

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

PEABODY ENERGY CORPORATION,

and

ARCH COAL, INC.,

Defendants.

Civil Action No. 4:20-cv-00317

DEFENDANT ARCH COAL INC'S ANSWER AND AFFIRMATIVE DEFENSES

Defendant Arch Coal, Inc. (“Arch”) hereby answers Plaintiff Federal Trade Commission’s (“FTC”) Complaint For Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act (the “Complaint”), related to the proposed joint venture (“Joint Venture”) between itself and Peabody Energy Corporation (“Peabody”) (collectively with Arch, “Defendants”), and asserts affirmative and other defenses.

PRELIMINARY STATEMENT

The FTC’s challenge, brought over Commissioner Wilson’s dissent, is mired in the past. It ignores dynamics that have rocked the wholesale energy markets over the last 10-15 years, slashing thermal coal sales. Thermal coal, including coal mined in the Southern Powder River Basin (“SPRB”), competes directly with other U.S. energy forms used to generate electricity. A megawatt of electricity produced from SPRB coal is indistinguishable from one produced using any other energy source. So how do U.S. electricity markets choose between diverse electricity

generating sources? Whether a generation unit fueled by coal, natural gas, solar array or wind turbines is called upon to supply electricity is decided by a marketplace that selects and rewards the lowest cost producer. When a light switch is flipped on, the demand for electricity is filled by the lowest cost units first, regardless of the fuel used to generate that electricity. The electricity markets *force* head-to-head competition between fuels.

Coal, and SPRB coal in particular, is losing that competition at an unprecedented pace. The rise of hydraulic fracturing (“fracking”) has made cheap natural gas the fuel of choice for electricity generation in the U.S. And the growth of wind- and solar-powered electricity has further displaced coal, including SPRB coal. Just a decade ago, thermal coal powered 50% of all electricity generated in the United States. Together, natural gas and renewables now account for over 56% of all electricity generation. Monthly coal-fueled generation dipped below 20% of total electricity generation for the first time in 2019, and plant retirements and low natural gas prices have further reduced this share in early 2020.

Specifically, coal production in the SPRB is down by more than 50% since 2008 and continues to fall as demand declines, leaving SPRB coal mines running well below capacity. U.S. electricity generation companies have stopped building coal-fueled generation plants entirely and have closed over 700 coal-fueled units since 2004. As the U.S. Energy Information Administration (“EIA”) explained in December 2019 when it found a direct link between coal plant retirements and low natural gas prices:

Sustained relatively low natural gas prices has allowed natural gas-fired generators to become more competitive with coal-fired units, leading to a general decline in using coal-fired capacity. A decline in use leads to a decline in revenues at a plant, which generally translates to lower operating margins, less ability to cover costs, and in many cases, retiring that capacity Because of more competitive natural gas prices, more advanced natural gas combined-cycle generators, and the increasing efficiency of the natural gas generator fleet, EIA

expects more coal-fired generators to retire, especially within the next decade. According to AEO Reference case projections, almost 90 GW of coal-fired capacity will retire between 2019 and 2030.¹

Energy companies recognize this dramatic shift. Their coal purchases have rapidly declined as efficient natural gas generating units permanently replace coal-fueled generators. They admit that “[n]atural gas prices are a primary driver of coal demand”² and “[i]f the price of natural gas is below \$3-4, then natural gas economically displaces most powder river basin [coal].”³ Natural gas prices are well below \$3/mmBTU, and virtually every reputable third party projects that they will remain well below that mark for the foreseeable future. In fact, today, natural gas prices are *below \$2/mmBTU*. As natural gas prices fall, generating electricity from coal becomes even more uneconomic. And renewable fuel sources like wind and solar are expected to continue to grow and displace coal throughout the U.S. The prospects for coal have deteriorated further in 2020.

The parties cannot alter these forces. Instead, to compete, coal producers must lower their costs. Peabody and Arch have wrung costs out of their businesses, but they still struggle to compete with increasingly low-priced natural gas. They—and three of the other five companies mining coal in the SPRB—were forced into bankruptcy in recent years as a result of these dynamics.

Peabody and Arch formed this Joint Venture to combine their mines in Colorado and the

¹ U.S. Energy Info. Admin., *U.S. Coal Plant Retirements Linked to Plants with Higher Operating Costs*, Dec. 3, 2019, <https://www.eia.gov/todayinenergy/detail.php?id=42155>.

² NRG Energy, Inc., 2018 Annual Report (Form 10-K), at 48 (Feb. 28, 2019), <https://www.sec.gov/Archives/edgar/data/1013871/000101387119000007/nrg201810-k.htm>

³ *Southern's Current Outlook, Presentation by Chad Hewitt, Fuel Manager*, at 25 (September 2015), https://training.ua.edu/almineral/_documents/ChadHewitt.pdf.

SPRB to lower their costs in an attempt to remain competitive in a declining market. Critically, the Joint Venture will dissolve a seven-mile border that separates their largest two mines, slashing costs across the supply chain. Highly skilled personnel, industry experts, and recent experience integrating two contiguous mines involving the very same mining complex substantiate the parties' conservative estimates of over \$1 billion in net present value of merger-specific cost savings over the venture's first ten years. These synergies are particularly necessary for the Joint Venture to remain competitive in today's declining market. In sum, the Joint Venture will lower the parties' costs thereby lowering prices to customers enabling coal-fueled units to compete more effectively for dispatch against natural gas and renewables.

The FTC does not dispute these dynamics; in fact, stunningly, it ignores them. It asks this court to put blinders on and join the FTC in a "SPRB coal-only" world to block the Joint Venture. If the FTC prevails, it will prevent the Joint Venture from achieving those efficiencies and guarantee that SPRB coal will continue losing to natural gas and renewables. Delaying and ultimately prohibiting this Joint Venture will harm the parties and their employees, their customers, and consumers across the country that would benefit if their utilities were able to buy lower-priced coal, as the parties have already committed to do for their SPRB customers.

Against this backdrop, Arch hereby answers the specific allegations in the Complaint. Any allegation in the Complaint that is not expressly admitted below is denied.⁴

⁴ The Complaint contains section titles, organizational headings, footnotes, and an introductory statement to which no response is required. To the extent that the titles, headings, footnotes, or introductory statement may be construed to contain allegations of fact to which a response is required, Arch denies all such allegations.

NATURE OF THE CASE

1. Arch avers that the first sentence of Paragraph 1 states legal conclusions to which no response is required. To the extent a response is required, Arch admits that the FTC has brought an action as described in the first sentence of Paragraph 1, but denies that the Joint Venture is anticompetitive. Arch admits that the Joint Venture would combine the coal mining and sales operations of their coal mines located in the Southern Powder River Basin. Arch denies the remainder of Paragraph 1 of the Complaint.⁵

2. Arch admits that the SPRB is a large coal-bearing geological formation located in northeastern Wyoming and that Arch extracts the coal and sells it, primarily to power plants. Arch also admits that its customers purchase SPRB coal (although increasingly less so) for various reasons. Arch denies the remainder of Paragraph 2.

3. Arch admits that public sources indicate that Defendants produced more than 60% of all SPRB coal mined in 2018, but otherwise is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in the first and second sentence of Paragraph 3. Arch denies the third sentence, states that the fourth sentence is an incomplete description of the Merger Guidelines, and denies the fifth sentence.

4. Arch denies Paragraph 4 of the Complaint.

5. Arch admits that, to the extent “new entry” means greenfield entry of new producers of SPRB coal, such new entry is unlikely to occur in the near term under current market conditions. Arch denies the remainder of Paragraph 5.

6. Arch denies Paragraph 6 of the Complaint.

⁵ References to paragraph numbers in this Answer correlate to the numbered paragraphs in the Complaint.

7. Arch avers that Paragraph 7 states legal conclusions to which no response is required. To the extent a response is required, Arch admits that the FTC has brought an action as described in Paragraph 7, but denies that it has engaged in any violation of law.

8. Arch avers that the first sentence of Paragraph 8 states legal conclusions to which no response is required. To the extent a response is required, Arch denies the first sentence of Paragraph 8. Arch admits the second sentence of Paragraph 8.

9. Arch avers that Paragraph 9 states legal conclusions to which no response is required. To the extent a response is required, Arch denies Paragraph 9.

JURISDICTION AND VENUE

10. Arch avers that Paragraph 10 states legal conclusions to which no response is required. To the extent a response is required, Arch admits that the FTC has brought an action as described in Paragraph 10, but denies that it has engaged in any violation of law.

11. Arch avers that Paragraph 11 states legal conclusions to which no response is required. To the extent a response is required, Arch admits that the FTC purports to quote from Section 13(b) of the FTC Act.

12. Arch avers that Paragraph 12 states legal conclusions to which no response is required. To the extent a response is required, Arch admits it is engaged in commerce.

13. Arch avers that Paragraph 13 states legal conclusions to which no response is required. To the extent a response is required, Arch admits that it is headquartered in St. Louis; that this Court has jurisdiction over this matter; and that venue is proper in this District.

14. Arch admits Paragraph 14 of the Complaint.

THE PARTIES AND THE PROPOSED JOINT VENTURE

15. Arch admits the first four sentences of Paragraph 15. Arch is without knowledge or information sufficient to form a belief as to the truth of the allegations in the fifth and sixth sentences.

16. Arch admits the first two sentences of Paragraph 16 except that it is without knowledge or information sufficient about the meaning of “reserves.” Arch admits the third and fourth sentences as a correct description of Arch’s production and revenues across the entire company’s portfolio two years ago but avers that the figures are misleading as stated.

17. Arch admits Paragraph 17 of the Complaint.

RELEVANT MARKETS

A. Relevant Product Market

18. Arch avers that Paragraph 18 states legal conclusions to which no response is required. To the extent a response is required, Arch denies Paragraph 18 of the Complaint.

19. Arch is without knowledge or information sufficient to form a belief as to why all electric power producers choose to buy coal from the SPRB. Arch admits that SPRB coal tends to be relatively close to the earth’s surface, that SPRB mines tend to yield subbituminous coal with a heat content typically that ranged from 8400 to 8800 BTU per pound, and that SPRB coal tends to have relatively low sulfur content. Arch either is without knowledge or information sufficient about the remainder of the Paragraph 19, or avers that the figures are misleading as stated.

20. Arch denies Paragraph 20 of the Complaint.

21. Arch is without knowledge or information sufficient to form a belief as to the FTC’s meaning of the phrases “Industry and public recognition,” “[p]ublic sources of

information” or “market participants and industry analysts.” To the extent a response is required, Arch denies Paragraph 21 of the Complaint.

22. Arch denies Paragraph 22 of the Complaint except that it admits that customers may issue RFPs as part of a process to purchase thermal coal.

23. Arch admits that it knows the identity of the customers who issue RFPs to Arch seeking to purchase SPRB coal, denies that it can “customize [its] bids based on a customer’s circumstances,” and is without knowledge or information sufficient to form a belief as to the remainder of the first sentence of Paragraph 23. Arch admits the second sentence except that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that greater distances typically result in greater shipping costs. Arch is without knowledge or information sufficient to form a belief as to the truth of the last sentence of Paragraph 23.

24. Arch denies the first sentence of Paragraph 24. Arch is without knowledge or information sufficient to form a belief as to the truth of the second sentence of Paragraph 24.

25. Arch admits that public sources indicate that the total demand for SPRB coal in the economy has been falling over time but expect that there will continue to be sales in the future, but otherwise is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 25.

26. Arch admits the first sentence of Paragraph 26 and denies the remainder.

B. Relevant Geographic Market

27. Arch avers that Paragraph 27 of the Complaint states legal conclusions to which no response is required. To the extent that it makes any assertion of fact, it is denied, except that Arch admits that SPRB coal is mined in the SPRB.

28. Arch avers that the first sentence of Paragraph 28 of the Complaint states legal conclusions to which no response is required. To the extent that it makes any assertion of fact, it is denied. Arch is without knowledge or information sufficient to form a belief as to the truth of the second sentence.

29. Arch avers that the first sentence of Paragraph 29 of the Complaint states legal conclusions to which no response is required. To the extent that it makes any assertion of fact, it is denied. Arch is without knowledge or information sufficient to form a belief as to the truth of the second sentence but admits that SPRB coal is sold in each of the sixteen identified states, among others. Paragraph 29 is otherwise denied.

THE JOINT VENTURE IS PRESUMPTIVELY ILLEGALITY

30. Arch denies the first sentence of Paragraph 30. Arch admits that public sources indicate that Defendants produced more than 60% of all SPRB coal mined in 2018 but otherwise is without knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of Paragraph 30.

31. Arch admits that besides Peabody and Arch there are five other producers of SPRB coal but otherwise is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of Paragraph 31. Arch admits the second sentence of Paragraph 31. Arch is without knowledge or information sufficient to form a belief as to the meaning of the phrase “meaningfully compete” and otherwise is without knowledge or information sufficient to form a belief as to the truth of the allegations in the third sentence of Paragraph 31. Arch admits the fourth sentence of Paragraph 31. Arch is without knowledge or information sufficient to form a belief as to the truth of other producers’ future scale or reserves,

or the measure used to compare SPRB coal “reserves” but admits that public information would confirm the remainder of the fifth sentence of Paragraph 31.

32. Arch admits that the Merger Guidelines measure concentration using HHIs but denies that those Guidelines are binding on the agency, let alone courts. Arch admits that the second, third and fourth sentences accurately summarize how “HHI” is described in the non-binding Merger Guidelines. Arch denies the remainder of Paragraph 32.

THE JOINT VENTURE WILL PRODUCE ANTICOMPETITIVE EFFECTS

33. Arch denies Paragraph 33 of the Complaint.

34. Arch denies Paragraph 34 of the Complaint.

35. Arch denies Paragraph 35 of the Complaint.

36. Arch denies Paragraph 36 of the Complaint.

37. Arch denies Paragraph 37 of the Complaint.

38. Arch denies Paragraph 38 of the Complaint.

LACK OF COUNTERVAILING FACTORS.

39. Arch denies Paragraph 39 of the Complaint.

40. Arch denies Paragraph 40 of the Complaint.

41. Arch denies Paragraph 41 of the Complaint.

42. Arch denies Paragraph 42 of the Complaint.

**LIKELIHOOD OF SUCCESS ON THE MERITS,
BALANCE OF EQUITIES, AND NEED FOR RELIEF**

43. Arch avers that Paragraph 43 states legal conclusions to which no response is required. To the extent a response is required, Arch states that Paragraph 43 is an incomplete description of Section 13(b) of the FTC Act.

44. Arch avers that Paragraph 44 states legal conclusions to which no response is required. To the extent a response is required, Arch denies Paragraph 44 of the Complaint.

45. Arch avers that Paragraph 45 states legal conclusions to which no response is required. To the extent a response is required, Arch denies Paragraph 45 of the Complaint.

46. Arch avers that Paragraph 46 states legal conclusions to which no response is required. To the extent a response is required, Arch denies Paragraph 46 of the Complaint.

ARCH'S AFFIRMATIVE DEFENSES

Arch asserts the following defenses, without assuming the burden of proof on such defenses that would otherwise rest with the FTC:

1. The Complaint fails to state a claim on which relief can be granted.
2. Granting the relief sought is contrary to the public interest.
3. The Complaint fails to allege a plausible relevant product market.
4. The Complaints fails to allege a plausible geographic market.
5. The Complaint fails to allege undue share in any plausibly defined relevant market.
6. The Complaint fails to allege any plausible harm to competition.
7. The Complaint fails to allege any plausible harm to consumers.
8. The Complaint fails to allege any plausible harm to consumer welfare.
9. Expansion by existing competitors, including non-coal sources of electricity, can be swift, likely, and sufficient such that it will ensure that there will be no harm to competition, consumers, or consumer welfare.
10. Customers have a variety of tools available to ensure that they receive competitive pricing and terms.

11. The Joint Venture will be procompetitive. It will result in substantial merger-specific efficiencies, including cost synergies, which will allow Peabody and Arch to compete more effectively than they can alone against competition from other electricity-generating fuels, particularly natural gas and renewables.

12. Arch reserves the right to assert any other defenses, as they become known to it.

NOTICE OF CONTEMPLATED RELIEF

WHEREFORE, Arch requests that the Court enter a judgment in its favor as follows:

- A. The Complaint be dismissed with prejudice;
- B. None of the Complaint's contemplated relief issue to the FTC;
- C. Any and all other relief as the Court may deem just and proper.

Dated: March 13, 2020

Respectfully submitted,

/s/ Stephen Weissman

Stephen Weissman, #451063 (DC)
Michael Perry, #1047965 (DC)
William Lavery, #503292 (DC)
Matthew Adler, #1022438 (DC)
Elisa Beneze, #1048179 (DC)
Jarad Daniels, #1044253 (DC)
Steven Pet, #1617458 (DC)
Baker Botts LLP
700 K St NW
Washington, DC 20001
Telephone: (202) 639-7700
Email: stephen.weissman@bakerbotts.com
Email: michael.perry@bakerbotts.com
Email: william.lavery@bakerbotts.com
Email: matthew.adler@bakerbotts.com
Email: elisa.beneze@bakerbotts.com
Email: jarad.daniels@bakerbotts.com
Email: steven.pet@bakerbotts.com

Counsel for Defendant Arch Coal, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of March, 2020, I served the foregoing on all counsel of record via the Court's ECF filing system.

/s/ Stephen Weissman

Stephen Weissman

Counsel for Defendant Arch Coal, Inc.