CHADBOURNE & PARKE LLP

Client Alert

FTC Files Suit to Block Acquisition of The Peoples Natural Gas Company

On March 15, 2007, the Federal Trade Commission (FTC) announced its decision to challenge Equitable Resources, Inc.'s proposed acquisition of The Peoples Natural Gas Company (Dominion Peoples), a subsidiary of Dominion Resources, Inc. The proposed acquisition, which is valued at $970 million, would merge the only two distributors of natural gas to nonresidential consumers in the greater Pittsburgh area. Equitable contends that the merger will create efficiencies by allowing the distributors to eliminate surplus pipelines. The distributors estimate that these efficiencies will reduce costs by approximately $145 million, saving customers nearly $10 million. To further enhance the appeal of the merger, Equitable has agreed to refrain from raising rates for three years following approval of the acquisition.

Despite these claimed benefits of the acquisition, the FTC voted 4-1 to issue a preliminary complaint in opposition to the merger. The complaint alleges that consummation of the merger agreement would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Specifically, the FTC argues that the merger would allow Equitable to obtain monopoly power in several Pennsylvania markets, thereby reducing future competition for natural gas distribution and eliminating customer discounts. In the complaint, the FTC notes that "Equitable and Dominion have competed vigorously for the business of individual nonresidential natural gas distribution customers in their overlapping service territories by offering discounts from the maximum rates …." By reducing the number of distributors in certain markets, the Commission contends that the merger would facilitate coordinated interaction between distributors while also eliminating any incentive to provide customer discounts. The FTC has authorized its staff to seek a preliminary injunction to prevent the distribution companies from consummating the merger.

Implications of the FTC's Complaint

The FTC's announcement is interesting for two related reasons. First, the FTC elected to initiate its challenge prior to a decision from the Pennsylvania Public Utilities Commission (PUC), which regulates most of the natural gas distribution in Pennsylvania. Prior to completing the merger, the two distributors must obtain authorization from the PUC. Based on this authorization requirement, the FTC challenge could prove moot. Prior to the announcement, PUC approval seemed likely after the PUC administrative law judge determined that the merger would facilitate the public interest. Given that determination, it is possible that the FTC's position with regard to the proposed merger will be in direct opposition to that of the PUC. There is a chance, however, that the Commission's complaint will influence the PUC's final evaluation of the merger.

Second, the Commission initiated the complaint despite the fact that the PUC currently controls natural gas delivery rates in the relevant markets. Although the PUC establishes the maximum rates for delivery of natural gas, the FTC determined that those rates are not representative of the actual rates charged in the relevant Pennsylvanian markets. Instead, the FTC has alleged that rigorous competition in the relevant markets has resulted in discounts from the maximum delivery rates. Based on these discounts, the merger could feasibly produce a "small but significant and nontransitory" increase in delivery rates in violation of the antitrust laws. Thus, in the relevant

Pennsylvanian markets, the maximum rate limitations do not insulate the markets from antitrust scrutiny. The FTC complaint demonstrates the Commission's ability to challenge acquisitions that involve interstate commerce even where a local state agency also exercises authority to regulate the acquisition.

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For Additional Information

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