

Statement of the Commission

In the Matter of Arch Coal, Inc., et al.

Docket No. 9316/File No. 031-0191

The Commission voted 4-1 today not to pursue further administrative litigation directed at Arch Coal, Inc.'s acquisition of Triton Coal Company, LLC, and to close the Commission's investigation into the matter. We are ultimately convinced that the public interest would not be benefitted by an administrative trial in this instance.

The Commission based its decision not to pursue further administrative litigation on its application of the criteria set forth in the 1995 *Statement of the Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction* ("Policy Statement").¹ The *Policy Statement* provides that the Commission will evaluate five factors in deciding whether to continue administrative litigation: (1) the factual findings and conclusions of law of the district court or any appellate court; (2) any new evidence developed during the course of the preliminary injunction proceeding; (3) whether the transaction raises important issues of fact, law, or merger injunction policy that need resolution in administrative litigation; (4) an overall assessment of the costs and benefits of further proceedings; and (5) any other matter that bears on whether it would be in the public interest to proceed with the merger challenge. After weighing these factors, the Commission has concluded that the public interest is best served by not pursuing administrative litigation in this case.

¹60 Fed. Reg. 39,741, 39,743 (1995); 4 Trade Reg. Rep. (CCH) ¶ 13,242 at 20,994 (Aug. 3, 1995).

1. Background

Arch and Triton both operated coal mines in the Southern Powder River Basin (“SPRB”), which is located in Wyoming. On March 29, 2003, Arch and Triton entered into a Merger and Purchase Agreement, pursuant to which Arch intended to acquire all of Triton’s assets, including Triton’s North Rochelle mine. Arch also entered into an executory contract to transfer another mine that it had acquired from Triton (the Buckskin mine) to Peter Kiewit Sons, Inc. (“Kiewit”).

The final transaction was unlike most mergers challenged by the Federal Trade Commission because it did not reduce the number of producers of the alleged relevant product, SPRB coal. Prior to the transaction, there were five producers of SPRB coal: Arch, Triton, Kennecott, Peabody, and Foundation. Because Arch sold the Buckskin mine to Kiewit, there continued to be five producers after the merger, with Kiewit taking Triton’s place as the fifth producer.² Nonetheless, the Commission authorized Staff to file the complaint because there was reason to believe that the effect of the transaction may have been to reduce competition substantially, in violation of Section 7 of the Clayton Act.³

On April 1, 2004, the Commission filed a complaint in the United States District Court for the District of Columbia seeking a preliminary injunction to block the acquisition.⁴ The

²The fact that a transaction does not reduce the number of competitors in a market, of course, does not immunize the transaction from an antitrust enforcement action. For example, a transaction that leaves the same number of competitors in a weakened condition could violate the Clayton Act. It is for this reason that the Commission typically retains the right to approve the buyer of a divested asset in its consent agreements with merging parties.

³One of the reasons for the Commission’s concern about the transaction was that the North Rochelle mine had been the primary source of output expansion of SPRB coal in recent years.

⁴Complaint for Preliminary Injunction Pursuant to FTC Act 13(b), *Fed. Trade Comm’n v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004).

district court conducted a lengthy preliminary injunction hearing that included testimony from eighteen lay witnesses, five experts, 1,067 exhibits, and seven substantive briefs. On August 13, 2004, the district court denied the Commission's motion for a preliminary injunction.⁵ The Court of Appeals for the District of Columbia Circuit then denied the Commission's motion for an injunction pending appeal, and the parties subsequently consummated the transaction.⁶ On September 10, 2004, the Commission withdrew the matter from administrative litigation.⁷

2. Application of Policy Statement Factors

a. District Court's Factual Findings and Conclusions of Law

The district court's factual findings and legal conclusions do not warrant administrative litigation of this matter. The district court conducted a lengthy preliminary injunction hearing that amounted to nearly a full trial on the merits. The record included the large majority of the Commission's relevant evidence. The district court then made detailed factual findings about competitive issues, including the substitutability of different types of coal, the bidding process, pricing and output decisions of the market participants, alleged prior coordinated conduct, and the transaction's alleged efficiencies. The evidence did not persuade the district court, after "weighing the equities and considering the Commission's likelihood of ultimate success, [that an injunction] would be in the public interest."⁸

⁵*Fed. Trade Comm'n v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004).

⁶Order, *Fed. Trade Comm'n v. Arch Coal, Inc.*, No. 04-5291 (D.C. Cir. August 20, 2004) ("Court of Appeals Order").

⁷Order Withdrawing Matter from Adjudication, *In the Matter of Arch Coal, Inc.*, Docket No. 9316 (Sept. 10, 2004).

⁸Federal Trade Commission Act, 15 U.S.C. § 53(b).

It is, of course, possible that the Commission would make different factual findings at an administrative trial. Nonetheless, the breadth of the district court’s factual record suggests that, absent significant new evidence that supports the case, administrative litigation could amount to an unproductive repetition of the same litigation. As discussed below, the Commission has not obtained such new evidence.

Commissioner Harbour’s dissent suggests that the breadth and depth of the district court record is relatively unimportant to the determination of whether administrative litigation is warranted, asserting that, for example, “[n]o matter how abundant the preliminary injunction record was in this case, it should not be viewed as a substitute for a full administrative trial.” (Dissent at 10.) We believe that this approach is at odds with the *Policy Statement’s* case-by-case standard, which calls for an assessment of the totality of the district court proceeding.⁹

The district court’s legal findings also do not favor pursuing administrative litigation. The Commission strongly disagreed with the district court’s holding that it was “novel” for the Commission to advance a theory based on the likelihood of coordinated decisions on output, and that this novelty made the Commission’s burden of proof “more difficult.”¹⁰ In its order denying the Commission’s request for an injunction pending appeal, however, the court of appeals expressly rejected this holding by the district court, stating that “the court agrees with the FTC

⁹A principal reason cited in the *Policy Statement* for administrative litigation is that a “preliminary injunction proceeding is generally much shorter in duration than a full trial, and, because of its expedited nature, the thoroughness of the evidentiary presentation and analysis may be less than would be expected in a full trial.” 60 Fed. Reg. 39,743. This reason largely does not apply here because the preliminary injunction hearing involved a thorough evidentiary presentation.

¹⁰*FTC v. Arch Coal*, 329 F. Supp.2d at 115, 131-32.

that there is nothing novel about the theory it has advanced in this case.”¹¹ Consequently, it appears unlikely that this legal error will reappear in a way that would be harmful to the Commission (and thus, the public) in future cases.

b. Existence of New Evidence

After the Commission withdrew the matter from administrative litigation, Staff reevaluated the evidence presented at the district court hearing, and conducted additional investigation into the transaction. During the course of this investigation, Staff obtained new evidence about one of the central issues – the capacity, expansion plans and production levels of most of the SPRB coal producers. On balance, however, this new evidence did not support continued administrative litigation.

Commissioner Harbour’s description of the new evidence omits reference to certain facts, which creates a clear misimpression of the weight of the evidence. Although much of this new evidence is protected from disclosure by statute, the Commission can describe the general nature of some of the omissions. For example, while the dissenting statement correctly explains that the Commission’s central theory was that Arch, Peabody Holding Co., and Kennecott Energy Co. would likely coordinate reductions in output, it fails to acknowledge any of the new evidence about these companies’ production and capital expenditure plans, the majority of which undermines the case. In addition, the dissent’s characterization of the production levels of the two smaller producers, Kiewit and Foundation Coal Corporation, does not acknowledge the existence of non-public evidence about these producers that does not support the case.

The dissent also cites alleged dramatic post-acquisition increases in the spot prices for

¹¹Court of Appeals Order, *supra*.

one class of SPRB coal during a three-month period beginning several months after the close of the transaction. These statistics are misleading. Due to increased demand, coal prices across the country have increased since the merger. In fact, SPRB prices have lagged behind prices in other coal regions of the country.¹² Moreover, the prices of the very large majority of *current* SPRB coal shipments were determined by contracts negotiated prior to the acquisition, and therefore cannot be attributed to the merger. Just as important, Staff found no evidence that these price increases are the result of post-merger coordinated conduct by the remaining producers.

c. Issues of Fact, Law, or Merger Injunction Policy

The court decisions do not raise policy issues of fact, law, or merger injunction doctrine that warrant resolution through administrative litigation. As discussed, the court of appeals rejected the principal portion of the district court's legal analysis with which the Commission disagreed (that the Commission's competitive effects theory was novel).

The Commission does wish to emphasize that the views of customers are important to the substantive analysis of the competitive effects of mergers. The Commission makes this statement in light of the district court's statement that the testimony of certain customer witnesses about the transaction's potential impact on competition was unpersuasive.¹³ Based on its experience in reviewing thousands of mergers, the Commission has found that customers' business needs and responsibilities typically require that they become knowledgeable about the

¹²*See, e.g.*, Average Weekly Coal Commodity Spot Prices, Business Week Ended May 13, 2005, *available at* <http://tonto.eia.doe.gov/FTP/ROOT/coal/newsmarket/coalmar050515.html>.

¹³*FTC v. Arch Coal*, 329 F. Supp.2d at 145-46.

nature of competition in their suppliers' markets. Further, we recognize that customer witnesses often risk alienating important suppliers when they testify, and are therefore unlikely to do so unless they have calculated, based on reasoned analysis, that a transaction is likely to reduce competition in the supply of the relevant product or service. The Commission will continue to rely on customer viewpoints in its analysis of the potential competitive effects arising from proposed mergers.¹⁴

d. Assessment of the Costs and Benefits

A balancing of the costs and benefits of administrative litigation also supports closing the case. The Commission is, of course, authorized to conduct a full administrative trial on the merits after a district court denies its request for a preliminary injunction. Indeed, there can be compelling reasons for pursuing administrative litigation in such cases.

While the Commission continues to believe that administrative litigation plays a vital role in the development and enforcement of the antitrust laws,¹⁵ it is equally clear, however, that

¹⁴The Commission disagrees with Commissioner Harbour's assessment that the district court required the Commission to prove that "future coordination undoubtedly will occur." Dissent at 7 (emphasis in original). The district court largely articulated the correct general standards for proving a violation under Section 7 of the Clayton Act (the effect of the transaction "may be substantially to lessen competition"). See *FTC v. Arch*, 329 F. Supp.2d at 115 (citations and quotations omitted). It is, of course, possible that the Commission might apply these standards differently, and give more weight to particular evidence, at an administrative trial. This possibility in this case, however, when considered in conjunction with the other factors in the *Policy Statement*, does not warrant an administrative trial.

¹⁵"Congress intended that the Commission would play a 'leading role in enforcing the Clayton Act, which was passed at the same time as the statute creating the Commission.' It was expected that an administrative agency was especially suited to resolving difficult antitrust questions, and that the FTC should be the principal fact finder in the process. . . ." *Policy Statement*, 60 Fed. Reg. at 39,741 (quoting *Hospital Corp. of America v. Fed. Trade Comm'n*, 807 F.2d 1381, 1386 (7th Cir. 1986)).

administrative litigation does not always advance the public interest.¹⁶ The benefits of administrative litigation can be reduced greatly when the large majority of the relevant evidence already has been presented by Staff at the preliminary injunction hearing, and when the preliminary injunction decision does not raise issues that are likely to impede future antitrust merger enforcement.

In this matter, the Commission expended substantial resources in the district court litigation because of the lengthy hearing. The higher standard of proof prescribed by a full trial on the merits would require the Commission to expend at least an equivalent level of resources to pursue a trial before an administrative law judge.¹⁷ Incurring these costs would not serve the public interest because: (1) Staff would essentially duplicate its prior efforts by presentation of largely the same record evidence that the district court found insufficient to warrant an injunction; and (2) the court of appeals corrected the most significant legal error by the district court that might have impeded the Commission's merger enforcement responsibility.

The dissent fails to consider the direct and indirect costs on Staff and the Commission (and therefore, on the public) of an additional trial before an administrative law judge, a likely appeal to the full Commission, and a potential appeal to the court of appeals.¹⁸ The Commission has concluded that, in this instance, the burdens of such a substantial resource commitment are

¹⁶*See id.* at 39,743 (“automatic pursuit of administrative litigation following denial of a preliminary injunction is not required to serve the public interest”).

¹⁷The Commission also would likely expend additional resources on an appeal to the full Commission, and potentially thereafter to the court of appeals.

¹⁸Nor does the dissent weigh the possibility that, even after these expenses are incurred, continued litigation may produce factual findings and legal conclusions similar to those in the district court's opinion (as modified by the court of appeals).

great enough to weigh on the side of forgoing additional administrative litigation.

e. Other Public Interest Factors

This decision not to pursue administrative litigation is consistent with the Commission's established policy of evaluating, on a case-by-case basis, whether pursuit of administrative litigation after the denial of a preliminary injunction motion would serve the public interest. It is our conclusion that in this case, it would not. The Commission is mindful, however, that the *Arch Coal/Triton* transaction involves a significant volume of commerce in an important sector of the U.S. economy. The Commission will continue to closely monitor competition among coal and other energy producers, and aggressively enforce the antitrust laws against producers that engage in anticompetitive conduct, including the kind of coordinated conduct identified as likely in the original complaint in the case. As Commissioner Leary explains in his additional statement, the Commission remains free to enforce the antitrust laws in these markets.