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 **REDACTED VERSION OF DOCUMENT FILED UNDER SEAL**

PLAINTIFF FEDERAL TRADE COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR A TEMPORARY RESTRAINING ORDER

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NATURE AND STAGE OF PROCEEDINGS

Plaintiff respectfully asks this Court to issue, prior to 10:59 p.m. CST on Sunday, March 1, 2020, a temporary restraining order ("TRO") that will preserve the status quo and prevent Defendants from combining certain coal mining operations, until this Court has had an opportunity to conduct an evidentiary hearing on the relief requested in Plaintiff's Complaint.

Absent a TRO, after 10:59 p.m. CST on March 1, 2020, Defendants intend to combine their coal extraction and sales operations relevant to coal mines located in the Southern Powder River Basin ("SPRB") of Wyoming (the "Joint Venture"). Defendants are unquestionably the two largest producers of SPRB coal, and they compete directly with each other to supply SPRB coal. The Federal Trade Commission ("Commission") found reason to believe that the proposed Joint Venture violates the antitrust laws enforced by the Commission, 15 U.S.C. §§ 18, 45 (2012), and thus (1) initiated an administrative proceeding to determine whether the Joint Venture will harm competition, and (2) filed this Complaint seeking a preliminary injunction to preserve the status quo "until the agency has had an opportunity to adjudicate the [transaction's] legality in an administrative proceeding." *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 35 (D.D.C. 2009); *see generally* 15 U.S.C. § 53(b) (2012).

The issue now before the Court is Plaintiff's request for a TRO to preserve the status quo for a limited period of time, until the Court has the opportunity to conduct an evidentiary hearing regarding the Commission's request for a preliminary injunction.[1] For the reasons set forth

[1] Courts commonly conduct evidentiary hearings in connection with the Commission's merger challenges brought under 15 U.S.C. § 53(b), commonly referred to by courts as "Section 13(b)" of the Federal Trade Commission Act. *See, e.g.*, *FTC v. Sanford Health, Sanford Bismarck*, No. 1:17-CV-133, 2017 WL 10810016 (D.N.D. Dec. 15, 2017), *aff'd sub nom. FTC v. Sanford Health*, 926 F.3d 959 (8th Cir. 2019); *cf. FTC v. Freeman Hospital*, 1995 WL 155237 (8th Cir. 1995) (remanding to the district court with instructions to conduct "an evidentiary hearing on FTC's complaint for injunctive relief"). When considering Plaintiff's request for a preliminary injunction, "[t]he only question addressed to this court is whether the status quo is to be

below, the Court should issue a TRO preventing Defendants from consummating the Joint Venture until such a hearing can be completed.

ARGUMENT

I. Where the Commission Is Likely to Succeed on the Merits, Section 13(b) of the FTC Act Requires the Court to Issue a Temporary Restraining Order

When the Commission seeks preliminary relief under Section 13(b), 15 U.S.C. § 53(b), and shows a likelihood of succeeding on the merits in its administrative proceeding, "the public interest in effective enforcement of the antitrust laws" trumps any private interests and requires preliminary relief. *See Sanford Health, Sanford Bismarck*, 2017 WL 10810016, at *24 (D.N.D. Dec. 15, 2017) (quoting *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001)). "Courts recognize that, if the FTC shows a likelihood of success on the merits, the equities favor issuance of a preliminary injunction." *Id.* "As to private equities, they 'do not outweigh effective enforcement of the antitrust laws. When the [FTC] demonstrates a likelihood of ultimate success, a counter showing of private equities alone would not suffice to justify denial of a preliminary injunction barring the merger.'" *Id.* (quoting *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981)). Indeed, to the best of Plaintiff's knowledge "[n]o court has denied relief to the FTC in a [Section] 13(b) proceeding in which the FTC has demonstrated a likelihood of success on the merits." *FTC v. ProMedica Health Sys.*, No. 3:11-cv-47, 2011 WL 1219281, at *58 (N.D. Ohio Mar. 29, 2011).

These same principles apply with heightened force to Plaintiff's request for a TRO, as the only potential harm to private interests is a modest delay in the Joint Venture until the Court is able to resolve Plaintiff's motion for a preliminary injunction. In contrast, if Defendants

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preserved until the FTC completes its adjudicatory function. It is not the function of this court to determine whether the antitrust laws are about to be violated. That determination is left to the FTC." *Sanford Health,* 2017 WL 10810016, at *23 (citations and internal quotation omitted).

combine their operations, current competition will be immediately eliminated and consumers may suffer immediate harm. Such harm would not be remedied even if the Court ultimately grants the Commission's motion for a preliminary injunction. Moreover, if the Joint Venture is consummated, the Court or the Commission may find it difficult to "unscramble the eggs" and restore competition to its previous state once the Commission's motion for a preliminary injunction is granted, or the Commission's administrative proceeding ultimately finds the Joint Venture to be unlawful.[2]

Due to the primacy of public equities over private interests, and taking into consideration the practical challenges of considering complex factual questions on a limited record, courts in previous merger cases have taken a pragmatic approach to the Commission's requests for a TRO. *See FTC v. Foster*, No. CIV 07-352 JB, 2007 WL 1302585, at *4 (D.N.M. Apr. 13, 2007) (the court must grant a TRO so long as it finds "there is a serious question"); *FTC v. Exxon Corp.*, Civil Action No. 79-1975, 1979 WL 1654, at *3 n.6 (D.D.C. July 28, 1979) (the FTC need not "make precisely the same showing at the temporary restraining order and preliminary injunction stages[ ] [p]articularly where, as here, the factual and legal issues are massive, and the time the Commission has had for the preparation of its case was relatively short").[3] The Court here should take a similarly pragmatic approach and issue a TRO to prevent irreparable harm and

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[2] *See, e.g., Weyerhaeuser*, 665 F.2d at 1085-86 n.31; *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 173 (D.D.C. 2000); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 87 (D.D.C. 2015).

[3] Recent precedent is limited, as the merging parties commonly stipulate to a temporary restraining order to provide time for adequate development of the evidentiary record. *E.g.*, *Sanford*, 2017 WL 10810016, at *1; Order granting Plaintiff's Motion for Entry of Stipulated Temporary Restraining Order, *FTC v. RAG-Stiftung,* No. 19-cv-02337, 2020 WL 532980 (D.D.C. Feb. 3, 2020) (ECF No. 9); Order Granting Motion for TRO, *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27 (D.D.C. 2018) (No. 18-cv-00414) (ECF No. 7); Order granting Joint Motion for Entry of Stipulated Temporary Restraining Order, *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015) (No. 15-cv-00256) (ECF No. 35).

preserve its ability to effectively analyze factual questions for the limited period needed to conduct an evidentiary hearing on the Commission's motion for a preliminary injunction.

II. The Commission is Likely to Succeed on the Merits

As the Eighth Circuit Court of Appeals recently explained, in Section 13(b) proceedings courts evaluate the likelihood that the FTC will succeed on the merits at the administrative proceeding through a burden-shifting framework. *Sanford Health*, 926 F.3d at 962. The Commission establishes "a presumption that the merger will substantially lessen competition" by showing "that the merger will result in an undue market concentration for a particular product or service in a particular geographic area." *Id.* Here, the Joint Venture is presumptively illegal because it will result in undue market concentration in the sale of SPRB coal, a "particular product" which courts have recognized as a relevant product market distinct from coals mined elsewhere in the United States. *See FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 123 (D.D.C. 2004) (holding that the "relevant product market is . . . SPRB coal."). "[A] particular geographic area" in which the undue concentration will result is the SPRB, which courts have recognized is an appropriate geographic market in which to assess a combination of SPRB coal miners. *Id.*; Compl. ¶¶ 27-29 (identifying the SPRB as a relevant geographic market).

This presumption of illegality is dispositive unless Defendants are able to make a sufficient showing that undue market concentration "inaccurately predicts the relevant transaction's probable effect on future competition." *United States v. Baker Hughes Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990). If, but only if, Defendants are able to make such a showing, the Commission must carry its burden of persuasion by presenting "additional evidence of anticompetitive effects." *Sanford Health*, 926 F.3d at 962. In this case, Defendants will not be able to demonstrate that market concentration provides a misleading predictor of competitive

effects, but regardless the Commission has substantial additional evidence that the Joint Venture will create anticompetitive effects by eliminating competition between Defendants.

A. The Joint Venture is presumptively illegal because it would create extraordinarily high market concentration in a relevant market for SPRB coal sold in the SPRB region

The Joint Venture is presumptively illegal because it will unduly increase concentration for the sale of the relevant product (SPRB coal), within a relevant geographic market (the SPRB region). *See Arch Coal*, F. Supp. 2d at 123; Compl. ¶¶ 18-29.

1. <u>The relevant product market is SPRB Coal</u>

SPRB coal satisfies the two well-established approaches employed by courts to define relevant product markets: the "practical indicia" identified by *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962), and the "hypothetical monopolist test" described in the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines") and applied by courts.[4]

***Brown Shoe* "practical indicia."** In defining relevant product markets, courts evaluate "such practical indicia as industry or public recognition of the [relevant market] as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe*, 370 U.S. at 325; *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 51(D.D.C. 2011). These factors show that SPRB coal is distinct from other products.

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[4] Courts often rely on the principles expressed in the Merger Guidelines. *See, e.g.*, *United States v. Anthem*, 855 F.3d 345, 349 (D.C. Cir. 2017) ("[T]his court considers [the Merger Guidelines] a helpful tool, in view of the many years of thoughtful analysis they represent, for analyzing proposed mergers."); *Sysco*, 113 F. Supp. 3d at 38 ("The Merger Guidelines are not binding, but the Court of Appeals and other courts have looked to them for guidance in previous merger cases.").

Industry participants and observers recognize that SPRB coal is separate from other products: for example, Defendants conduct internal analyses specific to SPRB coal, including regularly projecting SPRB supply and demand separately from supply and demand for other coals;[5] and industry observers track and predict prices for SPRB coal that are distinct from predictions made for other coals, natural gas, and other fuels.[6]

SPRB coal has different characteristics than other coals: SPRB coal mines yield subbituminous coal with a heat content that typically ranges from 8400 to 8800 BTU per pound, while other varieties of coal have different heat contents;[7] and, in addition, SPRB coal has lower sulfur content compared to other coals, and thus produces less of the pollutants that are restricted by local, state, and federal regulations.[8] SPRB coal also differs from non-coal sources of power because coal is a solid fuel, while natural gas is gaseous, and renewables generate energy from wind movement, water, or sunshine.

SPRB coal is produced in specialized production facilities consisting of coal mines located in the SPRB, by specialized vendors that operate SPRB coal mines. SPRB coal customers are likewise distinct. They predominantly consist of electric power producers operating SPRB coal-burning power generation units, which cannot readily substitute other fuels.

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[5] *See, e.g.*, PX1171 at 065 (SPRB supply and demand), 066 (Illinois Basin supply and demand); PX2155 at 005 (tracking "PRB Domestic Opportunity" separately from opportunities for coals from the Appalachian ("APP/NAPP") and Western Bituminous ("WBIT") regions).

[6] *See, e.g.*, U.S. Energy Information Administration ("EIA") Coal Markets data, https://www.eia.gov/coal/markets/#tabs-prices-1 (tracking spot prices for Powder River Basin 8800 BTU per short ton, compared to other coal basin prices).

[7] PX7002 ( ) ¶ 8.

[8] *See, e.g.*, PX7005 ( ) ¶ 6 (explaining the benefits of SPRB coal's low sulfur content); PX7004 ( ) ¶ 6 (same); PX9038 at 001 (explaining that "[s]tarting in the 1990s, many coal-fired power plants switched to subbituminous coal from the PRB—which has relatively low sulfur content—to meet tightening Clean Air Act emission standards.").

Coal-fired generation units cannot burn nuclear fuels or natural gas to replace coal,[9] and SPRB coal-fired units cannot substitute other types of coal without significant time and investment.[10]

Finally, SPRB coal has distinct prices: It is the lowest priced coal in the United States,[11] with an energy-equivalent price far below that of coal mined in other basins.[12] SPRB coal pricing is also distinct from the pricing of other fuels, such as natural gas and nuclear fuels.

Hypothetical Monopolist Test. Another method courts commonly use to assess relevant product markets is the hypothetical monopolist test.[13] The test focuses on "customers' ability and willingness to substitute away from one product to another in response to a price increase." Merger Guidelines § 4; *see also H&R Block*, 833 F. Supp. 2d at 51-52; *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 121-22 (D.D.C. 2016). In this case, the test asks: If all SPRB coal mines were controlled by a single owner, would that "hypothetical monopolist" likely impose a "small but significant and non-transitory increase in price" ("SSNIP")—typically five percent higher? *See* Merger Guidelines § 4.1.1. The answer to this question depends in large part on "the extent to which customers would likely substitute away from" SPRB coal in favor of a different product. *Id.* § 4.1.1. If a sufficient number of customers would continue to purchase SPRB coal at the

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[9] PX7003 ([REDACTED]) ¶ 9; PX7006 ([REDACTED]) ¶ 23.

[10] PX7003 ([REDACTED]) ¶ 5; PX 7002 ([REDACTED]) ¶ 7; PX7005 ([REDACTED]) ¶ 6.

[11] PX9003 at 009 ("The price of Powder River Basin coal is generally less than that of coal produced in other regions because Powder River basin coal has a lower heat content, however it is produced from thick seams using surface recovery methods thus, has a lower cost of production.").

[12] EIA Coal Markets data, https://www.eia.gov/coal/markets/#tabs-prices-2 (EIA data tracking spot prices for Powder River Basin 8800 BTU coal based on dollars per million BTU ("mmbtu"), compared to other coal basin prices).

[13] Economists commonly implement the hypothetical monopolist test when offering an opinion regarding the relevant market. *See, e.g.*, *Arch Coal*, 329 F. Supp. 2d at 121 (both Plaintiff's expert and Defendant's expert implemented the hypothetical monopolist test).

inflated price,[14] a SSNIP would be profitable, suggesting that SPRB coal constitutes a relevant market. Even at this early stage of the litigation, the Commission has evidence from customers that they will continue to purchase SPRB coal if faced with a SSNIP, as they cannot readily substitute away from SPRB coal in response to such a price increase. *See* PX7002 ( ) ¶ 7 [15]

2. The relevant geographic market is the SPRB region

The relevant geographic market is "the area in which consumers can practically turn for alternative sources of the product [or service] and in which the antitrust defendants face competition." *Sanford Health*, 2017 WL 10810016 at *27 (quoting *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1076 (N.D. Ill. 2012) (quoting *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1052 (8th Cir. 1999))). Here, "the geographic area where Defendants compete" is the SPRB region: the suppliers of SPRB coal are located within the Southern Powder River Basin, and this is the region in which purchasers of SPRB coal can seek alternative suppliers of SPRB coal. *See Arch Coal*, 329 F. Supp. 2d at 123.

[14] The SSNIP is compared to the level of "prices that would likely prevail absent the" Joint Venture. Merger Guidelines § 4.1.2. Thus, if prices absent the Joint Venture would have been lower than they are today, then the SSNIP must be compared to those lower prices that would have otherwise likely prevailed absent the transaction.

[15] *See also* PX 7003 ( ) ¶ 5; PX7006 ( ) ¶ 23; PX7004 ( ) ¶ 8.

3. The Joint Venture would result in undue concentration in the relevant market

In 2018, Peabody produced 119.2 million tons of coal from its three SPRB mines,[16] while Arch produced 79 million tons of coal from its two SPRB mines.[17] The Defendants are the two largest SPRB suppliers by a wide margin and their output is more than double the output of all other SPRB producers *combined*.[18] The Defendants' high share of the relevant market significantly exceeds levels long recognized to create a presumption of anticompetitive effects. *See United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963) ("a merger which produces a firm controlling an undue percentage share of the relevant market . . . *must* be enjoined") (emphasis added).

In assessing market concentration, courts often employ a statistical measure called the Herfindahl-Hirshman Index (HHI).[19] If an acquisition increases the HHI of a relevant market by more than 200 points and results in a post-acquisition HHI exceeding 2,500, it is "presumed to be likely to enhance market power." *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 52 (D.D.C. 2015) (citing Merger Guidelines § 5.3). Here, the post-Joint Venture concentration level of SPRB coal production would exceed 4,500, with an extreme change in concentration of more than 2,000

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[16] PX9002 at 014. Peabody operates three mines in the SPRB, including North Antelope Rochelle ("NARM"), Caballo, and Rawhide. *Id.*

[17] PX9003 at 014. Arch operates two mines in the SPRB: Black Thunder and Coal Creek. *Id.*

[18] *See* PX 9041 at 034, U.S. Energy Information Administration Data, Table 9, Major U.S. Coal Mines. The SPRB mines consist of: Peabody's North Antelope Rochelle Mine, Rawhide, and Caballo; Arch's Black Thunder and Coal Creek; NTEC's Antelope and Cordero Rojo; Eagle Specialty Materials' Belle Ayr and Eagle Butte; Kiewit's Buckskin; Western Fuels' Dry Fork; and Black Hills' Wyodak. The shares of each supplier are: Peabody (40.6%), Arch Coal (27%), NTEC (12.2%), Eagle Specialty Materials (12.1%), Peter Kiewit Sons' (4.6%), Western Fuels (2.1%), and Black Hills (1.4%). Thus, Peabody and Arch's combined share is 67.6%.

[19] HHIs are calculated by adding the squares of each market participant's individual market share. *See FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 53 (D.D.C. 1998).

points,[20] which far exceed the thresholds that trigger a presumption of illegality. Indeed, the Joint Venture would increase concentration by more than *ten times* the level which is presumed to be "likely to enhance market power." Merger Guidelines § 5.3; *see Sanford Health*, 2017 WL 10810016, at *27 ("A merger that significantly increases market shares and market concentration is presumed to be unlawful under Section 7 [of the Clayton Act].") (citing *Phila. Nat'l Bank*, 374 U.S. at 363).

B. Evidence of Likely Anticompetitive Effects Confirms the Strong Presumption of Illegality

The high market shares and HHIs establish a clear presumption of illegality, and Defendants cannot produce "evidence clearly showing that the merger is not likely to have such anticompetitive effects," as they are required to do to rebut the presumption of illegality. *Phila. Nat'l Bank*, 374 U.S. at 363. Nonetheless, the Commission's proof of anticompetitive effects is not limited to high market shares and the massive increase in market concentration. Abundant direct evidence of competition between Defendants, which the Joint Venture would eliminate, corroborates the presumption of harm.

1. <u>The Joint Venture will eliminate significant head-to-head competition between the Defendants</u>

Defendants publicly acknowledge that they are close competitors.[21] This close competition occurs within the SPRB, in which Peabody documents identify Arch among its "key

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[20] *See* PX 9041, U.S. Energy Information Administration Data, Table 9, Major U.S. Coal Mines; *see supra* note 18 (identifying SPRB mines). The shares of each of the competitors are: Peabody (40.6%), Arch Coal (27%), NTEC (12.2%), Eagle Specialty Materials (12.1%), Peter Kiewit Sons' (4.6%), Western Fuels (2.1%), and Black Hills (1.4%). The pre-JV HHI, calculated by taking the sum of the squares of these shares, is 2,698. The post-JV HHI will be 4,888, representing an increase in HHI of 2,189.

[21] *See, e.g.*, PX9002 at 026 (Peabody 2018 Annual Report naming Arch as one of its "principal U.S. direct coal supply competitors"); PX9003 at 019 (Arch 2018 Annual Report naming Peabody as one of its "principal domestic competitors").

competitors."[22] This competition directly benefits customers,[23] as Peabody and Arch regularly bid against each other and against other SPRB coal suppliers in response to customers' Requests For Proposals ("RFPs") for SPRB coal. Based on responses to an RFP, customers may select the most attractive competitive bid, or they may continue to negotiate with one or more RFP respondents in an effort to obtain lower prices.[24]

Both Defendants' executives acknowledge that competition for customer RFPs leads to "aggressive"[25] competition between Defendants, resulting in lower prices offered to customers. For example, in 2018 Arch's Chief Commercial Officer assessed [REDACTED] and concluded that:

> [REDACTED]

PX2162 at 001 (emphasis added). In subsequent 2019 negotiations involving the same customer ([REDACTED] Arch's Chief Marketing Officer was informed that [REDACTED] and in response

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[22] *See, e.g.*, PX1200 at 003 (May 2017 Peabody document naming Arch and Cloud Peak (now NTEC) as "Key Competitor[s]"); PX1199 at 001 (January 2019 Peabody slide comparing Peabody's PRB segment performance to only Arch). Likewise, Arch consistently tracks Peabody when considering its competition in the SPRB. PX2122 at 006, 032-33 (referencing Arch, "BTU" (an abbreviation for Peabody), and "CLD" (Cloud Peak, now NTEC)); PX2370 (listing breakdowns of SPRB producers' market share of specific customers).

[23] PX7002 ([REDACTED]) ¶ 9; PX7005 ([REDACTED]) ¶ 7-8.

[24] *See, e.g.*, PX1222 at 003 (following a 2019 RFP, "Ameren indicated that [Peabody] pricing would need to be nearly $.50/ton lower to be considered for recommendation.").

[25] *See, e.g.*, PX2358 at 001 (In 2019, Arch's bid failed to secure business with a customer because "Peabody [was] once again being aggressive trying to keep market share"); PX1215 at 004 (Peabody recognized that [REDACTED] to win business at a customer).

proposed reducing Arch's pricing in an effort to [REDACTED]

[REDACTED] PX2046 at 001. Peabody likewise recognizes that it must beat Arch's pricing in head-to-head competition, concluding in January 2019 that to "win business" at two plants operated by [REDACTED], Peabody [REDACTED]

[REDACTED] PX1215 at 004.

The Joint Venture would eliminate such competition between Defendants, bolstering the inference that anticompetitive effects are likely, because it would end "head-to-head competition between close competitors [that] is an important feature of the relevant market." *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 59 (D.D.C. 2018).

2. <u>The Joint Venture will have an increased ability to increase price by reducing output</u>

Peabody openly acknowledges in its public securities filings a strategy of "value over volume," in an effort to fulfill its "commitment to returning cash to shareholders." PX9002 at 020. In other words, Peabody's declared business strategy is to maintain SPRB prices (*value*) rather than maintain or increase production *volume* in a way that would lead to greater amounts of SPRB coal sold at lower prices. And it has acted on that strategy by withholding SPRB production, for example in January 2019, when an investor presentation announced a reduction of "10 million tons" from its NARM mine because "[a]t current spot pricing levels, we are not generating margins we find acceptable for our investors." PX1149 at 018. The Joint Venture will increase the combined entity's ability to reduce output in order to achieve higher prices and margins. Indeed, in evaluating a possible merger with Arch, Peabody looked at the acquisition of Arch as a potential opportunity to gain an [REDACTED]

[REDACTED] PX1151 at 003 (emphasis added).

C. Defendants Cannot Rebut Plaintiff's Strong Prima Facie Case

Defendants bear a particularly heavy burden to rebut the presumption of illegality where, as here, they confront a strong *prima facie* case. *Sanford Health*, 926 F.3d at 963; *Baker Hughes*, 908 F.2d at 991; *Wilhelmsen*, 341 F. Supp. 3d at 66; *Sysco*, 113 F. Supp. 3d at 23 (citing *Baker Hughes*, 908 F.2d at 991), *H&R Block*, 833 F. Supp. 2d at 72 (the stronger the *prima facie* case, the more evidence defendants must present to rebut the presumption). At this early stage of the proceeding, Defendants have not even advanced such rebuttal arguments before the Court, so it is premature for Plaintiff to attempt to address them in detail, other than to observe that recognized methods of rebutting a *prima facie* case are unavailable to Defendants.

Defendants will not be able to produce evidence that "entry of new competitors and the expansion of existing competitors will keep the industry competitive." *Sysco*, 113 F. Supp. 3d at 80. Entry or expansion can rebut a *prima facie* case only if it is "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern." *H&R Block*, 833 F. Supp. 2d at 73 (quoting Merger Guidelines § 9); *see also CCC Holdings*, 605 F. Supp. 2d at 47. Here, substantial barriers render entry or expansion in the SPRB coal market unlikely. Firms enter the SPRB coal market by leasing rights to mine tracts of federal land, known as lease by application ("LBA," *see* PX9033), which requires a lengthy regulatory process; according to Arch, "[e]very phase of the process is subject to legal challenges and delays," and many years may be required to obtain and develop new LBA reserves.[26]

Nor are alternative fuels sufficient to prevent anticompetitive effects. While natural gas prices have decreased in recent years, low natural gas prices are insufficient to alleviate the

[26] PX2160 at 002, 005

anticompetitive effects of the Joint Venture. Customers do [REDACTED] PX7002 ¶5, and attest that no alternative fuel can substitute for SPRB to degree that would allow customers [REDACTED] PX7006 ([REDACTED]) ¶ 23. In short, the evidence shows—as common sense suggests—that the utilities that have invested billions in the construction of power plants that burn SPRB coal will not substitute other sources of fuel in response to small but significant increases in SPRB miners' prices.

Finally, Defendants are unable to present "proof of extraordinary efficiencies" that might be sufficient to rebut Plaintiff's prima facie case, given the "[h]igh market concentration levels" the Joint Venture would create. *H&R Block*, 833 F. Supp. 2d at 89 (quoting *Heinz,* 246 F.3d at 720). While Plaintiff is aware of no court which has ever relied on efficiencies to rescue an otherwise unlawful transaction,[27] "evidence of enhanced efficiency [can] be considered in the context of the competitive effects of [a] merger." *Sanford Health*, 2017 WL 10810016, at *27. However, not all benefits or costs savings from a transaction constitute cognizable efficiencies. Cognizable efficiencies must be merger-specific and verifiable by an independent party. *H&R Block*, 833 F. Supp 2d at 89. Additionally, if efficiencies are to be considered, "claimed efficiencies must be passed through to consumers." *Sanford Health*, 2017 WL 10810016, at *27

[27] *See Wilhelmsen*, 341 F. Supp. 3d at 71 ("the Supreme Court has never recognized the so-called 'efficiencies' defense in a Section 7 case"); *CCC Holdings*, 605 F. Supp. 2d at 72 ("courts have rarely, if ever, denied a preliminary injunction solely based on the likely efficiencies"); *Heinz,* 246 F.3d at 720-21 ("high market concentration levels . . . require, in rebuttal, proof of extraordinary efficiencies" and "a rigorous analysis of the kinds of efficiencies being urged"); *see also Anthem*, 855 F.3d at 353-56 (discussing whether efficiencies could ever be an ultimate defense to Section 7 illegality). To the extent an efficiencies defense may be considered, Defendants must "verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific." *H&R Block*, 833 F. Supp. 2d at 89 (quoting *Heinz,* 246 F.3d at 720).

(citing *Saint Alphonsus Med. Ctr. Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 790 (9th Cir. 2015); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1223 (11th Cir. 1991)). In this case, any cognizable efficiencies that might result from the Joint Venture are unlikely to be passed on to consumers, as Defendants' own customers have concluded. PX7006 ([REDACTED]) ¶ 21 [REDACTED]

[REDACTED]

[REDACTED].[28]

CONCLUSION

For the reasons stated above, the Commission respectfully requests that the Court grant, prior to 10:59 p.m. CST March 1, 2020, Plaintiff's request for a temporary restraining order.

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[28] *See also* PX7005 ([REDACTED]) ¶ 9; PX7003 ([REDACTED]) ¶ 12.

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