BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Joint Application of Equitable Resources,	**:**	
Inc. and the Peoples Natural Gas d/b/a	**:**	
Dominion Peoples, for approval of the	**:**	
transfer of all stock and rights of the	**:**	**A-122250, F. 5000**
Peoples Natural Gas Company to	**:**	
Equitable Resources, Inc., and for the	**:**	
approval of the transfer of all stock of	**:**	
Hope Gas, Inc. d/b/a Dominion Hope, to	**:**	
Equitable Resources, Inc.	**:**	

BRIEF IN OPPOSITION TO SETTLEMENTS OF THE NATIONAL ENERGY MARKETERS ASSOCIATION

In accordance with Your Honor's Eighteenth Interim Order of November 17, 2006, the National Energy Marketer's Association ("NEM"), through its undersigned counsel files this Brief in Opposition to Settlements. As requested in that Order, this Brief addresses not only the individual settlements reached between Equitable Resources, Inc. and the various individual signatories, but also those issues raised in connection with this Application and not addressed by the unusual Joint Petition for Settlement. For the reasons set forth below, NEM respectfully requests that the application either be denied or that if a certificate is to issue that it contain the conditions suggested by NEM.

I. STATEMENT OF THE CASE

By application dated March 31, 2006, Equitable Resources, Inc. ("Equitable") and The Peoples Natural Gas d/b/a Dominion Peoples ("Dominion") filed an application for approval of the sale of all of the common stock of Peoples Natural Gas Company and Hope Gas, Inc. dba Dominion Hope to Equitable Resources.

The National Energy Marketers Association (NEM) and numerous other parties submitted Petitions to Intervene in the instant case, which were granted. NEM's Petition described in a generalized manner its concern about the impact that the proposed transaction could have on the development of the competitive retail market in the combined utility service territories. On May 25, 2006, a Prehearing Conference was held in which a procedural schedule was established for the case.

Equitable and Dominion filed Direct Testimony in support of their application on June 15, 2006. On September 1, 2006, NEM submitted the Direct Testimony of Mr. James Crist that was also sponsored by Hess and Constellation. On September 29, 2006, NEM filed Rebuttal Testimony of Mr. James Crist jointly with Hess and Constellation, and Equitable and Dominion also filed Rebuttal Testimony on this date. NEM's surrebuttal testimony, also submitted jointly with Hess and Constellation, was filed on October 23, 2006. Evidentiary hearings commenced on November 14, 2006, and continued through November 17, 2006. At the time of the hearings, the testimony of various witnesses was stipulated into the record. Cross-examination of other witnesses occurred.

Equitable and other parties filed a Joint Petition for Settlement on December 1, 2006. The Joint Petition requests approval of three separately executed term sheets denominated as "Settlement" documents. One Settlement is between Equitable, OTS, OCA, and Representative Wheatley/MVUC (hereinafter "Government Parties").[1] One Settlement is between Equitable

[1] It should be noted that although NEM uses "government parties" to represent the named signatories to the Joint Petition, the Office of Small Business Advocate, who is traditionally referred to as a "government party" is **not** a signatory to the Joint Petition.

and IOGA, and the final Settlement is between Equitable and Hess/Constellation. NEM is not a signatory to any of these documents.

NEM hereby submits this Statement in Opposition to address not only the Joint Petition, but also issues raised by the Application itself and which were not addressed by any of the individual settlement documents.

II. SUMMARY OF ARGUMENT

A. ON THE WHOLE, THE SETTLEMENTS EXECUTED BY THE DIFFERING PARTIES ARE NOT IN THE PUBLIC INTEREST, WILL PREVENT CUSTOMERS FROM OBTAINING THE BENEFITS OF A PROPERLY FUNCTIONING AND EFFECTIVE COMPETITIVE RETAIL GAS MARKET IN THE COMBINED SERVICE TERRITORIES AND SHOULD ONLY BE APPROVED SUBJECT TO CERTAIN CONDITIONS

NEM opposes the Settlements for the principal reason that they could increase costs significantly for consumers by failing to meaningfully support or advance the development of the competitive retail gas market in the Equitable-Dominion territory along with eliminating the currently existing, less expensive transportation routes to the citygate. If the Commission approves Equitable's acquisition of Dominion, Equitable will have little, if any, incentive to consider and adopt meaningful changes that support customer choice. Accordingly, now is the time to ensure that the significant problems that currently deter competitive entry, as well as the anti-competitive conditions likely to develop upon a combination of the utilities, are resolved in a satisfactory manner through firm commitments on the part of Equitable. NEM notes the importance of this consideration given the Commission's recent findings that, "there is a lack of 'effective competition' in Pennsylvania's retail natural gas supply market at this time."[2]

[2] Docket I-00040103, Investigation into the Natural Gas Supply Market, report issued October 2005, at 67. In its report, the Commission found that the, "marketplace lacks accurate and timely price signals,"

NEM cautions that even though certain Settlement provisions appear on their face to address concerns about competitive market conditions, they in fact create opportunities for Equitable to increase pricing, restrict gas delivery choice, create potential violations of the code of conduct and further enhance the ability to hinder most of their customers' efforts to enjoy the benefits of a competitive gas supply market. NEM contends that these provisions, upon close review, lack a real commitment on the part of Equitable to substantively address or change its choice program. Equally troubling is the fact that certain issues critical to competitive market development were left unresolved by the Settlements. This problem is compounded because it is likely these issues will be addressed in future Equitable 1307(f) case filings for which, in the past, competitive suppliers have generally been denied standing.

NEM questions whether a series of "one off" deals with different parties can even be called a "Settlement." A settlement can be characterized as an agreement among parties with competing interests. Settling parties may not agree with particular provisions in isolation but agree to the settlement as a whole because on balance it supports their general interests. In the instant case, the Joint Petition notes that, "Unless expressly stated herein, however, no individual Intervening/Protesting Party supports settlement terms other than those presented in its individually executed settlement term sheet." (Joint Petition, para. 12, page 5). It seems almost an oxymoron to denominate the term sheets filed by Equitable as a "settlement" when the parties have limited their support in this fashion. In essence, Equitable has punted the difficult tasks of

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and substantial barriers to entry and participation in the market by competitive suppliers exist." Id. at 66-67. The Commission decided a stakeholder collaborative group should be formed to consider an "integrated solution to enhance competition" throughout the State. Id. at 67. Amongst the issues the group was charged with examining were mandatory capacity assignments, price to compare, uniform supplier tariff rules, utility promotion of competition, utility negotiated supply contracts, market information and code of conduct. Id. at 67-69.

balancing the individual parties interests and achieving a mutually supported agreement to the Administrative Law Judge and the Commission.

Many of the initial bases that Equitable cited as benefits of the acquisition that were in the public interest would not have been realized by the terms of Equitable's initial application filing nor will they be realized by the terms of the multiple Settlements. For instance, in Equitable's initial application, purported savings of $10 million from pipeline contract non-renewal and $40 million from a change in Dominion's accounting methodology for gas in storage were amongst the chief benefits cited for support. The $40 million in savings from the accounting methodology change is, as stated by several intervenors, a very costly change for the ratepayers to bear as the "re-priced" storage gas would have required an increase in working capital which would require a rate increase. (NEM Stmt. 1, page 17, lines 8-15). Fortunately that scheme is no longer applicable because Equitable has agreed as part of one of the Settlements not to pursue it in this proceeding.

The $10 million savings from pipeline contract non-renewal was shown by NEM witness Crist as a misrepresentation of the actual effect on customers, which would double the cost of bringing gas to the citygate. The possibility of eliminating peak deliverability capacity was refuted as both Equitable and Dominion are currently meeting their peak needs with the proper amount of capacity and have no excess capacity to eliminate. Because both Equitable and Dominion are in the same geographic area, the peak need of the combined entity was shown to be the sum of each companies' peak, proving that elimination of the Dominion delivery capacity cannot be done. (NEM Stmt. 1, page 11, lines 1-6). Even the concept remains suspect inasmuch as Equitable's actual and ultimate ability to eliminate the subject pipeline contracts is questionable. Accordingly, many of the results of the acquisition that Equitable proffered as in the public interest will likely not be achieved.

III. ARGUMENT

A. THE LEGAL STANDARDS FOR APPROVAL OF THE JOINT PETITION AND TRANSACTION HAVE NOT BEEN MET BY THE PETITIONERS

The transaction has been characterized at various times as a stock purchase and/or a merger of two companies.[3] Regardless of how the transaction is characterized, the underlying statutory standards governing the issuance of a Certificate of Public Convenience must be met.[4]

No dispute can exist that the transfer of the stock of Dominion to Equitable is an act that requires the obtaining of a Certificate of Public Convenience from the Commission. 66 Pa. C.S. §1102(a)(3). In accordance with §1102(a)(3), upon the issuance of a certificate of public convenience, it shall be lawful for a utility:

> …to acquire from, or to 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 … property used and useful in the public service.

The legislature has provided the Commission with a standard that must be utilized in determining whether to grant or deny any application for such a certificate under §1102. In the granting or denial of any application, the Commission must be guided by the statutory requirements of 66 Pa. C.S. §1103(a), which provides, in pertinent part:

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[3] While the application and the Joint Petition characterize the transaction as merely a stock transfer, the Joint Petition cites *City of York v. Pa. P.U.C.*, 449 Pa. 136, 295 A.2d 825 (1972) for the proposal that "…this section of the Code requires a showing that a proposed **merger** will affirmatively benefit the public and specifically will 'affirmatively promote the service, accommodation, convenience or safety of the pubic in some substantial way'."

[4] While the Commission's regulations encourage settlements (52 Pa. Code § 5.231(a)), the parties to any agreement cannot alter the Commission's statutory duty.

> A certificate of public convenience shall be granted by order of the commission, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public. The commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable.

The mere fact that several parties to this proceeding have signed Settlement agreements cannot alter this statutory requirement. *Application of The United Telephone Company of Pennsylvania and Sprint Long Distance, Inc.*, A-313200F0007 and A-311379F0002 (March 22, 2006). In fact, the existence of a purported Settlement requires Your Honor, in your deliberations, to examine each provision of that agreement, and, in this case, the separate and distinct agreements between each party and Equitable, to insure that each provision is in the public interest and complies with all of the provisions of the Public Utility Code. As in any proceeding, Your Honor is presented with three potential ultimate outcomes: (1) grant the certificate; (2) deny the certificate; or (3) approve the certificate with conditions.[5]

Numerous Commission and Court decisions have interpreted the public interest standard in application proceedings and what constitutes sufficient evidence to meet the statutory standard. The Pennsylvania Supreme Court in *City of York v. Pennsylvania Public Utility Commission*, 449 Pa. 136, 295 A.2d 825 (1972) overruled its prior decision in *Northern Pennsylvania Power Company v. Pennsylvania Public Utility Commission*, 333 Pa. 265, 5 A.2d 133 (1939) and held:

> Section 203 of the Public Utility Law [now section 1103] requires that those seeking approval of a utility merger demonstrate more than the mere absence of any adverse effect upon the public. Section 203 requires that the proponents of a merger demonstrate that the merger will affirmatively promote the 'service,

[5] By virtue of the filing of a Joint Petition for Settlement in this proceeding, the signatories are requesting that Your Honor choose the third option, approve the application, and have the Commission issue a certificate with conditions attached.

> accommodation, convenience, or safety of the public' in some substantial way.

449 Pa. at 141, 295 A.2d at 828. The Commission has further expanded upon *York*. In *Application of Trigen - Philadelphia Energy Corporation*, A-130375F5000 (April 7, 2005), the Commission adopted the reasoning of Administrative Law Judge Chestnut when she stated in her Initial Decision:

> Thus, in order to obtain a certificate of public convenience, the applicants have the burden of proving that the transfer of control of TPEC is in the public interest. To be found to be in the public interest, the applicants must demonstrate by a preponderance of the evidence that the merger will "affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way."
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> * * *
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> When an applicant requests Commission approval to succeed to an existing utility's right to provide service, the applicant need not establish the necessity for the service, because the need is presumed to continue after the transfer. However, the Commission does examine the fitness of the applicant, to ensure that it has sufficient technical and financial capacity to render the service. The Commission in numerous cases has discussed the fitness requirements. For example, it stated in <u>Application of Newtown Artesian Water Company</u>, Docket No. A-212070F0003, Commission Opinion and Order entered July 1, 2003:
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> The fitness criterion involves three factors: the application must have the technical capacity to meet the need in a satisfactory fashion; the applicant must possess the financial ability to give reliable and responsible service to the public; and, the applicant must not demonstrate a persistent disregard for, flouting, or defiance of the Code and the Commission's orders and regulations sometimes referred to as "legal fitness." *See Re: O'Connor,* 53 Pa. P.U.C. 547 (1980); *Warminster Township Municipal Auth. v. Pa. P.U.C.*, 138 A.2d 240 (Pa. Superior Ct. 1958).

Slip Op. page 5.[6] While the Commission has not established a list of specific criteria that it will consider in the approval of an application for the transfer of stock or a merger, the Legislature required the consideration of certain items. With the passage of the Natural Gas Choice and Competition Act, the legislature mandated that the Commission shall consider:

> (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.
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> (2) The effect of the proposed merger, consolidation, acquisition or disposition on the employees of the natural gas distribution company and on any authorized collective bargaining agent representing those employees.

66 Pa. C. S. §2210(a).

That the Commission may impose conditions upon certificates and/or Settlement terms is well established.[7] Pursuant to 66 Pa. C. S. §1103 the Commission "…may impose such conditions as it may deem to be just and reasonable" on any certificate issued. Similarly, the Natural Gas Choice and Competition Act provides that if the Commission finds that the proposed merger, consolidation, acquisition or disposition will not result in a positive benefit that customers would receive from a properly functioning and effective competitive market,

> … the commission shall not approve such proposed merger, consolidation, acquisition or disposition, except upon such terms and conditions as it finds necessary to preserve the benefits of a properly functioning and effectively competitive retail natural gas market.

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[6] While NEM does not doubt that Equitable is financially fit to maintain its current operations, NEM maintains that there is insufficient evidence in this record for the Commission to determine whether that financial fitness will continue to exist after the stock transfer.

[7] The Natural Gas Choice and Competition Act has not altered the Commission's authority to impose conditions upon any certificate that may be issued or upon any Settlement.

66 Pa. C.S. §2210(b).[8]

As stated previously, the Commission's decisions are clear that the Joint Applicants must prove by a preponderance of the evidence that the proposed transaction and the Settlements are in the public interest because they will affirmatively promote the service accommodation, convenience or safety of the public in some substantial way. Such evidence must be gleaned from the record in this proceeding and not through the mere declaration of the parties to the Settlements. This Commission has not hesitated to either deny or alter a Settlement when it is of the opinion that insufficient information is available, there remain unanswered questions, or it finds that a portion of the Settlement agreement does not meet the public interest test. [9]

The task before Your Honor is clear. In order to approve the Joint Petition and the Application, Your Honor must find that the Applicants have, by a preponderance of the evidence contained in this record, proved that the transaction will affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way and that approval of the transaction will not prevent retail gas customers from obtaining the benefits of a properly functioning and effective competitive retail gas market. NEM respectfully suggests that this is not the case based upon the Joint Petition and the evidence of record in this proceeding.

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[8] See also, Joint *Application of The United Telephone Company, supra*., wherein the Commission gave conditional approval to a settlement.

[9] *Joint Application of The United Telephone Company, supra.* ("we are concerned with the dearth of information relative to the adequate resources referenced in paragraph 25 of the Joint Settlement"); *Pennsylvania Public Utility Commission v. Philadelphia Gas Works,*M-00031768 (Jan. 7, 2004) ("the request for approval of the Agreement does not provide sufficient information to enable this Commission to determine whether its provisions are in the public interest."); *Pennsylvania Public Utility Commission, et al v. Metropolitan Edison Company*, R-00016219 (Nov. 4, 2005) ("Upon review of the Amended Joint Petition, we conclude that it should be approved, with the exception of the annual supply contract renewal tariff requirement which shall be rejected.")

B. IF APPROVED BY THE COMMISSION, THE SETTLEMENTS SHOULD BE MODIFIED TO ENSURE THE VIABILITY AND PROMOTION OF ENERGY CHOICE IN THE COMBINED SERVICE TERRITORY

In the following section, NEM addresses the salient provisions of the three Settlement agreements as they pertain to competitive retail market development and how these provisions should be modified in order to achieve a firm commitment on the part of Equitable to facilitate consumers ability to participate in energy choice.

1. GOVERNMENT PARTIES SETTLEMENT

a. THE PROPOSED RATE CASE STAYOUT WILL DEPRIVE CONSUMERS OF PROPER EMBEDDED COST BASED UNBUNDLED RATES

By the terms of its Settlement with the Government Parties, Equitable agreed not to file for an increase in base rates until any earlier than January 1, 2009. This is meant to be in resolution of all cost of service issues, including synergy savings, associated with this case. This provision could have a significant negative impact on the development of the competitive retail gas market. If Equitable does not file a base rate case in which the subject of rate unbundling can be thoroughly examined for many years, then Equitable's customers will be deprived of appropriate price signals pertaining to competitive functions as well as be subject to duplicative costs and loss of available assets and revenues if they do decide to choose a competitive supplier.[10] NEM Witness Crist testified extensively to the disparity in distribution rates between Equitable and Dominion, with Equitable's distribution rates being markedly higher. (NEM Stmt.

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[10] It is unlikely that without a serious examination of the current rate structure and recovery mechanisms for a competitive market to develop at the residential and small commercial level, for all of the reasons developed more fully in J. Crist Direct and Rebuttal testimony sponsored by NEM. Even assuming, *arguendo* some customers did choose to purchase commodity from an alternative supplier, until and unless the base rates are examined to separate the costs of distribution from the costs of commodity supply, customers will continue to pay for services not received and assets not made fully available.

1, page 11, lines 9-17, NEM Stmt. 1-SR, page 18, lines 8-12). NEM suggests that one reason for the distribution rate disparity is the lack of embedded cost-based unbundled rates that properly allocate the costs of competitive-related functions to competitive rates.

Equitable should not be permitted to continue charging current customers as well as new Dominion customers its current distribution rates when said rates continue to improperly include commodity-related costs. This would be inequitable for two reasons. First, Equitable's distribution rates are significantly higher than Dominion's. There is no record justification for the difference. Yet, upon completion of the acquisition, captive customers will likely be required to pay those higher rates.

Equitable most likely will initiate the process of increasing transportation rates of customers that had below-tariff-maximum pricing. (NEM Stmt. 1-R, page 21, line 5). Such increases combined with a stay-out provision will allow Equitable to realize a windfall gain that is not reconcilable. If the stay-out provision is to be effective at maintaining the existing rate structures and levels then Equitable and Dominion must be instructed that all existing transportation contracts must be renewed at the same rates as currently exist and not be increased. Any revenue increases from renegotiated transportation contracts should be accrued and refunded to all customers.

Second, to the extent that inflated distribution rates are cross-subsidizing artificially low commodity rates, it inhibits the growth of customer choice opportunities. Unbundled rates should properly reflect the fully loaded cost of serving retail customers. This will allow consumers to see and respond to accurate market pricing signals and to make an informed comparison between competitive alternatives and their value propositions.

All suppliers providing commodity service to customers at retail, including default service and competitive suppliers, incur costs to do so in addition to the wholesale cost of the energy commodity. These costs include: no notice service, pipeline capacity charges, city-gate delivery requirements, and related commodity charges, a share of operating expenses including labor-related costs, credit costs, risk management premiums, load shape costs, commodity acquisition and portfolio management, working capital, taxes, administrative and general expenses, metering, billing, collections, bad debt, information exchange, regulatory compliance, and customer care.

These costs are incurred by competitive energy suppliers and are included in competitive energy supplier pricing. Many of these same costs are also incurred by utilities but are not allocated to utility commodity pricing. Failure to identify, unbundle and credit migrating customers with these costs results in a double payment. And the price signals cannot possibly operate efficiently if such costs remain in utility delivery service pricing. By requiring utility bills to identify, unbundle and price each competitive service separately from monopoly services, the Commission will encourage true competition on the basis of pricing, quality of service, and provision of value-added services.

Accordingly, NEM recommends that Equitable be required to submit an embedded cost based study as well as accompanying unbundled rates that properly allocate competitive commodity-related costs at the earliest possible date.

b. THE PURCHASE GAS COST RATE SHOULD BE A MARKET-BASED PRICE SIGNAL

1) DELIVERY SYSTEM CHANGES SHOULD NOT NEGATIVELY IMPACT CUSTOMER COSTS AND GAS DELIVERABILITY. COMPETITIVE SUPPLIERS NEED ADEQUATE NOTICE OF SUCH CHANGES.

As described in its testimony in this proceeding, Equitable determined that it could replace or terminate existing interstate pipeline contracts with Texas Eastern, Tennessee and Dominion Transmission. (Equitable Stmt. 3, page 24, lines 13-15). Equitable projected that by terminating these contracts that $10 million in savings could be achieved per year. (Equitable Stmt. 3, page 28, lines 9-12). By the terms of the settlement agreement with the Government Parties, it was agreed that Equitable would eliminate these Tetco, Tennessee and DTI pipeline contracts.

NEM notes three issues associated with this provision. First, as discussed by NEM Witness Crist, whether these reductions in capacity are even possible is questionable, since the same number of customers, consuming the same amount of gas with the same usage profile will still be present in the combined service territory. (NEM Stmt. 1, page 11, lines 1-4). Accordingly, serious consideration needs to be given to the affect on deliverability of the elimination of these contracts. If these reductions are not in fact achievable then the purported $10 million savings that Equitable cites as a justification for approval of the acquisition will not be realized.

Second, in comparing Equitable and Dominion's tariffs, NEM Witness Crist noted that the capacity charge to get gas to Equitable's citygate is $1.71/mcf with a balancing charge of $0.18/mcf. This does not compare favorably with Dominion's capacity and balancing charge of $0.66/mcf.[11] Such increases in the delivery costs of gas to the citygate would raise all customers' costs regardless if those customers were consuming system gas or obtaining gas from a marketer. The aggregate effect of moving the gas supply of Dominion Peoples through the

[11] This analysis is and was intended to illustrate the significant discrepancy between the two entities rates for providing similar services, and is in no way intended to signify that either rate is appropriate for the services being provided, as NEM has not engaged in that analysis at this point.

Equitrans system will increase costs in excess of $88 million dollars annually. If Equitable assumes responsibility for managing the entire gas supply portfolio of the combined utilities, the combination of reduced pipeline capacity coupled with higher costs, certainly suggests that marketers' costs will be higher.

Third, on a broader level, NEM is concerned that as Equitable seeks to optimize its delivery system it may in the process abandon or remove transmission interconnection or distribution lines. Abandonment or removal of these lines could adversely affect existing marketer agreements with customers or create a system constraint that could preclude a marketer from providing service to customers or increase the cost of the marketer providing gas service to customers. NEM believes that it is imperative that marketers be provided adequate notice of Equitable's intention to abandon or remove any specific transmission interconnection or distribution line. Marketers must have a reasonable period of time to alter the method of delivering natural gas to their customers at no additional cost and under the same terms and conditions to the customer and the marketer. Absent any emergency situation, any producer, pipeline or LDC interconnection being used by suppliers must not be disconnected unless all suppliers using the interconnect are notified of a proposed abandonment. Should a supplier be utilizing the line to be abandoned, and in order for a supplier to insure any contract between itself and a customer not be breached by Equitable's unilateral action, an opportunity should exist for a supplier to obtain another delivery source to the customer under the same terms and conditions as were in place immediately prior to the decision to abandon the line. Additionally, as the abandonment of an interconnection could force a supplier to modify or abrogate transportation agreements and/or supply paths, the Commission should require Equitable to apply to this

Commission for approval to abandon and provide all suppliers and parties to this proceeding with notice of such application.

2) ANY CHANGES TO GAS IN STORAGE ACCOUNTING METHODS SHOULD BE ACCOMPLISHED IN A FORUM OPEN TO MARKETER PARTICIPATION AND IMPLEMENTED IN A COMPETITIVELY NEUTRAL MANNER

In its testimony in this proceeding, Equitable proposed to change the accounting methodology for the gas in storage on the Dominion system from the LIFO (last in, first out) method to the FIFO (first in, first out) method. Equitable claimed this would produce in excess of $40 million in customer savings. (Equitable Stmt. 1, page 17, lines 1-10, Equitable Stmt. 3, page 24, lines 1-4). However, in its settlement with the Government Parties, Equitable agreed not to seek a change in accounting methodology for gas in storage inventory in this proceeding. NEM submits that this is an inadequate resolution of this issue.

NEM Witness Crist explained that a change in the accounting methodology would not result in actual cost savings, it would only impact when to recognize costs. Moreover, Mr. Crist noted that changing the storage inventory methodology has attendant tax, rate base and accounting consequences that Equitable failed to mention. (NEM Stmt. 1, page 17, lines 8-15). With these considerations in mind, Equitable's $40 million savings estimate seems overstated. Moreover, since the Government Parties' settlement does not seek the accounting change, one of the significant purported benefits of the merger will not be realized.

NEM is concerned that although Equitable is not seeking an accounting methodology change "in this proceeding," that Equitable will do so, and likely in a proceeding for which marketers have not traditionally been granted standing to intervene. Equitable would likely make such a proposal in a 1307(f) proceeding in addition to proposed changes in gathering fees, other charges and practices which could impact a marketer's ability to supply competitively priced natural gas to customers. If NEM and/or the energy marketers that comprise its membership are not permitted to participate in the 1307(f) case, it is possible that a resolution that negatively impacts competition in the Equitable service territory could be permitted.

NEM recommends that if the accounting methodology change does in indeed result in savings, it should be flowed back through a separate credit rider such that all customers - full service, transportation and retail choice - benefit in a competitively neutral manner. This result is appropriate inasmuch as all customers contributed to the cheaper gas in storage. NEM urges the Commission to consider the impact of this recommendation. If Equitable is allowed to reflect the savings in its commodity rate: 1) it will artificially lower the rate thereby interfering with market pricing signals; and 2) penalize customers that have migrated as they will be unable to share in the benefit of an asset that they paid for.

NEM strongly suggests that Equitable be prohibited from requesting a change in storage gas inventory valuation for an extended period, and any request for a change should be required to be made as part of a base rate case in which marketer participation is permitted.

3) CAPACITY/COMMODITY ACQUISITION FUNCTION CONSOLIDATION SHOULD BE CONSIDERED IN A BASE RATE CASE WHERE THE UNDERLYING COST ALLOCATIONS OF THESE COMPETITIVE FUNCTIONS CAN BE ANALYZED

The Government Parties Settlement provides that a joint §1307(f) application will be filed by the "Utilities" for the purpose of consolidating capacity and commodity acquisition efforts to reduce overall PGC rates for the Utilities customers. On a related note, in the IOGA Settlement, IOGA agreed to support Equitable's blended gas cost proposal to take effect October 1, 2007. In combination, these provisions of the different Settlements appear to require the Commission to approve in advance an illegal act. While the initial sentence of subsection (f) of

§1307 speaks of natural gas distribution companies (plural), the remainder of the section speaks of the actions to be taken by a company (singular). Thus, until the companies are officially merged into one company the statute would appear to require the filing of individual §1307(f) gas cost rates and preclude the filing of a joint §1307(f) application.

NEM also questions whether the consolidation of capacity and commodity acquisition efforts should more properly be the subject of a base rate case. Inasmuch as the combination of these competitive functions should reveal the historical costs incurred by the utilities to perform them and how the costs have been allocated between delivery and commodity rates, this would be an opportune time to require rate unbundling associated with these competitive functions.

2. IOGA SETTLEMENT PROVISIONS

a. DOMINION'S OPERATIONAL RULES AND PRACTICES FOR POOL OPERATIONS SHOULD BE IMPLEMENTED ON THE COMBINED UTILITY SYSTEM

As noted by NEM Witness Crist, producer issues are of concern for marketers because such issues impact their ability to access competitively priced sources of gas. This is particularly important in this case because: 1) more than half of the supply on Dominion's system is provided by local production; and 2) Dominion's rules pertaining to producers as well as rules pertaining to marketers that purchase gas from local producers are more fair and reasonable than Equitable's. (NEM Stmt. 1, page 20, lines, 10-22, page 21, lines 1-2).

By the terms of the IOGA settlement, Equitable agreed to implement certain of Dominion's operational rules and practices on its distribution/gathering system. This would include implementation of a monthly gas accounting methodology and the use of Dominion's historical meter production/nomination methodology. It was also agreed that Dominion's existing rules in these areas will be maintained. Equitable and IOGA agreed to a 120-day implementation period that can be extended for good cause, with the aim of completing the process within 180 days. NEM submits that to the extent the Settlement provision ensures that: 1) the more favorable Dominion rules are permitted to remain in place for the Dominion system, and 2) that certain Dominion rules will be exported to the Equitable system, that this provision of the Settlement is in the public interest and should be approved.

The settlement also provides that by October 1, 2007, Equitable commits to integrate and charge producers a single, uniform set of rates for the entire Equitable and Dominion transmission, distribution, and gathering system. With respect to this provision, NEM reiterates its concern that Equitable may impose its higher gathering rates, restrict access to on-system storage or otherwise impose restrictions that will increase costs to marketers and the consumers they serve. (NEM Stmt. 1, page 20, lines 21-22, page 21, lines 1-2). NEM continues to urge that Dominion's operational rules be implemented for the combined service territory.

3. HESS/CONSTELLATION SETTLEMENT PROVISIONS

a. THE AGENCY PROGRAM SHOULD BE ELIMINATED IN ALL FORMS BY A DATE CERTAIN AND AS SOON AS POSSIBLE

Pursuant to the provisions of the Hess/Constellation settlement, it was agreed that Equitable could use their existing agency program, by which it secures supply services on behalf customers, in circumstances that involve "a customer attempting to bypass or otherwise leave the Equitable system." This is simply not necessary and should not be permitted.

Equitable claims it "needs" the agency program to deal with competitive bypass or distribution switching threats with others local distribution companies such as T.W. Phillips and Columbia Gas of Pennsylvania. Dominion currently faces similar competitive threats from the exact competitors of Equitable and manages all of their competitive practices without using an agency program, even through they have such language in their tariff. Through the years Dominion has migrated all of their former agency customers to discounted transportation service. NEM Stmt. 1-SR, page 16, lines 20-23, page 17, lines 1-8). Equitable could and should adopt the same practices.

In the settlement agreement, Equitable agreed to a modification of its agency program when dealing with their competitive customers. Equitable's modified agency program would be provided under the following conditions:

1) The customer requests such a service of the Company.
2) The customer is an existing customer of the Company.
3) The customer represents that it has received a bona fide offer from another company to bypass or otherwise leave the Equitable distribution system.
4) Equitable must attempt to obtain offers for supply services from at least three different natural gas suppliers.
5) Equitable shall provide documentation to the Commission, upon request, that the four conditions have been met.

Equitable's agreement to "attempt to obtain offers for supply services from at least three different natural gas suppliers," provides little assurance or guidance as to how those offers will be gathered, shared, evaluated or used. There is reason to suspect this could merely serve as a way to gather market intelligence to undercut competitive offerings. Also, if it is intended that Equitable will obtain quotes and actual supply for a customer, this effectively removes the customer from the decision making process. Plainly, this could not be characterized as "customer choice" but rather more accurately termed "local distribution company choice."

In the third paragraph of the settlement, Equitable then commits not to sign up customers using Dominion Rate CER or any transportation agency service. As Dominion has no customers currently served under either provisions, this commitment simply would continue Dominion's current practices. What is objectionable is the last sentence which allows Equitable to seek "to replace these provisions with the proposed language contained in paragraph 2 above." Paragraph 2 lists the five criteria allowing the use of agency, which would be a huge step backwards. Instead, Dominion Peoples should be directed to eliminate the agency language from their existing transportation tariffs GS-T and T as is stated in paragraph 3, and the Commission should explicitly require that no such program be offered in its service territory.

Under the settlement, existing agency contracts will be grandfathered and assigned to Equitable's marketing affiliate. Thus a customer is merely being transferred from one Equitable-controlled program to another. In the Equitable agency program, utility customer representatives are utilized to manage the sales process for gas supplied by their affiliate, Equitable Energy, thereby affording the affiliate the significant competitive advantage of no-cost customer acquisition. (NEM Stmt. 1, page 8, lines 7-15). As is made clear by Equitable's contract renewal language, customers are required to provide Equitable with the terms of competitive supplier offers and to renew with Equitable on those terms creating a perpetual lock-in to successive renewals. (NEM Stmt. 1, page 9, lines 1-13). Customers are generally not made to understand that they are in fact receiving commodity from the affiliate and not the utility itself. NEM Witness Crist revealed Equitable's substantial financial interest in the Agency program as well as the overwhelming market share enjoyed by Equitable's affiliate. Revenues collected by virtue of the program were $66.2 million in 2003, $72.5 million in 2004, $80.5 million in 2005 and by July 31st of this year already totaled almost $52 million. (NEM Stmt. 1-SR, page 4, lines 1-13). For these reasons, NEM has strong reservations about the agency program continuing in any guise.

It is also unclear how the transfer of the grandfathered customers to Equitable's affiliate will be accomplished consistent with the standards of conduct and the effect of the transfer of revenues from a regulated entity to an unregulated entity. If Equitable maintains that for administrative simplicity the entire book of agency business should be assigned from the utility to an energy marketer (they propose their affiliate, Equitable Energy), NEM would propose Equitable sell the agency book of business to a non-affiliated supplier with the sale going to the highest bidder. Any future customer acquisition activity by Equitable's affiliate, Equitable Energy, should be undertaken in conformance with the rules that exist in the Code of Conduct. Equitable Energy should receive an affirmative customer consent on a new contract to acquire a customer, similar to what any other marketer is required to obtain.

Equitable Gas should provide the customer information including contract expiration dates of all agency customers to all registered marketers. Contract termination notices should then be sent to those agency customers, and the customers should be allowed to sign up for gas supply service from any marketer.

Overall, even though the settlement purports to limit the circumstances under which agency can be offered, a substantial threat to competitive marketers will still exist. This is illustrated by Paragraph 7 of the Hess/Constellation settlement that provides,

> Subject to 1 and 2, above, for all existing non-agency customers or for agency customers whose contracts have expired, natural gas commodity in the Equitable service territories shall only be available from Equitable Gas Company at PGC rates or from a PA PUC licensed natural gas supplier.

Paragraph 1 referenced in this quote preserves Equitable's continuing ability to continue to offer agency service for "a customer attempting to bypass or otherwise leave the Equitable distribution system." Accordingly, there is no firm termination date for the agency program and all customers remain potential agency program participants. Moreover, NEM notes that the majority of agency customers are non-competitive anyway. Accordingly, the purported rationale for agency, preventing competitive bypass, is not even applicable. As a result, these customers should not and need not be renewed in the agency program.

For the foregoing reasons, NEM urges the Commission to require the elimination of Equitable's agency program as soon as possible and by a date certain. The anticompetitive affect of a utility competing with marketers as gas suppliers to customers in its own territory cannot be overstated. A litany of products and services can and will be provided to customers from natural gas suppliers in the competitive market. However, this will not occur so long as the regulated utility, with its significant market power, is also offering products in direct competition with marketers on a playing field steeped sharply in their favor. Nor will it happen, as in this case, when the utility affiliate offers the competitive product without conforming to a code of conduct and therefore improperly benefiting from the utility's market dominance. To the extent that the agency program was intended to facilitate economic development in Equitable's service territory, NEM submits this can be accomplished in a competitively neutral manner. This could entail Equitable offering customers a delivery rate discount, and encouraging customers to seek competitive offers for commodity supply.

b. DOMINION'S CHOICE TARIFF SHOULD BE IMPLEMENTED FOR THE COMBINED SERVICE TERRITORY

One of the obvious questions raised by the acquisition of Dominion is how the choice program rules of the two utilities will be integrated and assimilated. Given the more advanced state of customer migration in the Dominion territory, the resolution of this issue is very important. Currently, there are eleven NGSs active on Equitable's system compared to twenty NGSs active on the Dominion system. (NEM Stmt. 1-SR, page 2, lines 14-17). As of October 1st of this year, 6.8 percent of residential customers on Equitable's system were served by alternate suppliers compared with 29 percent of residential customers on Dominion's system that were served by alternate suppliers.[12] In the absence of Commission direction on the issue, NEM is concerned that the Equitable choice rules will be adopted for the systems of both utilities to the detriment of the existing choice programs.

NEM notes that Equitable Witness Dalena recognized that beneficial efficiencies can be achieved through the implementation of a uniform choice program. "It is reasonable to assume that one consistently applied Choice program for a combined pool of 568,000 potential residential choice customers provides an opportunity for NGSs to benefit from economies of scale such as, reduced transactional costs e.g. nominations, accounting, etc. and reductions in the cost to acquire customers." (Equitable Stmt. 2, page 7, lines 8-12). NEM agrees with this assessment. Yet, no proposal was submitted by the utilities in this regard. Moreover, Equitable maintained that there was nothing wrong with the choice program rules on its system as evidenced by a lack of formal complaints. (Equitable Stmt. 3-R, page 32, lines 18-22, page 33, lines 1-2). NEM submits that this is an inadequate barometer of the success of Equitable's choice program rules.

NEM Witness Crist delineated a number of specific areas in which the Dominion choice rules were superior. For instance, Dominion provides customer consumption and supply data on a real time basis with daily website postings. (NEM Stmt. 1, page 22, lines 14-19). By comparison, Equitable only provides a statement five days following the month-end. Clearly, the Dominion rules are more facilitative of marketers' ability to match supply and demand. Additionally, Dominion's rules pertaining to nominations, balancing, cash outs and penalties are

[12] PA Office of Consumer Advocate, Natural Gas Shopping Statistics, October 1, 2006, available at: http://www.oca.state.pa.us/Industry/Natural_Gas/gasstats/gstats0706.pdf.

more marketer friendly as well. For instance, Dominion permits three days for imbalance trading while Equitable only permits one day. (NEM Stmt. 1, page 23, lines 14-19).

In the Hess/Constellation settlement, it was agreed that a separate proceeding would be initiated for the purpose of combining the Equitable and Dominion tariffs, wherein Equitable "commits to filing tariff provisions that promote the development of the competitive market in the combined service territory." Prior to initiating such proceeding, Equitable agreed to form a marketers group to receive recommendations on the merged tariff. NEM believes that this provision falls short of ensuring that the ultimate choice tariff rules will indeed support the development of the competitive retail gas market. In fact, the provision raises more questions than it answers. When will the marketers group be formed? Will any marketer recommendations actually be incorporated? When will the Commission proceeding to evaluate the proposed tariffs be initiated? What rules will be in effect in the interim?

NEM recommends that as a condition of the approval of the merger that the Commission require Equitable to adopt Dominion's choice program rules. In essence, a rebuttable presumption should be established that the Dominion rules will be implemented for the combined utility. Going forward, NEM recognizes that there may be valid reasons for departing from one of the Dominion rules. For example, Equitable should be permitted the opportunity to make a good faith showing that operational constraints make adoption of a particular rule unduly burdensome. Likewise, provision should be made for the possible implementation of the results of the gas stakeholder process.[13] Accordingly, NEM urges the Commission to establish a clearly-defined process with a firm timetable within which Equitable and other stakeholders will form a working group to design a combined tariff. This working group should be tasked with creating an operations manual that delineates details and methods of nominations, storage injection and

[13] Docket I-00040103, Investigation into the Natural Gas Supply Market.

withdrawals, capacity release, and storage assignment amongst other issues. The operations manual should be deemed part of the tariff. The Commission should identify a date by which the proposed choice tariff is to be filed. Alternatively, if the stakeholders cannot agree on tariff and/or operations manual provisions, the Commission should establish a process whereby individual recommendations can be made to the Commission for its determination. The working group should be required to be instituted on an on-going basis as may be necessary to accommodate the various recommendations the Commission may adopt through the gas stakeholder process.

c. EQUITABLE'S ALTRA SYSTEM SHOULD BE REQUIRED TO HAVE THE SAME FUNCTIONALITY AS DOMINION'S E-SCRIPTS SYSTEM

The marketer-utility interface is critical to supporting a vibrant choice program. Dominion uses a reliable and efficient system called E-Scripts for marketers to nominate and schedule gas for customers. Equitable did not purchase E-Scripts as part of the acquisition. As a result, Equitable's ability to handle the increased data requirements of Dominion is called into question. (NEM Stmt. 1, pages 22, lines 22-23, page 23, 1-4). In this regard, the Hess/Constellation Settlment provides that Equitable agrees to consider changes to its operational rules and practices, as proposed by a marketers group, to achieve certain functionality in its ALTRA system. NEM's concern with this provision is the same as stated with respect to marketer work group proposed to consider the choice program – there is no firm commitment that Equitable will actually make the changes, it will merely consider them. This is simply insufficient to support the development of the competitive market.

D. ISSUES NOT ADDRESSED BY SETTLEMENT PROVISIONS

NEM's testimony identified Equitable's future treatment of Dominion's on system storage assets as critical to determining marketers ability to cost effectively do business in the combined service territory. This issue was not addressed by the Settlement agreements.

1. MARKETERS SHOULD CONTINUE TO HAVE THE BENEFIT OF DOMINION'S ON-SYSTEM STORAGE AND CUSTOMER ASSETS SHOULD FOLLOW THE CUSTOMER WHEN THEY MIGRATE

As noted by NEM Witness Crist, there is a notable difference between the location of Dominion and Equitable's storage assets. (NEM Stmt. 1, pages 18-20). According to Mr. Crist, Dominion "obtains storage from pipeline suppliers, most notably Dominion Transmission, and they have their own storage fields on their distribution system. Equitable obtains storage from pipeline suppliers, most notably Equitrans, but has no storage fields on their distribution system." (NEM Stmt. 1, page 18, lines 17-21). Mr. Crist explained why Dominion is preferable in this regard,

> Dominion Peoples allocates their on-system storage to the marketers on a pro-rata basis, meaning that they receive appropriate amounts of storage based on the needs of their customers. On Equitable, since their storage is located on Equitrans, marketers must buy that storage from Equitrans at FERC-approved rates. It costs more to operate as a marketer under the arrangement on the Equitable system and that means that the customers pay more.

(NEM Stmt. 1, page 19, lines 4-10). NEM is concerned that upon completion of the acquisition that Dominion's storage assets will be transferred to Equitrans and that marketers will no longer have the benefit of on-system storage. NEM recommends that storage and utilization rights should be assigned to individual customers as they leave Equitable system supply for that of a competitive supplier. The storage and utilization rights should be under the same terms and conditions as that customer would have received as a sales customer. NEM recommends that the Commission require Equitable to notify all competitive suppliers of its intent to transfer storage assets currently held by Dominion and that it be required to obtain Commission approval of such transactions.

IV. CONCLUSION AND REQUESTED RELIEF

NEM submits that Equitable has failed to prove by a preponderance of the evidence that the three Settlements executed by the different settling groups are in the public interest and will support the development of a properly functioning and effective competitive retail gas market in the combined utility service territories. Indeed, certain provisions of the settlement could result in significantly higher costs for a majority of the customers and therefore cause substantial harm. For those reasons, the combined Settlements and the acquisition should be denied or approved subject to the recommended modifications set forth herein.

If the Commission approves the Settlements, NEM urges that it be done subject to the following modifications and conditions:

1. Equitable should be required to file an embedded cost based rate study and accompanying unbundled rates that properly allocate competitive commodity-related costs to competitive commodity-related functions;
2. Equitable should be required to give competitive suppliers with adequate notice of changes to its delivery system;
3. Any changes to the gas in storage accounting methodology should be filed in a base rate proceeding, and any resultant savings should be passed through to all consumers in a competitively neutral manner;
4. The consolidation of the capacity and commodity acquisition functions of the utilities should be examined in a base rate proceeding where the underlying cost allocations of these competitive functions can be fully analyzed;
5. Dominion's operational rules should be implemented on the combined utility system;

6. The agency program should be eliminated in all forms by a date certain and as soon as possible;
7. Dominion's choice program rules should be implemented on the combined utility system. A stakeholder review process should be established establishing firm timelines for action and a Commission resolution;
8. Equitable's ALTRA system should be required to have the same functionality as Dominion's E-Scripts system; and
9. Marketers should continue to have the benefit of Dominion's on-system storage subsequent to completion of the transaction. Moreover, customer assets should follow the customer when they migrate to a competitive supplier.

Respectfully submitted,

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