UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch

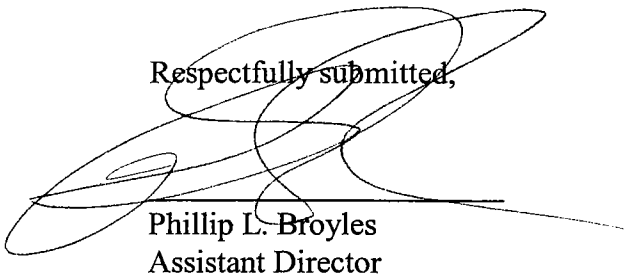
In the Matter of	
EQUITABLE RESOURCES, INC.,	
DOMINION RESOURCES, INC.,	Docket No. 9322
CONSOLIDATED NATURAL GAS COMPANY,	PUBLIC
and	
THE PEOPLES NATURAL GAS COMPANY,	
Respondents.	

ERRATA SHEET TO COMPLAINT COUNSEL'S BRIEF IN SUPPORT OF ITS MOTION TO STRIKE THE AFFIRMATIVE DEFENSE OF STATE ACTION

Complaint Counsel hereby file an errata sheet to correct errors in the Complaint Counsel's Brief in Support of its Motion to Strike the Affirmative Defense of State Action and exhibits for the Brief, which were filed April 11, 2007. The brief and exhibits should be corrected by replacing the originally submitted brief and exhibits with the attached corrected brief and exhibits. The attached spreadsheet shows the changes made.

Dated: April 17, 2007

Respectfully submitted,



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COMPLAINT COUNSEL'S ERRATA SHEET FOR CITATIONS			
CITATIONS	**PAGE**	**CORRECTION**	**CORRECTED**
Glaberson v. Comcast Corp., 2006 Trade Cas. (CCH) ¶ 75,531 (E.D. Pa. 2006)	vi, 22	Added "-2."	*Glaberson v. Comcast Corp.*, 2006-2 Trade Cas. (CCH) ¶ 75,531 (E.D. Pa. 2006)
15 P.S. § 3541 (repealed 1988)	ix, 15 n.14	Replaced P.S. with PA. STAT. ANN. Added (West 1967).	15 PA. STAT. ANN. § 3541 (West 1967)(repealed 1988)
15 P.S. § 3542 (repealed 1988)	ix, 15 n.15	Replaced P.S with PA. STAT. ANN. and 3542 with 3543. Added (West 1967).	15 PA. STAT. ANN. § 3543 (West 1967)(repealed 1988)
66 Pa. C.S.A. § 1102(3)	ix, 22 n.28	Added (a).	66 Pa. C.S.A. § 1102(a)(3)
Order Denying Petition of the Office of Trial Staff for the Commencement of an Investigation of Competitive Practices Between Natural Gas Distribution Companies at 8 (Oct. 6, 2005) (Pa. P.U.C. No. P-000052160) (citing Answer of The Peoples Natural Gas Company).	3	Add "- 9."	Order Denying Petition of the Office of Trial Staff for the Commencement of an Investigation of Competitive Practices Between Natural Gas Distribution Companies at 8 - 9 (Oct. 6, 2005) (Pa. P.U.C. No. P-000052160) (citing Answer of The Peoples Natural Gas Company).
Slip op. at 19-22.	14 n.19	Replace Slip op. with *Id.*	*Id.* at 19-22.
Phonetele, Inc. v. AT&T, 664 F.2d 716 (9th Cir. 1981)	22 n.30	Added ", 737."	*Phonetele, Inc. v. AT&T*, 664 F.2d 716, 737 (9th Cir. 1981)

COMPLAINT COUNSEL'S ERRATA SHEET FOR CITATIONS (continued)			
CITATIONS	**PAGE**	**CORRECTION**	**CORRECTED**
428 U.S. at 595-96	28	Replaced 595-96 with 596.	428 U.S. at 596
94 F. Supp. 2d at 410 (citations omitted)	32	Replaced 94 F. Supp. 2d with *Id.*	*Id.* at 410 (citations omitted)
Patrick v. Burget, 486 U.S. at 106	33	Replaced 106 with 101.	*Patrick v. Burget,* 486 U.S. at 101

COMPLAINT COUNSEL'S ERRATA SHEET FOR QUOTATIONS			
QUOTATIONS	**PAGE**	**CORRECTION**	**CORRECTED**
"foreseeable"	10	Delete quotation marks.	foreseeable
"actively supervised by state itself."	30	Added single quotation mark before "actively" and after "supervised."	"'actively supervised' by state itself."
The mere presence of some state involvement or monitoring does not suffice.	31	Added single quotation mark before "The" and after "suffice."	'The mere presence of some state involvement or monitoring does not suffice.'

COMPLAINT COUNSEL'S ERRATA SHEET FOR EXHIBITS	
EXHIBITS	**CORRECTION**
CX 0001	Failed to label Complaint Counsel's Exhibit List with CX0001.
CX 0004	Failed to include the full text of 15 PA. STAT. ANN. § 3543 (West 1967)(repealed 1988).

PUBLIC

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9322

In the Matter of

EQUITABLE RESOURCES, INC.

Patricia V. Galvan
Michael H. Knight
Michael J. Bloom
Thomas H. Brock
Geoffrey M. Green
Neil W. Averitt
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April 11, 2007

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CONSOLIDATED NATURAL GAS COMPANY,	)	**PUBLIC**
and	)	
THE PEOPLES NATURAL GAS COMPANY,	)	
Respondents.	)	

BRIEF OF COMPLAINT COUNSEL
IN SUPPORT OF ITS MOTION TO STRIKE
THE AFFIRMATIVE DEFENSE OF STATE ACTION

Respondent Equitable Resources, Inc. ("Equitable") plans to acquire The Peoples Natural Gas Company from Dominion Resources, Inc. (collectively, "Dominion"). On March 15, 2007, the Federal Trade Commission filed an administrative complaint alleging that the acquisition of Dominion violates Section 5 of the Federal Trade Commission ("FTC") Act, 15 U.S.C. § 45 (2000), and Section 7 of the Clayton Act, 15 U.S.C. § 18 (2000), by eliminating competition between the only natural gas distribution companies serving certain nonresidential customers in

western Pennsylvania.[1] Respondents answered on April 9, 2007, asserting, *inter alia,* that federal antitrust review of their proposed merger is barred by the state action doctrine. Complaint Counsel now move that the Commission strike Respondents' affirmative defense of state action as insufficient as a matter of law. There is no plausible set of facts under which the doctrine would be applicable in this matter.

The state action doctrine provides a narrow defense to federal antitrust review for private parties: (1) carrying out a clearly articulated and affirmatively expressed state policy that displaces competition with regulation; and (2) whose activity in carrying out that policy is actively supervised by the state itself. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (setting forth the two-pronged analysis for private parties claiming state action protection). The doctrine is designed to accommodate conflicting policies of the state and federal governments. It suspends federal antitrust enforcement in deference to state sovereignty in cases where the state has clearly acted to displace competition to pursue other regulatory goals.

Here, however, it is apparent on the face of the statutes that govern natural gas utility mergers in Pennsylvania that there is no such conflict between jurisdictions. State and federal laws equally value competition in utility service, and equally condemn anticompetitive mergers between utility companies. The federal government fosters competition in the Clayton Act and the FTC Act, and the Commonwealth of Pennsylvania fosters competition in the Natural Gas

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[1] If allowed, the proposed merger would end competition between Equitable and Dominion, leaving nonresidential customers in many overlap areas subject to monopoly service. This class of customers includes some of the largest institutions in the Pittsburgh area, including hospitals, schools, churches, and apartment buildings. A price rise to these customers is likely in turn to force an increase in the prices they charge to their own customers.

Choice and Competition Act of 1999, 66 Pa. C.S.A. §§ 2201-2212 (2007). This Pennsylvania law codifies the longstanding policy of the Commonwealth to safeguard competition where it exists between natural gas distributors such as Equitable and Dominion – a policy that Dominion has acknowledged in the past.[2] Far from displacing competition, the Act requires the Pennsylvania Public Utility Commission ("PUC") to examine the competitive effects of a proposed merger between natural gas distributors and explicitly prohibits the approval of any merger found to be anticompetitive. 66 Pa. C.S.A. § 2210. Moreover, the statute clearly indicates that the Pennsylvania legislature, in providing for the review of natural gas mergers, did not intend to "restrict the right of any party to pursue any other remedy available to it." 66 Pa. C.S.A. § 2210(c).

In the absence of divergent policies, and in the absence of any clear intent by the Commonwealth to displace federal merger review, there is no basis for upholding the state action defense. State and federal agencies can properly review the transaction in accordance with their own particular standards and procedures.

Not surprisingly, both Pennsylvania governmental offices that have reviewed the proposed transaction – the Attorney General's Office and the PUC – concluded that state review is not exclusive with regard to the federal antitrust laws and that the state action defense does not apply.[3] After analyzing the Natural Gas Choice and Competition Act, the Chief Counsel to the

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[2] *See* Order Denying Petition of the Office of Trial Staff for the Commencement of an Investigation of Competitive Practices Between Natural Gas Distribution Companies at 8-9. (Oct. 6, 2005) (Pa. P.U.C. No. P-000052160) (citing Answer of The Peoples Natural Gas Company).

[3] Letter from James A. Donahue, III, Chief Deputy Attorney General, Antitrust (continued...)

PUC concluded that the PUC's review process is not exclusive and does not pre-empt FTC review.[4] The Antitrust Section of the Commonwealth Attorney General's Office agrees with this construction of the Natural Gas Choice and Competition Act. In a letter addressing the Equitable/Dominion acquisition, the Antitrust Section concluded that the Act:

> is not the type of displacement of competition with regulation which would warrant the application of the state action doctrine. Actually, it is the opposite – the displacement of regulation with competition. Federal courts have denied the application of the state action doctrine where the relevant state policy is designed to foster competition. *County of Stanislaus v. Pacific Gas & Electric Co.*, 1994 WL 706711, 22 (E.D. Cal. 1994); *Anheuser-Busch, Inc. v. Goodman*, 745 F. Supp. 1048, 1052 (M.D. Pa. 1990). The goal of the Natural Gas Choice and Competition Act is to promote competition. 66 Pa.C.S.A. § 2204(g); § 2203(2).[5]

In sum, the Commission should strike Respondents' state action defense because Pennsylvania has neither clearly articulated, nor affirmatively expressed, a policy authorizing anticompetitive mergers between natural gas distribution companies (under *Midcal* prong one).

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[3] (...continued)
Section, Commonwealth of Pennsylvania, to Bohdan R. Pankiw, Chief Counsel, Pennsylvania Public Utility Commission (Nov. 14, 2006) (hereinafter referred to as "Donahue Letter"); Letter from Bohdan R. Pankiw, Chief Counsel, Pennsylvania Public Utility Commission, to Barbara Adams, General Counsel, Commonwealth of Pennsylvania (Oct. 13, 2006) (hereinafter referred to as "Pankiw Letter").

[4] The Chief Counsel, Bohdan R. Pankiw, pointed specifically to § 2210(c) of the Act, which preserves the rights to pursue "other remedies." 66 Pa.C.S.A. § 2210(c). He concluded that "[t]his language tends to undercut the view that the Commission's review of the Dominion acquisition would be exclusive." Pankiw Letter at 2. The PUC formally took a position similar to their Chief Counsel – that its review of a merger did not preclude a subsequent private (or governmental) antitrust action or create a state action defense – in its amicus brief filed in *City of Pittsburgh v. West Penn Power Co.* Amicus Brief Pennsylvania Public Utility Commission Relating to Defendants' Motions to Dismiss Complaint, *City of Pittsburgh v. West Penn Power Co.*, Civ. No. 97-1772 (W.D. Pa. Nov. 18, 1997). The court ultimately found that plaintiff lacked standing, and did not address the state action issue. *City of Pittsburgh v. West Penn Power Co.*, 993 F. Supp. 332 (W.D. Pa. 1997), *aff'd*, 147 F.3d 256 (3rd Cir. 1998).

[5] Donahue Letter at 2.

But if the Commission concludes that such a policy has been clearly articulated and affirmatively expressed, it should find that Pennsylvania does not adequately supervise anticompetitive mergers between natural gas distribution companies (under *Midcal* prong two).

I. THE *PARKER* STATE ACTION DOCTRINE SHIELDS ANTICOMPETITIVE CONDUCT FROM FEDERAL ANTITRUST SCRUTINY ONLY WHEN THE CONDUCT IS IN FURTHERANCE OF A CLEARLY ARTICULATED STATE POLICY TO DISPLACE COMPETITION AND WHEN THE CONDUCT IS ACTIVELY SUPERVISED BY THE STATE

Pennsylvania's statutory scheme governing natural gas utility mergers does not meet the rigorous legal standards for state action immunity as articulated by the U.S. Supreme Court, and thus the state action defense must be denied as a matter of law.

A. The Standard of Review

The Commission may strike from any pleading any "insufficient defense." *Cf.* Fed. R. Civ. P. 12(f). A motion to strike can be a useful means of removing "unnecessary clutter" from a case, which may serve to expedite the proceedings. *See Heller Fin., Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1294 (7th Cir. 1989). The Commission should strike an affirmative defense if the Respondents could not prove any set of facts in support of the defense that would defeat the complaint. *See Williams v. Jader Fuel Co., Inc.*, 944 F.2d 1388, 1400 (7th Cir. 1991); *Reis Robotics USA, Inc. v. Concept Industries, Inc.*, 462 F. Supp. 2d 897, 905 (N.D. Ill. 2006).[6]

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[6] The leading antitrust treatise advises that state action issues can often be disposed of on the pleadings. Phillip E. Areeda & Herbert Hovenkamp, I *Antitrust Law* ¶ 222b at 388 (2d ed. 2000):

> Briefly, state authorization is generally interpreted by an objective test that looks at the language of the authorizing statute; if other evidence is needed, it can be gleaned from legislative histories or state judicial decisions. Active supervision, when it is required, is usually examined by looking at the supervisory structure

(continued...)

For purposes of this motion, the Commission should assume that the merger of Equitable and Dominion will result in reduced competition and higher prices for natural gas distribution services. *See Electrical Inspectors, Inc. v. New York Board of Fire Underwriters*, 145 F. Supp. 2d 271, 276 (E.D.N.Y. 2001). Further, in construing the state action doctrine, the Commission should heed to the principle – affirmed by the Supreme Court – that implied exemptions from the antitrust laws are disfavored, and that the *Parker* doctrine must be construed narrowly. *Federal Trade Comm'n v. Ticor Title Ins.*, 504 U.S. 621, 636 (1992).

B. The *Parker* State Action Doctrine

The Supreme Court first articulated the state action doctrine in *Parker v. Brown*, 317 U.S. 341 (1943).[7] This case upheld California's Agricultural Prorate Act against a Sherman Act challenge, upon finding that the legislation clearly intended to restrict competition among agricultural commodities growers. The Court concluded that the Sherman Act did not bar a state, acting through its legislature, from undertaking actions that yield anticompetitive results. The Court based its holding on the recognition that, under a dual system of government, the state is "sovereign, save only as Congress may constitutionally subtract from [its] authority." *Id.* at 351. The Court could discern in the language and legislative history of the Sherman Act no intent to

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[6] (...continued)
created in the relevant statutes or state administrative or judicial decisions, although occasionally inquiry will have to be made into the details of agency oversight.

[7] "The state-action doctrine is sometimes referred to as 'Parker-immunity.' But as the Fifth Circuit has cautioned, states are not 'immune' from antitrust laws, but rather are exempted from them." *Capital City Cab Service, Inc. v. Susquehanna Area Regional Airport Authority*, 470 F. Supp. 2d 462, 467 n.5 (M.D. Pa. 2006) (*citing Surgical Care Ctr. of Hammond, L.C. v. Hospital Serv. Dist. No. 1*, 171 F.3d 231, 234 (5th Cir. 1999) (*en banc*)).

restrain the activities of "a state or its officers or agents" in those particular circumstances in which the subject activities were "directed by [the state] legislature."[8] *Id.* at 350-51.

The state action doctrine limits the reach of the antitrust laws, and thus safeguards the traditional role of the states in regulating local commerce in the interest of the safety, health, and well-being of local communities. *See Parker*, 317 U.S. at 362. The *Parker* decision did not determine whether or to what extent the defense would apply to the activities of private parties acting pursuant to state law, but did issue the following warning: "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351. In other words, state sovereignty notwithstanding, there are limits upon the state's authority to empower private parties to act in a manner that would otherwise contravene the federal antitrust laws.

In *Midcal*, a unanimous Supreme Court established a two-prong test to determine when anticompetitive conduct engaged in by private parties is entitled to state action immunity. First, the challenged restraint must be undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition in favor of regulation. *Midcal*, 445 U.S. at 105. Second, the anticompetitive conduct must be actively supervised by the state. *Id.*; *accord Ticor*,

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[8] The Supreme Court has determined that a state legislature or state supreme court acting in its legislative capacity is "the sovereign itself," whose conduct is exempt from liability under the Sherman Act without need for further inquiry. *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984). In contrast, subordinate political subdivisions, including state regulatory boards, "are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985) (a municipality is not the sovereign); *see Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 62-63 (1985) (state Public Service Commission "acting alone" could not shield anticompetitive conduct from antitrust scrutiny); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791-92 (1975) (state bar association, a state agency for certain purposes, was not entitled to state action exemption).

504 U.S. at 633 (1992); *South Carolina State Board of Dentistry*, FTC No. 9311, slip op. at 15 (July 30, 2004). These two requirements established in *Midcal* are examined in greater detail below.

C. The "Clear Articulation" Requirement

In applying the clear articulation standard, courts must be careful to distinguish between a legislative intent to *displace* competition, and a legislative intent to *supplement* competition. Only the former can be the basis for the state action defense. "The fact of the matter is that States regulate their economies in many ways not inconsistent with the antitrust laws," *Ticor*, 504 U.S. at 635-36, and without intending thereby to provide an antitrust immunity. *Id.* at 636-37. Proper application of the clear articulation requirement "ensures that antitrust law will not be set aside unless the state does in fact intend to displace competition." *TEC Cogeneration Inc. v. Florida Power & Light Co.*, 76 F.3d 1560, 1568 n. 22 (11th Cir. 1996).[9]

When reviewing state utility regulation, courts often discern a legislative policy to regulate monopoly power where it exists, and at the same time to safeguard competition where, as here, multiple firms operate or are capable of operating. For example, in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the state action defense was asserted by an electric utility that distributed free light bulbs to customers. The utility was pervasively regulated by the Michigan

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[9] *See also Columbia Steel Casting Co. v. Portland General Electric Co.*, 111 F.3d 1427, 1436 (9th Cir. 1996) ("The state-action doctrine cloaks anticompetitive conduct with antitrust immunity only if the state's intent to displace competition with regulation is 'clearly articulated and affirmatively expressed as state policy.'") (*quoting Midcal*, 445 U.S. at 105); Phillip E. Areeda & Herbert Hovenkamp, I *Antitrust Law* ¶ 221d at 363 (2d ed. 2000) ("Even strong regard for state policy would require antitrust immunity *only* if that were the state's wish – that is, if the state intended in some sense to displace the antitrust laws from a certain area of activity.") (emphasis in original).

Public Service Commission, and the agency authorized the utility to recover the costs of the light bulbs as part of the company's electricity rates. *Cantor*, 428 U.S. at 581. The *Parker* defense was nevertheless rejected, because the State had not affirmatively articulated a policy to displace competition with regard to the distribution of light bulbs. *Id.* at 598.

Although the legislature need not follow any particular formula in expressing its intent to displace competition, it must be clear that the state contemplates such an outcome. *See Town of Hallie*, 471 U.S. at 43. It follows that general or neutral legislative authorizing language will not be construed to grant authority to undertake anticompetitive action. *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982). For example, state legislatures commonly authorize businesses incorporated under state law to make acquisitions; states do not thereby authorize acquisitions that unreasonably lessen competition. *See Northern Securities Co. v. United States*, 193 U.S. 197, 345-46 (1904).[10] More generally, a state's grant of ordinary corporate powers is not to be construed as authority for that entity to engage in anticompetitive

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[10] In *Northern Securities*, railroads attempting to consummate an anticompetitive merger through a holding company defended on the grounds that the holding company was not prohibited by its charter from acquiring the stock of the railroads. The Court rejected this argument, recognizing that when enacting its corporation laws and authorizing the acquisition of stock, the state did not intend to permit anticompetitive transactions:

> It is proper to say in passing that nothing in the record tends to show that the State of New Jersey had any reason to suspect that those who took advantage of its liberal incorporation laws had in view, when organizing the Securities Company, to destroy competition between two great railway carriers engaged in interstate commerce in distant States of the Union.

193 U.S. at 345.

activity. *First American Title Co. v. DeVaugh*, ___ F.3d ___, 2007-1 Trade Cas. (CCH) ¶ 75,604 (6th Cir. 2007).[11]

An intention to displace competition may be inferred only where the challenged conduct is the kind of program or action that the legislature authorized, and the suppression of competition is the foreseeable result of the legislative authorization. *Town of Hallie*, 471 U.S. at 41-44; *Yeager's Fuel v. Pennsylvania Power & Light*, 22 F.3d 1260, 1266-67 (3d Cir. 1994). In *Southern Motor Carriers*, for example, the Court considered whether the *Parker* doctrine applied to common carrier rate bureaus that engaged in collective rate-making permitted by state public service commissions. *Southern Motor Carriers*, 471 U.S. at 50. The Court found a policy to displace competition because the state statutes in question either explicitly permitted collective rate-making, *id.* at 63, or otherwise plainly contemplated an "inherently anticompetitive rate-setting process." *Id.* at 64. An anticompetitive effect is said to be foreseeable when it would "ordinarily or routinely" result from the authorizing legislation. *South Carolina Board of Dentists*, slip op. at 22-23.

Numerous cases have held that if the policy of the authorizing legislation does not contemplate competitive harm – if the legislation is fully consistent with antitrust principles – then a defense under the *Parker* doctrine may not be maintained.[12] And most certainly, where the

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[11] *See also* Phillip E. Areeda & Herbert Hovenkamp, I *Antitrust Law* ¶ 225b4 at 453-55 (2d ed. 2000).

[12] *See, e.g., DeVaugh*, 2007-1 Trade Cas. (CCH) ¶ 75,604 (6th Cir. 2007); *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 442 F.3d 410, 441 (6th Cir. 2006); *Michigan Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 534 (6th Cir. 2002); *California ex rel. Lockyer v. Mirant Corp.*, 266 F.Supp. 2d 1046, 1056 (N.D. Cal. 2003) ("If the state policy does not conflict with the goal of the federal antitrust laws, there is no need to apply (continued...)

state has expressly disavowed an intention to authorize anticompetitive conduct, the state action exemption is unavailable. An explicit articulation of the state's pro-competition policy was present, for example, in *California CNG, Inc. v. Southern California Gas Co.*, 96 F.3d 1193 (9th Cir. 1996). A California utility provided commercial fleet operators with low-priced natural gas fueling stations at prices that were subsidized by utility ratepayers. State law authorized utilities to operate fueling stations at ratepayer expense, subject to certain conditions. *Id.* at 1197. Among these conditions was that the programs must not "interfere with the development of a competitive market." *Id.* at 1199. The legislation did not confer state action immunity because, given this proviso, there was no clearly articulated state policy to allow anticompetitive conduct. *Id.* at 1203.

In sum, the critical question under prong one of the state action defense is whether the sovereign itself has acted to displace competition. In order to evidence such a decision sufficiently, the state law must articulate a public policy that intrinsically departs from competitive norms. In the absence of a state policy to displace competition, the actions of a regulated private actor – even conduct that is expressly authorized by a state agency – does not constitute state action for purposes of the federal antitrust laws.

D. The "Active Supervision" Requirement

State supervision must be sufficient to ensure that a private party's anticompetitive action is shielded from antitrust liability only when "the State effectively has made [the challenged] conduct its own." *Patrick v. Burget*, 486 U.S. 94, 106 (1988).

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[12] (...continued)
the doctrine at all."); *McCaw Personal Communications, Inc. v. Pacific Telesis Group*, 645 F.Supp 1166, 1172 (N.D. Cal. 1986).