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WITNESS

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(None)

FORM 2

EXHIBIT INDEX

NUMBERS

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FD-302-2

P R O C E E D I N G S

1
2 ADMINISTRATIVE LAW JUDGE MICHAEL A NEMEC: This
3 morning we are having a further prehearing conference in
4 the case captioned Equitable Natural Gas Company versus The
5 Peoples Natural Gas Company. The docket is at C-20031128.

6 Present by way of telephone in Harrison are Thomas
7 Niesen and Charles Thomas representing Equitable Gas,
8 Johnnie Simms representing the Office of Trial Staff, Mr.
9 Kevin Moody representing NRG Energy. Present in the
10 hearing room with me are Attorney Tony Picadio representing
11 PACT, Norman Kennard and Susan George representing Peoples
12 Natural Gas Company. Also, Mr. Frutchey is on the line
13 also for Equitable Gas.

14 My name is Michael Nemec and, of course, I have been
15 trying to get this case organized and get it proceeding,
16 and here we are again.

17 I received second prehearing conference memoranda
18 from Equitable and from Peoples. First of all, since it's
19 your case, Mr. Thomas, why don't you start off.

20 MR. THOMAS: Thank you, Your Honor. As we
21 indicated in our prehearing memoranda and as was also
22 indicated in Dominion Peoples' prehearing memoranda, a
23 history of the case has been set forth and I don't think
24 there's any need to go into that history of how we got to
25 where we are.

1 We had asked for an extension and a further
2 prehearing conference and extension of all the schedules,
3 generally 60 days. However, we didn't specifically ask for
4 the hearings be set 60 days in advance of the earlier set
5 of hearings.

6 We have been conducting discovery. Discovery
7 remains ongoing. As indicated in Equitable's prehearing
8 memorandum, five sets of interrogatories were propounded.
9 We have received responses recently from Dominion Peoples
10 on 2, Set 2 interrogatories and 1, Set 3 interrogatories.

11 We know from having reviewed those that we don't
12 believe that they fully provided all of the information
13 that was requested so that we have a Set 6 in preparation
14 as we speak. We also indicated in our prehearing
15 memorandum that we plan to have three or four depositions,
16 one of Ms. George, and we plan to go forward with those.

17 I think, having said that, it's a little early at
18 this time to schedule the hearings unless we do so at dates
19 out into the fall because both companies have their 1307(f)
20 cases coming up. I think Equitable has received over a
21 hundred interrogatories so far, I think it's over 120, in
22 that proceeding.

23 I was looking at the interrogatories. A number of
24 them are boiler plate, a number are not, but I assume that
25 Peoples is receiving a number in its 1307(f) proceeding,

1 and because of that, Your Honor, I think we need to go
2 forward with the discovery phase in this proceeding with
3 the idea that the hearings would not be held until some
4 time in the fall.

5 One additional point in that regard is that we have
6 filed a Count 5. We are challenging Peoples' right to
7 serve in the Golden Triangle. We think that it would
8 expedite consideration and resolution of this proceeding if
9 Count 5 bifurcated and that we go forward on Count 5 first
10 because if successful, it may obviate the need for further
11 participation by PACT. I think it would remove the PACT
12 issues.

13 There are still other issues with respect to the
14 other counts that would still be appropriate for
15 resolution, but if we bifurcated Count 5 and resolved it, I
16 think the issue with respect to service to PACT would be
17 resolved as part of that and in the end it would expedite
18 the entire proceeding.

19 We, Equitable, are not serving PACT right now. I
20 don't think that the other parties are being hurt by the
21 need for a full discovery phase on this proceeding, and I
22 think that as we develop the record, we are learning more
23 and more that will be appropriate for evidentiary
24 presentation and I don't think anybody is being harmed by a
25 thorough investigation of the issues.

1 That, in a nutshell, is where we are, Your Honor.
2 Just in response to some of what was in Dominion Peoples'
3 second prehearing memo, I don't want anybody to think that
4 Equitable Gas Company is against competition. Equitable
5 believes that competition is appropriate as long as it's
6 fair competition.

7 We believe that what Dominion Peoples is doing, for
8 the reasons we have averred, is not fair competition. We
9 believe that it's in violation of the Public Utility Code
10 and the public interest.

11 JUDGE NEMEC: I want to understand your position at
12 this point. Your proposal is to proceed on Count 5 with
13 further discovery and then perhaps a hearing in the fall at
14 some point?

15 MR. THOMAS: Yes, in the...

16 JUDGE NEMEC: And then a decision on Count 5, and
17 depending on what that decision is, then whether to proceed
18 on Counts 1 through 4?

19 MR. THOMAS: Yes, that, in a nutshell, would be it,
20 Your Honor, and if we were to proceed with respect to
21 Counts 1 through 4 and if Equitable were successful in
22 Count 5, I'm not so sure that we would need to tie up some
23 of the parties, other than Dominion Peoples, that are
24 involved in this proceeding because if Equitable is
25 successful on Count 5, really the issue with respect with

1 service to PACT would go away.

2 JUDGE NEMEC: Let's go with the bifurcation matter
3 first. Mr. Kennard.

4 MR. KENNARD: Your Honor, Dominion Peoples would
5 oppose the bifurcation of this case. First off, it's
6 inappropriate to file a motion, essentially, under the
7 guise of a prehearing conference memorandum.

8 The prehearing conference memo was filed at quarter
9 to 4:00 on Friday. If bifurcation is to be an issue, then
10 Equitable should set it forth as a motion and give all the
11 parties the opportunity to carefully consider it and
12 respond in writing.

13 We came to this prehearing conference today ready
14 establish a schedule, and we sent you -- when Equitable
15 asked for its last delay, we stipulated it with them and we
16 sent you a letter that we jointly worked on and agreed to
17 that said the purpose of the prehearing conference today
18 was to establish specific dates for the upcoming events.

19 It's a waste of time for us to be here today and now
20 have Equitable argue that, well, we shouldn't establish a
21 schedule because we would like to bifurcate the case and
22 until that bifurcation is resolved, we can't possibly
23 establish a schedule.

24 There's no reason, but going to merits of it, if
25 Your Honor please, as opposed to the procedural problems

1 that Equitable has created by doing it the way it did it,
2 there's no reason for an extension for bifurcation.

3 First off, it is not dispositive of even the right-
4 to-serve issue to go into Count 5 because even -- we
5 believe that Dominion Peoples never gave up service rights.
6 It may have transferred customers, it may have transferred
7 facilities, but there's not any evidence that there was
8 ever any intent to give up service territory.

9 In fact, throughout the 1980s, Dominion Peoples
10 continued to make offers in the downtown Pittsburgh area to
11 provide service without any objection from Equitable. But,
12 even were, in the remote chance, that service territory
13 found to have been abandoned, the point of delivery of that
14 service is outside the of area that Equitable claims
15 service was implicitly abandoned. So, it's not a
16 dispositive issue.

17 The second point is that these issues are all
18 intertwined. The issue of service territory also relates
19 to competition between companies. It also relates to the
20 price terms that are related to the transaction.

21 I thought it was interesting in explaining the
22 motion that Mr. Thomas did, that bifurcation may not even
23 resolve the other counts. That - and I take it from that
24 that there is substantial possibility that Equitable may
25 continue to proceed with the other counts even if service

1 territory is resolved.

2 They say it resolves it as to PACT, is what he said,
3 but I don't think -- even see how that's true, but PACT is
4 still very interested in the terms and conditions of
5 service, and if that litigation continues, then all we have
6 done is simply elongated this proceeding.

7 We find it incredulous, Your Honor, that we could
8 easily focus on Count 5 and the service territory and
9 Equitable will continue to argue about predatory pricing
10 and if we don't resolve the predatory pricing allegation at
11 the same time, then Equitable is free to make the argument
12 without ever having had to produce evidence on the pricing
13 issue.

14 This complaint was filed in August of 2003. The
15 issues here aren't that complicated. If a rate case can be
16 resolved in nine months, certainly this can go to trial
17 within 12 months of the date of the filing.

18 Dominion Peoples is not afraid to go to hearings,
19 Your Honor, in fact wants to do so, wants its day in court.
20 As we said last November when we had a prehearing
21 conference, Dominion Peoples wants to clear its name.
22 Equitable continues to assert unproven allegations as fact
23 and we need resolution of that.

24 This is Equitable's third attempt to delay this
25 case. In the original prehearing conference, Dominion

1 Peoples was prepared to go to trial in April. We argued
2 that through. Equitable resisted, arguing that a
3 significant amount of time is needed for discovery. At
4 that point Equitable hadn't undertaken any discovery and
5 they put out a couple sets subsequently to that.

6 At the first prehearing conference we compromised on
7 a hearing in May, and in January, Equitable moved to extend
8 the schedule by 60 days to allow time for further discovery
9 on Count 5. That motion that was filed to extend the
10 schedule is the same as their prehearing conference memo.
11 In fact, a lot of the language is directly out of that.

12 Now two and a half months later Equitable is back
13 before Your Honor saying, well, we need depositions. This
14 was an argument they made back in November. Why don't we
15 have depositions? Why isn't Equitable willing to move
16 forward on this case? Why are they now talking about some
17 time in the fall?

18 Dominion Peoples and PACT, Your Honor, both need
19 closure on this case, and Equitable needs to step up to the
20 place and prosecute its complaint rather than avoid it.

21 We oppose bifurcation and we propose, as we did in
22 our prehearing conference memo, to work out the matter of
23 scheduling with Your Honor and the parties so that we are
24 in trial in July and August.

25 MR. THOMAS: May it please, Your Honor, I would

1 just like to respond to a couple of things Mr. Kennard
2 said. Equitable has not been delaying this case. There
3 were regulation deadlines for responding to discovery. We
4 voluntarily agreed to those at the beginning to accommodate
5 counsel's vacation schedule.

6 Then we agreed to a further extension to accommodate
7 the fact that there was a strike at Peoples which, by the
8 way, three days after we agreed was over. It still took 50
9 days to get the responses, and it wasn't Equitable that
10 originally requested the additional 60 days, it was jointly
11 after my discussion with counsel for Dominion Peoples, and
12 counsel for Dominion Peoples was the one who wrote the
13 letter.

14 We have not been delaying the case. It's just taken
15 so long for the discovery responses and there, as I said,
16 hasn't been a strike for some time. Quite frankly, Your
17 Honor, when we are getting the responses, they are
18 incomplete. We have to follow them up. From what we are
19 seeing, even in the incomplete responses, it's fertile
20 ground for even further inquiry before we go to hearing.

21 I don't have a problem nor does Equitable have a
22 problem with scheduling dates for hearing provided we have
23 the understanding that the best time for hearing is in the
24 fall and the best way to go about it to do Count 5 first
25 because Count 5 may eliminate the PACT matter very quickly.

1 It's our position that Peoples abandoned its service
2 rights in the Golden Triangle. We think it's a geographic
3 area that is well known in the city. We have evidence to
4 present on that point. We have outstanding discovery
5 seeking more evidence from Peoples' records on it, but what
6 have found is pretty good.

7 We don't think that Peoples has the right to service
8 in the Golden Triangle which they abandoned. Then they
9 come back 34 years later and they say, well, the service
10 connection is outside the Golden Triangle and they financed
11 the connecting line.

12 We think Count 5 needs to be resolved first. We
13 think that's the most expeditious way to go. We are
14 prepared to schedule the hearings today and we are prepared
15 to schedule various dates with the understanding that the
16 best time for those hearings is in the fall and the most
17 expeditious resolution of this case is to do Count 5 first.

18 JUDGE NEMEC: How do you respond to the comment
19 that you perhaps should have filed a formal motion to that
20 effect and given parties an opportunity to respond in
21 writing?

22 MR. THOMAS: If that's the way the parties would
23 like it, we will file the motion today, Your Honor. We did
24 it in a prehearing conference memo and we thought that that
25 was sufficient time to address that issue. If Your Honor

1 would like a formal motion, we can file a formal motion.

2 JUDGE NEMEC: Okay. Let's hear what some of the
3 other parties have to say. Mr. Simms, any comment?

4 MR. SIMMS: No, Your Honor.

5 JUDGE NEMEC: Mr. Moody?

6 MR. MOODY: No, Your Honor.

7 JUDGE NEMEC: Mr. Picadio?

8 MR. PICADIO: I would strongly oppose bifurcating
9 the issue of whether Peoples abandoned the service
10 territory. I think there is a bifurcation issue here, but
11 that's not it.

12 This issue that I see is under what circumstances
13 can the PUC invalidate this contract that was privately
14 negotiated between Peoples and PACT. I think that's an
15 entirely different question as to whether the Commission
16 should somehow increase its regulations of the level of
17 competition that has been going on in western Pennsylvania.

18 PACT relied on the public tariff filings here, which
19 Peoples' tariff shows that it is serving Pittsburgh, the
20 City of Pittsburgh, Allegheny County, so we look and we see
21 that we are in that territory. We take a look at their
22 tariff and find that all of the provisions of our contract
23 comply with the tariff.

24 Under those circumstances, I don't think the
25 Commission has the authority to invalidate that contract

1 regardless of what the Commission wants to do in the future
2 about competition. That's the issue, it seems to me, that
3 should be resolved first and then PACT can go home.

4 JUDGE NEMEC: Okay. Mr. Thomas.

5 MR. THOMAS: May it please Your Honor, we had a
6 difficult time hearing everything that Mr. Picadio was
7 saying. He was breaking up. I got the gist that PACT is
8 opposed to the bifurcation. I heard him say that PACT
9 studied the tariff of Peoples and they saw a listing of the
10 City of Pittsburgh or Allegheny County.

11 Your Honor, that doesn't make Count 5 go away, and
12 it doesn't make Equitable's complaint against Dominion
13 Peoples with respect to Count 5 or any of the other counts
14 inappropriate or push it to the side.

15 The fact that there is a contract entered into with
16 a company that is, in our opinion, violating the Public
17 Utility Code as well as Commission regulations, the fact
18 that there is a signature on that contract doesn't trump
19 the fact that there have been violations of the Code and
20 the regulations and so forth.

21 Count 5 is certainly appropriate and if Dominion
22 Peoples does not have the right to service customers
23 located in the Golden Triangle, then that contract is going
24 to have to go away. The Commission certainly could
25 invalidate the contract, but it certainly is a more

1 fundamental issue than that.

2 If you think about it, Your Honor, you abandon a
3 whole area of the city 34 years, 33 years ago, and then you
4 come back 33 years later and you handpick the customers you
5 may wish to serve, I think that's not a and using what,
6 in our opinion, is rate discrimination, I think that
7 becomes a service discrimination issue as well, dangerously
8 close to the old red-lining we used to see.

9 I think that it is a fundamental issue, and we just
10 weren't aware of it when we filed the initial complaint,
11 but this Count 5 is really a serious issue for the
12 Commission to consider, and you throw in the other matters,
13 as our discovery is producing, with respect to what is
14 being used in displaced service by the existing provider
15 and some of the tactics being used, it's certainly not a
16 situation that is in the public interest.

17 It's not really a situation involving fair
18 competition. It's not really a situation involving the
19 type of competition that was envisioned by the Act.

20 MR. KENNARD: Your Honor, if I might respond.

21 JUDGE NEMEC: Okay, go ahead.

22 MR. KENNARD: I think Mr. Thomas just condemned his
23 own theory on bifurcation. What he said was that Dominion
24 Peoples abandoned 33 years ago and combined it with the
25 predatory pricing. Obviously we disagree with the merits

1 of the argument. He has taken the opportunity to present
2 an argument on the merits.

3 More fundamentally we are talking about the
4 bifurcation, and we do think that Equitable, despite the
5 fact that they are now asking for bifurcation, every time
6 they talk about abandonment they talk about predatory
7 pricing and they shouldn't be allowed to do that.

8 We've got to get their evidence out on the table.
9 We can continue to have these prehearing conferences where
10 Mr. Thomas makes prejudicial arguments about what the facts
11 are going to prove without ever having to prove the facts.
12 Let's get to the merits of this case.

13 Peoples did not abandon service territory in
14 Pittsburgh. In fact, they have continuously provided
15 service in Pittsburgh. With respect to the area
16 colloquially known as the Golden Triangle, that's not a
17 known service territory.

18 It wasn't abandoned in 1971 by the simple transfer
19 of customers to Equitable, and Dominion Peoples has
20 continued to offer service in that Golden Triangle area in
21 the 1980s and through the 1990s. Besides that, the point
22 of delivery is not within the Golden Triangle.

23 So, that's my response to the merits of it, but more
24 fundamentally we can't talk about competition, we can't
25 talk overlapping service territory, we can't talk about

1 predatory pricing in some convenient order of one, two,
2 three because this case doesn't lend itself to that
3 intellectually, legally it doesn't, and administratively it
4 doesn't.

5 We will now have two hearings, is what Equitable's
6 proposal is. They have been pushing off any hearing
7 whatsoever. Now we are going to push off two hearings.

8 MR. THOMAS: May it please, Your Honor, Peoples has
9 not served in the Golden Triangle for 33 years until their
10 service to PACT. That's a fact.

11 MR. KENNARD: It's not a fact until it's on the
12 record, and let's get there.

13 JUDGE NEMEC: We could go on for a long time back
14 and forth. In order to impose some order on this
15 proceeding, I am going to ask you to put your motion to
16 bifurcate in writing, and upon receipt of it, the parties
17 will have ten working days to respond in writing. Then I
18 will issue an interim order with regard to the conclusions
19 I reach, and then we will go from there on the bifurcation.

20 Do you want to go into any discovery disputes now?

21 MR. KENNARD: Your Honor, before we leave the
22 bifurcation, everybody is on the line, we're all here
23 today. The rest of us, and hopefully Equitable too, is
24 prepared to talk about a schedule. Can we not get to that
25 and at least tentatively set up a schedule and not waste

1 this day because Equitable put in a bifurcation proposal
2 three working hours ago?

3 JUDGE NEMEC: You mean schedule for hearings?

4 MR. KENNARD: Yes.

5 JUDGE NEMEC: You can talk about it. What I was
6 thinking about doing is -- let's do it this way. Both in
7 the motion to bifurcate and in your responses, put forth
8 with that a proposed schedule in accord with your
9 respective positions on the bifurcation.

10 Depending on where I come down on the motion to
11 bifurcate, then I will also include a proposed schedule
12 which you can then -- you will have something in writing to
13 look at and you can come back with your counter proposals.

14 MR. KENNARD: Your Honor, I contacted counsel for
15 Equitable last Wednesday and said that we want to work out
16 a schedule. I never heard anything back from them. At
17 quarter to 4:00 on Friday, we had this motion to bifurcate
18 -- this prehearing conference motion, memo.

19 There is no motion for bifurcation pending. Can we
20 not try to set up a schedule without considering the
21 motion, which hasn't even been filed yet, with all the
22 parties here, and then we can change it if the bifurcation
23 is granted, but can we not put today to some useful
24 purpose?

25 JUDGE NEMEC: Sure, we can do that. Maybe we can

1 start by trying to resolve any outstanding discovery
2 disputes before we get to a schedule.

3 MR. KENNARD: Okay.

4 JUDGE NEMEC: Forgive me, but I don't have it
5 memorized in terms of what the discovery disputes are, but
6 I know that there are outstanding discovery disputes. We
7 need to resolve those before we get to the schedule.

8 I would further point out that it's Equitable's case
9 and they don't seem to be in any hurry to prosecute it.
10 Until I get -- one of the big hunks of paper that I have
11 just pulled out that got misfiled with what I have in front
12 of me was Duquesne's provider of last resort case, which is
13 a time-limited case that I have to get resolved on or
14 before July 1st. That's coming up like a freight train in
15 my face.

16 MR. THOMAS: May it please Your Honor?

17 JUDGE NEMEC: Go ahead.

18 MR. THOMAS: The reason why we haven't come forward
19 to propose our hearing dates, which would I guess set the
20 schedule for everything else, is because while it's been
21 difficult, we are learning so much more with every set of
22 discovery response so that we aren't really in a position
23 to know the extent of our direct case.

24 We need to have the discovery be concluded. We
25 would have no problem providing a proposed schedule with

1 our motion. We have no problem with later today trying to
2 work out a proposed schedule with counsel for any of the
3 parties.

4 We think, though, that the trigger point would be
5 what the hearing dates would be in the fall, what issues,
6 which counts will be considered on those dates and then we
7 can back it off. If we go with a 60-day extension of the
8 various testimony submission dates and so forth, we may
9 wind up having testimony that's surrebuttal that's filed
10 some time in mid-July, but not picking up the case again
11 until September.

12 That's why we think it would be better if we were
13 going to hearings in September to push the dates for
14 discovery and the direct cases and responsive testimony,
15 rebuttal testimony and surrebuttal testimony closer to
16 those fall hearings days.

17 Again, we would be happy to speak with counsel for
18 any party, counsel for all parties, to work on that
19 schedule. We do think, however, that it would be best, at
20 least for Equitable and Dominion Peoples, not to have two
21 many things in this particular proceeding occurring at the
22 same time as the obligations in 1307(f).

23 As I said, I don't know how many interrogatories
24 Dominion Peoples has received so far, but Equitable hasn't
25 made its definitive April 1307(f) filing and our

1 interrogatory count is in excess of 120. It looks to me as
2 though the 1307(f) cases are going to have a great deal of
3 scrutiny.

4 JUDGE NEMEC: Well, I...

5 MS. GEORGE: Your Honor, I could just speak for
6 Dominion Peoples and say that Dominion Peoples is able to
7 move forward on multiple fronts at one time.

8 We've got this case before the Administrative Law
9 Judge that Equitable has brought against us. We are
10 involved in a civil suit. We are able to move forward on
11 two fronts there. We don't need Equitable to take care of
12 us in that regard. We can handle the 1307(f) hearing and
13 defend ourselves in this case as well.

14 JUDGE NEMEC: Yeah, I'm not sure I understand the
15 interrelationship between this case and the 1307(f).

16 MS. GEORGE: I don't either.

17 JUDGE NEMEC: Are Peoples and Equitable on a
18 similar schedule in the 1307(f) proceeding?

19 MS. GEORGE: Identical.

20 MR. THOMAS: Both companies have an April 1 filing
21 and both companies have the obligation to submit their
22 direct cases on or about the first of April with direct
23 testimony.

24 Your Honor, you have been in the 1307(f)
25 proceedings. You have essentially the same sort of

1 schedule. The non-filing parties have so many days to
2 conduct their discovery and submit testimony, and then the
3 filing party, the utility, submits rebuttal. Then there's
4 surrebuttal and then there are hearings.

5 Probably in our case, given the way the schedules
6 normally work with utility's 1307(f) having many of the
7 same parties, one of us will have the first week in June,
8 one of use will have the second week in June and Columbia
9 will have the third -- the first three weeks in June will
10 involve the 1307(f) hearings for the Pittsburgh area gas
11 companies.

12 MR. KENNARD: In that regard, Your Honor, this also
13 would occur after your recommended decision is due in the
14 Duquesne case. We are proposing trial in July or early
15 August. It works around all the issues anybody has
16 presented so far, so we think it's appropriate to have
17 hearings at that time.

18 MR. THOMAS: May it please Your Honor, I notice
19 from reading Dominion Peoples' prehearing memo, they want
20 extra time to prepare their direct case. They have
21 proposed hearings in August in their prehearing memo. I'm
22 saying it's probably wiser to slip them by a month and go
23 to September.

24 At the same time, I'm not saying that we agree that
25 Dominion Peoples should be entitled to extra time to

1 prepare their direct case, especially after hearing counsel
2 say they can do several cases at one time.

3 JUDGE NEMEC: Mr. Simms, any comments?

4 MR. SIMMS: Not at this time, Your Honor.

5 JUDGE NEMEC: Mr. Moody?

6 MR. MCODY: No, Your Honor.

7 JUDGE NEMEC: Mr. Picadio?

8 MR. PICADIO: I would like to present this issue
9 that I have raised as to the...

10 MR. SIMMS: Your Honor, could you ask the gentleman
11 to speak up? I can't hear him.

12 MR. PICADIO: I would like to address in a motion
13 the issue of treating separately the validity of the
14 Peoples-Pact contract and under what circumstances can it
15 be set aside. The more cases I read, the more I can become
16 convinced that that's a completely different issue.

17 MR. THOMAS: I'm sorry, Your Honor, I could not
18 hear what Mr. Picadio was saying.

19 JUDGE NEMEC: Try it again.

20 MR. PICADIO: I want to raise the issue of whether
21 we can deal with the validity of the Peoples-PACT contract
22 in a more rapid fashion in a motion. I said that the more
23 cases I read, the more it becomes apparent to me that
24 that's a completely different issue, whether the Commission
25 should become involved in further regulating the extent of

1 competition in western Pennsylvania.

2 We have a customer here who relied on a filed
3 tariff, went out and spent a million and a half dollars to
4 build a service line, entered into contracts with the
5 suppliers based upon what the public record indicated was
6 permissible.

7 It seems to me that on those facts, the Commission
8 has very, very limited power to invalidate that contract,
9 and I think that issue is a threshold issue that should be
10 addressed before we get into how many other times Peoples
11 has waived retainage and whether Equitable is also waiving
12 retainage and things like that.

13 JUDGE NEMEC: Mr. Thomas, any response?

14 MR. THOMAS: I think that issue may be tied up with
15 the Count 5 issue, Your Honor. I know that if Peoples
16 abandoned service and lost its service rights in the Golden
17 Triangle area, that contract isn't valid. And, there is a
18 separate civil proceeding involving various contract issues
19 in which PACT is the defending party.

20 JUDGE NEMEC: Mr. Picadio?

21 MR. PICADIO: Judge Nemec, if you permit me to
22 raise this by motion, then Equitable will be required to
23 respond and set forth any case law they think supports a
24 position that appears to me to be entirely unfounded.

25 JUDGE NEMEC: Okay. You are certainly free to file

1 your motion, and once you do, they will respond, I'm sure.

2 With regard to the bifurcation matter, I want to
3 have that in writing and I want to give parties a chance to
4 respond in writing. I think that's how we will deal with
5 the bifurcation.

6 I terms of scheduling, you can propose schedules in
7 your responses or in your motions and we will proceed from
8 that point.

9 Do we have any outstanding discovery matters to deal
10 with?

11 MR. KENNARD: Yes, Your Honor, we do. Just in
12 terms of discovery status, by the end of today, Equitable
13 will have responses to all of its discovery except for Set
14 5, which was delivered -- Set 5 was served last week.

15 Dominion Peoples, on the other hand, is not getting
16 answers to discovery, particularly those that related to
17 instances where Equitable has not charged retainage, where
18 Equitable has not charged banking and balancing charges,
19 where Equitable has made capital contributions, where
20 Equitable has discounted its tariff rates.

21 The PUC regulations state that Dominion Peoples is
22 entitled to obtain discovery which is relevant to the issue
23 in this case, whether it relates to a claim or defense of
24 the party seeking the discovery or the claim or defense of
25 the another party, in this case Equitable.

1 Dominion Peoples has withdrawn its objections to
2 and, in fact, now answered the Equitable discovery relating
3 to those other instances besides PACT where it does not
4 collect retainage, and we are asking Equitable be required
5 to do the same.

6 It's the Commission's policy to permit competition.
7 Obviously, competition is on price. Dominion Peoples'
8 tariffs permit it to not collect the retainage, retainage
9 is discretionary. It permits it to discount its
10 transportation rates. It permits it to enter into multi-
11 year contracts. Dominion Peoples has filed its tariffs.

12 What Equitable is doing here is attempting to invent
13 a price war of some type. They haven't really explained to
14 us why they think it's below cost, and I guess until we get
15 the testimony, we are not going to find out. We think in
16 that situation, Equitable's practices are relevant to that
17 inquiry.

18 If we are going to establish a pricing mechanism,
19 something called predatory pricing -- I don't know what
20 Equitable wants to call it. What they refer to as
21 predatory pricing, in their complaint they called it
22 commercial reasonableness.

23 They assert that Equitable's combination of prices
24 and terms to PACT is predatory. Why is it predatory? Why
25 is it any different than what anybody else does in the

1 competitive market in western Pennsylvania. We think it's
2 completely relevant to the inquiry in this case and
3 Equitable has, in fact, placed into issue pricing issues
4 among public utilities with customers.

5 When Dominion Peoples initially objected to
6 Equitable's discovery on this point, Equitable claimed it's
7 legitimate and fair for Equitable to inquire concerning the
8 extent Dominion Peoples' waiver practices. It said it was
9 relevant because it averred it in its complaint. Yet, here
10 Dominion Peoples has made the same averment of Equitable in
11 its answer to paragraph 21 stating that Equitable's tariff
12 also permits waiver and Equitable has done so in a number
13 of occasions.

14 Now in this proceeding, Equitable argues that, well,
15 it's only PACT that is at issue, that it's the pricing of
16 Dominion Peoples with respect to PACT and elsewhere that
17 defines the scope of this proceeding. But, we can't have
18 two theories of scope, Your Honor, one applicable to
19 Dominion Peoples when Equitable has asked questions and one
20 applicable to Equitable when Dominion Peoples is asking
21 questions.

22 This case is in a discovery stage. Relevancy is a
23 broad standard, and so long as it bears on any issue
24 related to the case, basically discovery is permitted.

25 Equitable claims that the records are not available.

1 If you recall, initially -- this is not the first time we
2 have had a dispute on this point. The first time the
3 interrogatory said, with respect to overlapping service
4 territory, please identify the instances of where tariff
5 charges were not collected.

6 Equitable came back and said, we don't keep our
7 records that way, we can't tell you which customers are in
8 overlapping service territories and which customers are
9 not. We filed, in our second set, a request that didn't
10 have that limiter in there, so we are not asking them to
11 bifurcate out those -- sorry to use that word, bifurcate --
12 to separate out those instances where a customer was
13 competitive or not competitive. We simply asked for all
14 situations.

15 I want to read back to Your Honor, Equitable's own
16 arguments where they were attempting to get the same
17 information from Dominion Peoples, which, as I stated, they
18 have. What they said about the record issue was, "Dominion
19 Peoples has as record, a contract for each and every one of
20 the circumstances in which it has waived retainage.
21 Dominion Peoples can review its service agreements and
22 provide copies of those agreements to which retainage is
23 waived."

24 Equitable has -- first off, it is relevant, Your
25 Honor. Secondly, Equitable has the records by virtue of

1 its contracts. It can go through and do the work that's
2 required under basic discovery. We think it's fair and we
3 are tired the objections and games playing when it comes to
4 this item and want answer.

5 As Mr. Thomas said a little while ago, they are
6 learning more and more every day in discovery, and Dominion
7 Peoples would like to get to that point, Your Honor, where
8 we could learn something.

9 JUDGE NEMEC: Mr. Thomas.

10 MR. THOMAS: If it please, Your Honor, Mr. Niesen
11 will respond.

12 MR. NIESEN: First of all, Your Honor, let's talk
13 about the waiver of retainage. We have answered that
14 question and many days ago provided those instances in
15 which Equitable has waived retainage. We even gave the
16 name of the customer, I believe, to Dominion Peoples. We
17 did that on a highly confidential basis.

18 My recollection, Your Honor, is that all of that was
19 the subject of two motions to compel by Dominion Peoples,
20 which Your Honor dealt with, and the order that Your Honor
21 issued said that those answers were satisfactory.

22 Now in regard to what we have asked Dominion
23 Peoples, however, we had retainage questions which were
24 issued some time in the middle of December, and that is one
25 of the questions that was then answered finally late last

1 week. I think it was on Thursday.

2 As a result of that answer, it was a highly
3 confidential answer so I won't say anything to disclose to
4 the confidential material in it, but I can say I believe
5 there were no names of customers identified, but there was
6 information in it which we feel is incomplete and which we
7 intend to follow up on.

8 In regard to -- and I think it's reasonable for us
9 to do that. We got the answers on Thursday, less than a
10 week ago. Those questions were outstanding for some time.
11 We waited for the answers rather patiently, I think, and
12 now we are at the point where we intend to follow up on
13 them.

14 In our memorandum, we said that we have outstanding
15 follow-up interrogatories, and we also intend possibly to
16 depose Mr. Holmes who is the man identified as responsible
17 for giving the answers to those retainage questions.

18 What Mr. Kennard is raising in regard to the
19 discovery issue is the subject of a motion to compel which
20 he has outstanding and which we answered on March the 10th,
21 I believe. Your Honor should have copies.

22 The issue becomes whether the discovery sought by
23 Dominion Peoples is relevant. If you are going to test
24 that, Your Honor, what you need to look at is what is
25 alleged in the complaint, in Equitable's complaint.

1 As we study our answer, what we have presented is
2 that Dominion Peoples is engaged in a pattern of conduct.
3 Using the waiver of retainage is an example. It's not
4 discounting retainage, it's not discounting any of these
5 otherwise discountable rates. It is an entire waiver of
6 the retainage in a way that is done without economic
7 justification and the result being, as we have argued, a
8 below-cost predatory rate.

9 We have the same kind of pattern and conduct
10 allegations made in Count 3 as well as Count 2. All of
11 that, I think as we said in the answer, is relevant to
12 establishing the boundaries of discovery.

13 The issues presented in our complaint are not
14 whether either Peoples or Equitable discounts it
15 discountable rates and charges. Both companies do that.
16 What we have alleged is whether Dominion Peoples, not
17 Equitable, is engaged in a pattern of conduct in pricing
18 that is unrelated to economic theory and without underlying
19 cost justification.

20 If Dominion Peoples wants to make that kind of
21 allegation and engage in this kind of broad discovery, it
22 should file a complaint and it should do it under oath or
23 affirmation. We will respond and we will deal with
24 discovery issues at that point.

25 What we object to is the attempt to use -- to

1 mischaracterize our complaint in a way that supports this
2 otherwise broad discovery about every circumstance where a
3 rate has been discounted, every offer that has been made in
4 regard to a discountable tariff provision.

5 That's beyond the scope of the complaint. It simply
6 has nothing to do with what we allege in the complaint and
7 we think that the discovery that is being sought here is
8 not relevant or material to the allegations in our
9 complaint.

10 JUDGE NEMEC: Okay. Mr. Kennard.

11 MR. KENNARD: Your Honor, the issue here is
12 competition. Commission policy is to permit competition.
13 Competition occurs on price.

14 Equitable has stated that the scope of this
15 proceeding is about the degree to which pricing is related
16 to economic theory and is needed to match competition.
17 Competition is that which exists among the companies, and
18 certainly relevant to that inquiry is what Equitable's
19 pricing practices are.

20 There has been focus on the issue of retainage, but
21 there are several key elements of the agreement between
22 PACT and Dominion Peoples that Equitable argues are un-
23 competitive.

24 The first is the term of the agreement, how long
25 does it last. We have asked Equitable -- they have alleged

1 that's anti-competitive in a competitive market between
2 utility companies. It's fair, certainly, to ask -- to
3 attempt to define that competition and how others competing
4 in that market behave, whether Equitable -- what's the
5 longest contract they have. If they think that 15 years is
6 too long, what's the longest contract they have?

7 The second item is the transportation rate itself,
8 what price per mcf does it cost to transport volumes
9 through the system? They have alleged that the 17 cents
10 that Dominion Peoples charges is anti-competitive,
11 predatory, below market conditions. Again, what's the
12 market condition; what is the lowest price that Equitable
13 has gone to; how is that competition defined?

14 They have alleged that Dominion Peoples has waived
15 retainage for PACT. That's true, but has Equitable done it
16 also? We do have some discovery; that's the one item out
17 of the list I am going through that we have some discovery
18 on.

19 What about other tariff items? If that's -- if
20 Dominion Peoples, for example, charges PACT for banking and
21 balancing charges, has Equitable ever waived those; is that
22 one of the items that Equitable waives, but Dominion
23 Peoples collects? We believe that that issue is very
24 relevant because it all comes back to the same point, and
25 that is the 1307(f) case that Mr. Simms is prosecuting

1 against both companies.

2 There's all these terms and conditions that are in
3 the agreement. Equitable takes each one and says that
4 that's anti-competitive, it's in excess of what is needed
5 to serve the market, and our contention is that this is
6 just another competition case in western Pennsylvania.
7 There's nothing particularly notable about it. We do what
8 is needed to meet the competition and we are following our
9 tariffs.

10 We are entitled to know what Equitable is doing
11 also. By bringing an allegation in a complaint that
12 alleged anti-competitive behavior, we are entitled to know
13 what the competition is.

14 JUDGE NEMEC: Okay. Mr. Niesen.

15 MR. NIESEN: Your Honor, just briefly, we have
16 alleged in our complaint a pattern of conduct exemplified
17 by the circumstances with PACT which goes far beyond the
18 normal competition practices. And, we have compared that
19 in our complaint and our answer with our circumstances with
20 PACT.

21 Here the retainage, and there's really no question
22 about it, has been waived in its entirety. Nothing is
23 being collected for retainage.

24 When it comes to looking at what discovery we must
25 answer, what we object to is the attempt to use our

1 complaint as a license to discuss this rather extremely
2 broad discovery about circumstances where we, in each and
3 every instance, have offered to waive or have waived an
4 otherwise discountable tariff charge. This simply isn't
5 proper and it puts a spin on the complaint which is not
6 part of the complaint now or (inaudible)...

7 JUDGE NEMEC: Are you still there?

8 MR. NIESEN: I'm here, yes.

9 JUDGE NEMEC: I'm afraid you broke up towards the
10 end.

11 MR. NIESEN: I attempted to conclude my remarks by
12 saying that the discovery that we have objected to is, in
13 our view, so broad. It is immaterial, it is irrelevant to
14 the allegations we have made in our complaint, and we
15 object to using the complaint as a license to obtain rather
16 unlimited discovery about circumstances where we discounted
17 discountable rates.

18 That's not what our complaint was about, is about
19 now or was about when it was filed, Your Honor.

20 JUDGE NEMEC: Okay. Mr. Picadio?

21 MR. PICADIO: I would like to be heard on this
22 because we have a similar issue. They have objected to a
23 number of our interrogatories. We are going to be filing a
24 motion to compel and it's kind of the same issue.

25 Equitable, as I understand it, is alleging that

1 these practices are -- that they contend that Dominion
2 Peoples are engaging in are commercially unreasonable. It
3 seems to be that before you and ultimately the Commission
4 can make a determination of that, you have to see how
5 widespread these practices are and how unusual they are.

6 If this level of competition has existed in this
7 market for a long period of time and both companies are
8 doing fine, then it seems to me that that would be
9 certainly an important fact in the overall determination as
10 to whether this level of competition is or is not
11 commercially unreasonable.

12 The other reason I think that these answers should
13 be compelled is because the Commission is being asked to
14 invalidate a contract here because the price level was
15 below that which Equitable contends was legally valid. Now
16 it seems to me that if there are a lot of other contracts
17 out there that were made below that same threshold, the
18 Commission could inadvertently be invalidating a whole lot
19 of contracts without even knowing it unless all of this
20 information is before it before it acts.

21 JUDGE NEMEC: Mr. Niesen.

22 MR. NIESEN: Your Honor, as I said at the outset,
23 we have identified in a highly confidential response, those
24 two circumstances where we have waived retainage. We even
25 gave the customer names to Dominion Peoples.

1 The Dominion Peoples' answer to a waiver of
2 retainage interrogatory, it identifies -- it provides
3 preliminary information, also of a highly confidential
4 nature, which we believe requires further specification.

5 I guess the answer to Mr. Picadio is that we have
6 provided the information as he suggested as to the number
7 of customers we have waived retainage and the names of the
8 customers. We are still waiting for Dominion Peoples to
9 provide a similar detail and response to our interrogatory.

10 MR. KENNARD: We want to get to the point where we
11 need clarification of an interrogatory, number one. Number
12 two, the retainage issue is about ten percent of what we
13 are talking about.

14 JUDGE NEMEC: Excuse me a second. Are you saying
15 that you feel you have answered the PACT interrogatories?

16 MR. NIESEN: We have not answered the PACT
17 interrogatories, Your Honor.

18 JUDGE NEMEC: The response that you just provided,
19 was that in response to Mr. Picadio?

20 MR. NIESEN: Yes.

21 JUDGE NEMEC: Do you intend to answer the
22 interrogatories.

23 MR. NIESEN: What response -- you mean a response
24 to an interrogatory, Your Honor?

25 JUDGE NEMEC: Yes.

1 MR. NIESEN: No, that response was a response to a
2 Peoples' interrogatory.

3 JUDGE NEMEC: You heard Mr. Picadio say that they
4 are going to be filing a motion to compel.

5 MR. NIESEN: Sure. As Your Honor said earlier, Mr.
6 Picadio can file motions that he feels appropriate. We
7 will respond to that in due course.

8 JUDGE NEMEC: All right. Mr. Kennard, you were
9 saying?

10 MR. KENNARD: I was stating that Mr. Niesen stated
11 that they have already answered the question on retainage.
12 My point is it's not that the - the interrogatory is not
13 limited to retainage. It asked to know what tariff items
14 have been waived or not collected by Equitable.

15 If Dominion Peoples has waived or not collected
16 retainage, but collects banking and balancing, for example,
17 it's relevant that Equitable doesn't, and we are entitled
18 to look all the way across all those particular tariff
19 points to determine where Equitable's pricing is at in
20 order to be able to defend and have any real input -- any
21 real defense of this case in terms of defining what is
22 competition in western Pennsylvania. So, we really need
23 these answers and we hope...

24 MR. NIESEN: This is Mr. Niesen, Your Honor. I
25 think that's where we...

1 JUDGE NEMEC: Hold on a second. Let him...

2 MR. NIESEN: I'm sorry?

3 JUDGE NEMEC: Let's let Mr. Kennard finish. Go
4 ahead, Mr. Kennard.

5 MR. KENNARD: We would hope we could get an order
6 out of Your Honor compelling answers.

7 JUDGE NEMEC: Go ahead, Mr. Niesen.

8 MR. NIESEN: I suppose that is where we disagree
9 with Mr. Kennard and Peoples, Your Honor. We don't think
10 that our complaint warrants the type of discovery that
11 Peoples is attempting in the disputed interrogatories.

12 I would point out in that regard that on our side of
13 the table, we have not presented similar questions to
14 Peoples asking it to identify each and every instance where
15 it has waived, or discounted I should say, an otherwise
16 discountable tariff charge, or in addition identify those
17 situations where it has offered to discount an otherwise
18 discountable tariff charge.

19 It just simply goes beyond what the substance of the
20 complaint is, Your Honor.

21 MS. GEORGE: Your Honor, may I speak, please?

22 JUDGE NEMEC: Ms. George, go ahead.

23 MS. GEORGE: Your Honor, you are being asked to
24 decide whether behavior engaged in by Peoples is predatory
25 or anti-competitive. In order for you to do that, you need

1 to understand the context of western Pennsylvania utility-
2 to-utility competition.

3 In order for you to understand that context, you not
4 only need to know what Peoples does, but in this case you
5 need to know what Equitable does so you can compare what
6 Peoples does with what Equitable does and decide, yes,
7 Peoples did something that is unfair, or no, Peoples has
8 not done something that is unfair or predatory.

9 We cannot defend ourselves and say our behavior is
10 not anti-competitive, our behavior is not predatory because
11 -- and the way we can prove that is by showing you what
12 Equitable does. We can't do that if they don't answer the
13 questions that we ask.

14 It goes beyond just the fact that they have objected
15 to some of these questions. We ask them a question and we
16 ask them, you know, identify which individuals has
17 firsthand knowledge. Their response is, we are uncertain
18 what firsthand knowledge means. What kind of games are we
19 playing here?

20 This is what we are up against. How can we defend
21 ourselves unless we have the same information about what
22 they are doing, what the rest of the competitive
23 environment in western Pennsylvania is? We have some
24 knowledge from their customers who have come to us and told
25 us what they do, but we want to know extensively what they

1 do so we have a better context.

2 That's all we are asking for, to give you the
3 information you need to understand to make a decision.

4 JUDGE NEMEC: Okay. Mr. Niesen.

5 MR. NIESEN: Your Honor, again I return to the
6 retainage question. We have given them those instances
7 where we waived retainage. We have even given them the
8 customer name. What we are waiting for still is a similar
9 like response to our questions.

10 At that point then it would seem there will be equal
11 information distributed, as Ms. George suggests, and the
12 additional questions sought by Peoples which ask for all
13 instances of discounting tariff charges, a question which
14 we, ourselves as complainants, have not presented to
15 Dominion Peoples at this point, those questions are what is
16 neither relevant nor material to this case.

17 MR. KENNARD: Whether Equitable has asked the same
18 interrogatory of us has no bearing whatsoever on whether or
19 not we are entitled to ask a question. If they want to ask
20 for more discovery on us on those points, certainly we are
21 not going to object on the grounds of relevance. We are
22 going to enter into an inquiry as to what they want now and
23 how to best answer it and not refuse to answer it.

24 JUDGE NEMEC: All right. I will suggest something
25 and then Equitable can respond and Peoples can respond. I

1 am going to suggest that counsel for Equitable and Peoples
2 and PACT, to the extent that you want to, Mr. Picadio,
3 schedule an informal conference and go through question by
4 question which ones are objected to, which ones you are
5 going to answer and how you are going to answer them.

6 Once you have done that, present to me a detailed
7 listing of each and every discovery question that is
8 disputed and the basis for the dispute.

9 MR. KENNARD: We have done that already, Your
10 Honor. We posed the interrogatories to Equitable. They
11 came back and said they wouldn't answer them. We then
12 called them up and said, would you please? They said, no,
13 it's not relevant, we refuse to answer them. Then we filed
14 our motion to compel and they filed their answer. It's all
15 up there.

16 JUDGE NEMEC: The answer you are referring to is
17 the one of March 10th?

18 MR. KENNARD: Yes, Your Honor, and our motion to
19 compel was filed five days previous.

20 JUDGE NEMEC: Are there not other outstanding
21 interrogatories that are in dispute between you and
22 Equitable?

23 MR. KENNARD: Only the ones that are identified in
24 our original motion to compel and to which they respond in
25 their answer. Those are the ones that are...

1 JUDGE NEMEC: Okay. I can deal with that. If
2 that's spelled out in the motion to compel and their
3 answer, I can deal with that. I have a detailed listing of
4 what is in dispute.

5 MR. KENNARD: Other than that, there's nothing else
6 that is overdue, outstanding.

7 JUDGE NEMEC: Is it your intention to file a motion
8 to compel, Mr. Picadio?

9 MR. PICADIO: Yes.

10 JUDGE NEMEC: Okay, and then they can respond to
11 that and I will have that in front of me.

12 MR. PICADIO: Yes.

13 JUDGE NEMEC: In terms of the motion to bifurcate,
14 you are going to file a motion and once you file that
15 motion, Mr. Thomas and Mr. Niesen, then the parties will
16 respond to that, and then I will deal with that. Okay?

17 MR. THOMAS: Okay, Your Honor.

18 JUDGE NEMEC: Anything from OTS?

19 MR. SIMMS: No, Your Honor.

20 JUDGE NEMEC: Mr. Moody?

21 MR. MOODY: No, Your Honor.

22 JUDGE NEMEC: You have been pretty quiet.

23 MR. MOODY: It seems to me that at this point what
24 is being discussed is between the other parties.

25 JUDGE NEMEC: There has been a lot of talking and I

1 have a lot of work to do here to sort it out. Does anyone
2 on the phone want a copy of the transcript?

3 MR. MOODY: Not for me, Your Honor.

4 MR. THOMAS: Yes, Your Honor, Equitable does.

5 JUDGE NEMEC: All right. We are going to adjourn
6 at this point, and I expect to hear from you all in due
7 course. Thank you for your participation.

8 (Whereupon, at 11:20 a.m., the hearing was adjourned.)
9
10
11

12 C E R T I F I C A T E

13 I hereby certify, as the stencographic
14 reporter, that the foregoing proceedings were reported by
15 me and thereafter reduced to typewriting by me or under my
16 direction; and that this transcript is a true and accurate
17 record to the best of my ability.
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