31(b).

2. Statement of Facts. On March 1, 2006, Equitable Resources Inc. executed an agreement to acquire the capital stock of The Peoples Natural Gas Company from the Consolidated Natural Gas Company, a subsidiary of Dominion Resources, Inc. Equitable and Peoples are, *inter alia*, local distribution companies that distribute natural gas to residential and nonresidential end users within their service territories. Equitable and Peoples both provide local distribution services to end users in western Pennsylvania.

The Commission issued an administrative complaint on March 14, 2007, alleging that Equitable's acquisition of Peoples violates the antitrust laws. The complaint alleges that a relevant product market is the local distribution of natural gas to individual nonresidential end users, and that the relevant geographic market

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is the individual service location of each nonresidential end user that benefits or could benefit in the future from competition between Equitable and Dominion in western Pennsylvania.

In their answers dated April 9, 2007, Respondents deny certain allegations regarding the nature of their operations. Respondents also deny the allegations setting forth the relevant markets in which the competitive effects of the merger should be evaluated; the allegations that market entry would be difficult; and the allegations that the acquisition would have anticompetitive effects. Respondents also set forth certain affirmative defenses, including, *inter alia*, that, by virtue of the approval of the transaction by the Pennsylvania Public Utility Commission, the complaint is barred by the state action doctrine; that the merger is in the public interest; and that the proposed acquisition will result in substantial merger-specific efficiencies that will benefit consumers.

3. Legal Issues. The principal legal issues in this case are as follows:

- a. Complaint Counsel alleges that the acquisition of Peoples by Equitable may substantially lessen competition or tend to create a monopoly, in violation of section 7 of the Clayton Act, 15 U.S.C. § 18, and that the agreement pursuant to which the acquisition will occur is an unfair method of competition, in violation of section 5 of the FTC Act, 15 U.S.C. § 45. Respondents contend that the transaction is lawful and cite in that regard the merger specific efficiencies that would result from this transaction, which they contend would far outweigh the costs of any alleged loss of competition.
- b. Respondents contend that the FTC's claims are barred by the state action immunity doctrine, enunciated by the United States Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943), and *California Retail Liquor*

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Dealers Ass'n v. Midcal Aluminum, Inc. 445 U.S. 97 (1980). In that regard, Respondents cite the April 13, 2007, decision of the Pennsylvania Public Utility Commission approving the acquisition of Peoples by Equitable, the clear articulation of the Commonwealth's policy to displace competition at issue and the Commonwealth's active supervision of the conduct at issue. Complaint Counsel contends that the Commonwealth of Pennsylvania has not "clearly articulated and affirmatively expressed" a state policy to displace competition, nor is the anticompetitive conduct of Equitable "actively supervised by the state itself."

- c. Respondents also contend that the complaint fails as a matter of law to state a claim upon which relief can be granted and that the alleged market definitions are not legally cognizable.

4. Motions. On April 11, 2007, Complaint Counsel filed a motion to strike the first affirmative defense of each of the Respondents asserting the state action defense. On April 16, 2007, the Commission issued an Order staying all briefing on Complaint Counsel's motion until further notice. Each party may file a motion for summary disposition of the case pursuant to Rule 3.24 after the close of discovery.

5. Amendment of the Pleadings. Complaint Counsel and Respondents do not currently contemplate an amendment to either the complaint or the answers; however, Complaint Counsel reserves the right to seek leave to amend the Complaint pursuant to Rule 3.15.

6. Evidence Preservation. Complaint Counsel and Respondents represent to the Commission that they have taken steps necessary to preserve evidence relevant to the issues reasonably evident in this action, including the interdiction of any

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document-destruction program or ongoing erasures of emails, voice mails, and other electronically-recorded materials.

7. Discovery.

- a. Interrogatories and Requests for Admissions . There is no limit to the number of sets of interrogatories the parties may issue, as long as the total number of interrogatories, including all discrete subparts, does not exceed twenty-five (25) to Complaint Counsel from all Respondents and does not exceed twenty-five (25) to all Respondents from Complaint Counsel. The interrogatories in separate sets shall be numbered sequentially. The number of requests for admissions, including all discrete subparts, shall not exceed forty (40) to Complaint Counsel from all Respondents and shall not exceed forty (40) to all Respondents from Complaint Counsel, except that the limit on requests for admissions shall not apply to requests relating to the authenticity or admissibility of exhibits. Additional interrogatories and requests for admissions will be permitted only for good cause.
- b. Document Requests. There shall be no limit on the number of document requests.
- c. Timing of Requests. Document requests, requests for admission, interrogatories, and subpoenas, except for discovery for purposes of authenticity and admissibility of exhibits, shall be served so that the time for a response to the discovery request shall be on or before the discovery cut-off date.
- d. Timing of Responses. For all interrogatories and requests for production served prior to this Order's issuance, objections to the interrogatories and requests for production shall be due within ten (10) days of the date of this Order, and responses, documents and

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materials shall be produced within thirty (30) days of the date of this Order.

For interrogatories, requests for production and requests for admissions served after the issuance of this Order, objections shall be due within ten (10) days of service of the discovery request, and responses, documents and materials shall be produced within thirty (30) days, of service of the discovery request.

- e. Electronically-Stored Information. Disclosure and discovery of electronically-stored information shall be governed by the Federal Rules of Civil Procedure, as amended on December 1, 2006.
- f. Deposition Notices. Service of a notice of deposition five business days in advance of the date set for the taking of the deposition shall constitute reasonable notice.

8. Related Cases. On April 13, 2007, the Commission filed an action in the United States District Court for the Western District of Pennsylvania, *Federal Trade Commission v. Equitable Resources, Inc.*, et al., Case No. 07cv0490, in which the Commission sought a temporary restraining order and a preliminary injunction enjoining the acquisition of Peoples pending a final decision in this administrative litigation. At a status conference on April 13, 2007, Judge Arthur J. Schwab entered an order establishing certain procedures for the litigation. In particular, Judge Schwab established a briefing schedule for defendants' motion to dismiss the complaint on state action grounds in which the parties will fully brief the motion by May 1, 2007, and the Court plans to issue a ruling on the motion to dismiss the week of May 7, 2007. Judge Schwab has not stayed discovery pending disposition of the motion to dismiss, and discovery has already begun. Also, the Court established a hearing date on the Commission's motion for a preliminary injunction to

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begin June 4, 2007, at 9:00 a.m., and the hearing is expected to last two days.

9. Scheduling. Complaint Counsel and Respondents agree to a stay of discovery and all other obligations in this administrative proceeding from June 1, 2007, to five business days after the completion of the hearing in the related case identified in Paragraph 8. The following is the pre-hearing schedule:

May 11, 2007	Exchange preliminary witness list (not including experts) with description of proposed testimony.
June 20, 2007	Exchange revised witness lists (not including experts), including preliminary rebuttal fact witnesses, with description of proposed testimony.
June 25, 2007	Status report due and, if requested by either party, conference with the Commission.
June 29, 2007	Deadline for issuing document requests, requests for admission, interrogatories, and subpoenas, except for discovery for purposes of authenticity and admissibility of exhibits.
July 27, 2007	Close of discovery, other than discovery permitted under FTC Rules of Practice ' 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
July 30, 2007	Complaint Counsel provides expert witness list and expert witness reports.
August 3, 2007	Status report due and, if requested by either party, conference with the Commission.

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- August 7, 2007 Respondents provide expert witness list and expert witness reports.
- August 14, 2007 Complaint Counsel provides rebuttal expert witness list and rebuttal expert reports. Any such report is to be limited to rebuttal of matters set forth in the Respondents' expert reports. If material outside the scope of fair rebuttal is presented, the Respondents will have the right to seek appropriate relief (such as striking part or all of Complaint Counsel's rebuttal expert report(s) or seeking leave to submit surrebuttal expert reports).
- August 21, 2007 Deadline for completion of depositions of all experts
- August 27, 2007 Exchange final proposed witness and exhibit lists including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative, or summary exhibits), and a brief summary of the expected testimony of each witness.
- Serve on the Commission final proposed witness and exhibit lists, including designated testimony to be presented by deposition, and a brief summary of the testimony of each witness.
- August 27, 2007 For parties that intend to offer into evidence at the hearing confidential materials of an opposing party or non-party, provide notice

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to the opposing party or non-party, pursuant to FTC Rules of Practice § 3.45(b).

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| August 30, 2007 | Deadline for filing motions for summary disposition, motions in limine, motions to strike, and motions for in camera treatment of proposed trial exhibits. |
| September 5, 2007 | Exchange and serve courtesy copy on the Commission objections to final proposed witness lists and exhibits lists. Exchange objections to the designated testimony to be presented by deposition and counter designations. |
| September 7, 2007 | Exchange proposed stipulations of law, facts, and authenticity. Parties file pretrial briefs, not to exceed fifty (50) pages. |
| September 14, 2007 | Deadline for filing responses to motions for summary disposition, motions in limine, motions to strike, and motions for in camera treatment of proposed trial exhibits. |
| September 17, 2007 | Deadline for filing reply to response to motions for summary disposition, motions in limine, motions to strike, and motions for in camera treatment of proposed trial exhibits. |
| Date to be determined by trier of fact | Final prehearing conference to be held at 10:00 a.m. in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC. The parties are to meet and confer prior to the conference regarding trial logistics, any designated deposition testimony, and proposed stipulations of law, facts, and |

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authenticity. Stipulations of law, facts, and authenticity shall be prepared as a Joint Exhibit and offered at the final prehearing conference. Counsel may present any objections to the final proposed witness lists and exhibits, including the designated testimony to be presented by deposition. All trial exhibits must be offered at the final prehearing conference. The offered exhibits will be admitted or excluded at this conference to the extent practicable.

September 24, 2007 Commencement of Hearing, to begin at 10:00 a.m. in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC.

10. Hearing. The parties estimate that the hearing will take approximately four weeks.

11. Other Matters.

- a. Service on the parties shall be deemed effective on the date of delivery by electronic mail (formatted in Adobe Acrobat), and three days shall be added to the time for any responsive action, consistent with the provisions of Fed. R. Civ. P. 6(e) regarding service by electronic mail. Absent leave of the Commission or presiding official, this provision does not modify any of the dates set forth in Paragraph 9. Service by electronic mail shall be followed promptly by delivery of an original by hand or by U.S. mail, first class postage prepaid, to the following addresses:

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To Complaint Counsel:

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- b. Memoranda in support of, or in opposition to, any non-dispositive motion shall not exceed ten (10) pages, exclusive of attachments.
- c. If papers filed with the Office of the Secretary contain in camera or confidential material, the filing party shall mark any such material in the complete version of their submission with **{bold font and brackets}**. 16 C.F.R.

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§ 3.45. Parties shall act in accordance with the rules for filings containing such information, including FTC Rules of Practice § 4.2. Public versions of the papers with the in camera or confidential material omitted shall be filed pursuant to 16 C.F.R. § 3.45(e).

- d. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas duces tecum and subpoenas ad testificandum. For subpoenas duces tecum, the party issuing the subpoena shall provide copies of the subpoenaed documents and materials to the opposing party within five (5) business days of service. For subpoenas ad testificandum, the party seeking the deposition shall consult with the other parties before the deposition date is scheduled. Additionally, the deposition of any person may be recorded by any means permitted by Fed. R. Civ. P. 30, provided that the party seeking the deposition notifies the deponent and the other party of its intention to record the deposition by other than by stenographic means at least two (2) days in advance of the deposition.
- e. No deposition of a non-party shall be scheduled between the time of production in response to a subpoena duces tecum and three (3) days after copies of the production are provided to the non-issuing party, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, the documents are produced at the time of the deposition, or as agreed to by all parties involved.
- f. At the time an expert is first listed as a witness by a party, the listing party shall provide to the other party: (a) materials fully describing or identifying the background and qualifications of the expert; (b) a list of all publications authored by the expert; (c) a list of

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all prior cases in which the expert has testified, been deposed, submitted an expert report, or submitted any other signed statement as an expert witness; and (d) a copy of all transcripts, expert reports, and other signed statements relating to such prior cases in the possession, custody, or control of the expert or the listing party.

- g. The parties shall provide for each testifying expert witness a written report containing the information required by the FTC Rules of Practice § 3.31(b)(3). Drafts of expert reports and notes taken by expert witnesses need not be produced. Communications between expert witnesses and counsel or consultants need not be produced.
- h. The preliminary and revised witness lists shall represent the parties' good faith designation of all potential witnesses the parties reasonably expect may be called at the hearing. A party shall notify the other parties promptly of changes in preliminary and revised witness lists to facilitate completion of discovery within the dates specified by the scheduling order. After the submission of the final witness lists, additional witnesses may be added only: (a) by order of the Commission or the presiding official, upon a showing for good cause; (b) by agreement of the parties, with notice to the Commission or the presiding official; or (c) if needed to authenticate or provide the evidentiary foundation for, documents in dispute, with notice to the other parties and the Commission or the presiding official. Opposing counsel shall have a reasonable amount of time to subpoena documents for and depose any witness added to the witness list pursuant to this paragraph, even if the discovery takes place during the hearing.

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- i. The final exhibit lists shall represent the parties' good faith designations of all exhibits the parties reasonably expect may be used in the hearing, other than demonstrative, illustrative, or summary exhibits. Additional exhibits other than demonstrative, illustrative, or summary exhibits may be added after the submission of the final lists only: (a) by order of the Commission or the presiding official, upon a showing of good cause; (b) by agreement of the parties, with notice to the Commission or the presiding official; or (c) where necessary for purposes of impeachment.
- j. Applications for the issuance of subpoenas commanding a person to attend and give testimony at the hearing must comply with FTC Rules of Practice § 3.34, must demonstrate that the subject is located in the United States, and must be served on opposing counsel. Oppositions to applications for issuance of subpoenas shall be due within three (3) business days after the filing of the application.
- k. At least five days prior to the commencement of the case-in-chief, Complaint Counsel shall provide Respondents with a schedule of witnesses expected to be called each day during the case-in-chief. At least five days prior to the commencement of the Respondents' defense case, Respondents shall provide Complaint Counsel with a schedule of witnesses expected to be called each day during the defense case. At least two (2) days prior to Complaint Counsel's rebuttal case, Complaint Counsel shall provide Respondents with a schedule of witnesses expected to be called each day during the rebuttal case. The parties further shall provide one another with copies of any demonstrative exhibits seventy-two (72) hours before they are used with a witness.

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- l. The procedure for marking of exhibits used in the adjudicative proceedings shall be as follows: (a) Complaint Counsel's exhibits shall bear the designation "CX" and Respondents' exhibits shall bear the designation "RX"; and (b) the parties shall number the first page of each exhibit with a single series of consecutive numbers. For example, Complaint Counsel's first exhibit shall be marked "CX-1." When an exhibit consists of more than one page, each page of the exhibit must bear a consecutive control number. Additionally, all exhibit numbers must be accounted for, even if a particular number is not actually used at the hearing.
- m. At the final pre-hearing conference, the parties shall introduce all exhibits they intend to introduce at the hearing. The parties further shall give the originals of exhibits to the court reporter, which the court reporter will maintain as part of the record.
- n. The parties shall endeavor to resolve any discovery disputes quickly and efficiently. If the parties are unable to reach an agreement resolving the disputes they should bring them promptly to the Commission's attention by calling the offices of Commissioner J. Thomas Rosch and arranging for a telephonic hearing on the dispute.

By the Commission.

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IN THE MATTER OF
RAMBUS INCORPORATED*Docket No. 9302 – Order, April 27, 2007***ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENT’S PETITION FOR RECONSIDERATION OF THE
FINAL ORDER AND GRANTING COMPLAINT COUNSEL’S
PETITION FOR RECONSIDERATION OF PARAGRAPH II.C. OF
THE FINAL ORDER**

The Commission issued its Opinion On Remedy and Final Order in this matter on February 2, 2007. The Opinion and Final Order were served on Rambus and its counsel on February 9, 2007, and the Final Order therefore became final and effective on April 12, 2007. 16 C.F.R. § 3.56(a); *accord* 15 U.S.C. § 45(g)(1),(2). On February 16, 2007, Rambus filed a Petition for Reconsideration of the Final Order.¹ On February 26, 2007, Complaint Counsel filed a Petition for Reconsideration of Paragraph III.C. of the Final Order.² The Commission has determined to grant Rambus’s Petition in part, and to deny it in part, and to grant Complaint Counsel’s Petition. Accordingly,

¹ On February 16, 2007, Respondent also filed a Motion For Stay of the Final Order Pending Appeal. On March 16, 2007, the Commission granted in part and denied in part that Motion, and in particular stayed enforcement of Paragraphs IV., V.A., VI., and VII. of the Final Order, upon the filing of a timely petition for review of the Final Order in an appropriate court of appeals and until the court of appeals issues its mandate. On April 4, 2007, Respondent filed a petition for review of the Final Order in the Court of Appeals for the District of Columbia Circuit.

² Complaint Counsel also included in the same filing their Response to Rambus’s Petition for Reconsideration of the Final Order.