

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

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FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ARCH COAL, INC., *et al.*,

Defendants.

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) Case Number 1:04CV00534 (JDB)  
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**ANSWER OF DEFENDANT ARCH COAL, INC., TO FEDERAL TRADE  
COMMISSION'S COMPLAINT FOR PRELIMINARY INJUNCTION**

Defendant Arch Coal, Inc. ("Arch), by counsel, answers the Complaint for Preliminary Injunction ("Complaint") filed by the Federal Trade Commission ("FTC").

**PRELIMINARY STATEMENT**

This Court has been asked by the FTC and certain States to issue an injunction that would prevent Arch's proposed acquisition of the North Rochelle coal mine from Triton Coal Company, LLC ("Triton") and the concurrent divestiture to Peter Kiewit Sons', Inc. ("Kiewit") of Triton's Buckskin mine (the "Transactions"). Arch, Triton, and Kiewit will demonstrate during this proceeding that the FTC and the States cannot meet their burden for obtaining an injunction because the Transactions are unquestionably procompetitive and will provide both higher output and lower costs for consumers of coal. Triton desires to exit the coal business because it has been unable to generate a single dollar of return to its investors for the entire period they have owned these mines. It has been unable to find other economically viable acquisition alternatives. The Transactions will enable it to sell its mining operations to two

parties that can more efficiently and aggressively deploy these assets for the benefit of customers and consumers.

There will be no lessening of competition as a result of the Transactions. The Complaint's sole claim, based entirely on speculative economic theory, is that the Transactions will result in an increased likelihood of coordinated output restrictions among producers in the Southern Powder River Basin ("SPRB"). The facts, however, do not support this theory. To the contrary, the Transactions will not reduce the number of competitors in any relevant market, and fall within the "safe harbor" concentration levels contained in the FTC's Merger Guidelines—even within the artificially narrow relevant antitrust market alleged in the Complaint. There has been no coordination among coal producers in the past, they do not presently coordinate, and industry conditions not only make it highly unlikely, but in fact virtually impossible, for coal producers in the SPRB (or elsewhere) to reach, monitor, or maintain any sort of meaningful coordinated activity in the future.

Competitive realities belie the Complaint's theory that the Transactions may in the future perhaps encourage a coordinated effort to restrict output. In the face of pure theory, there has been consistent and substantial expansion of coal production over the past decade, and the competitive market forces producing that result will, without question, remain fully in place after the Transactions. In fact, the substantial efficiencies to be derived from these Transactions, together with their output-enhancing nature, can only add to the competitive dynamics that ensure robust competition among coal suppliers.

The sale of the Buckskin mine to Kiewit is procompetitive in every respect. Kiewit does not currently operate in the SPRB. It will bring massively greater resources to expand production and reduce costs at the mine. The FTC and the States do not dispute this. As such, this entire proceeding is about the acquisition of a single mine, North Rochelle, and must be regarded in that perspective. North Rochelle is a mine that did not exist seven years ago, and seven years from now will go out of existence again when its reserves are exhausted. It is but one of numerous mines operating within the United States, and produces less than 24 million of

the approximately 1.1 billion tons of coal produced annually in this country. It simply defies common sense to believe that this acquisition of a single mine of limited life and small production lessens competition, let alone *substantially* lessens competition, in any relevant market, particularly when viewed against the substantial cost reductions and output enhancements the Transactions will indisputably create.

Against this backdrop, Arch responds to each of the specific allegations in the Complaint as follows:

### **Jurisdiction And Venue**

1. The allegations as to jurisdiction and venue state legal conclusions to which no response is required.

### **The Parties**

2. Arch admits the allegations contained in Paragraph 2.
3. Arch admits the allegations contained in Paragraph 3.
4. Arch denies the allegations contained in the first sentence, and admits the allegations contained in the second sentence of Paragraph 4.
5. Arch denies the allegations contained in the first sentence, and admits the allegations contained in the second sentence of Paragraph 5.
6. The allegations contained in Paragraph 6 are legal conclusions to which no response is required.

### **Section 13(b) of the FTC Act**

7. Arch admits that Paragraph 7 accurately quotes portions of 15 U.S.C. § 53(b).

### **The Proposed Acquisition and the Commission's Response**

8. Arch admits that, pursuant to a Merger and Purchase Agreement dated May 29, 2003, Arch agreed to acquire all of the assets of Triton from New Vulcan Coal Holdings, LLC, for approximately \$364 million. Arch further states that, pursuant to an Asset Purchase

Agreement, dated as of January 30, 2004 between Kiewit and Arch, Arch agreed to divest Triton's Buckskin mine and related assets to Kiewit concurrent with Arch's acquisition of the assets of Triton. In all other respects, the allegations contained in Paragraph 8 are denied.

9. Arch admits that, pursuant to an Asset Purchase Agreement, dated January 30, 2004, between Kiewit and Arch, Arch has agreed to divest, for \$82 million, Triton's Buckskin mine and related assets to Kiewit concurrent with its acquisition of the assets of Triton. In all other respects, the allegations contained in Paragraph 9 are denied.

10. Arch admits that, on March 30, 2004, it was informed by the FTC that, over the dissent of Commissioner Leary, the FTC Commissioners had voted to commence this action. The remainder of the allegations contained in Paragraph 10 state legal conclusions to which no response is required.

11. Arch admits the allegations contained in Paragraph 11 as to Arch.

12. Arch lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 12, and therefore denies them. Arch further states that the Transactions are in the public interest, and will violate neither Section 7 of the Clayton Act nor Section 5 of the FTC Act, but, instead, will result in substantial procompetitive benefits without any lessening of competition in any purported relevant market.

#### **Coal From the SPRB**

13. Arch admits that coal is a leading energy source in the United States, and further admits that coal-fired generating plants account for a significant percentage of coal consumption and electric-power generation in the United States, but otherwise denies the allegations contained in the first and second sentences of paragraph 13. The allegations contained in the third sentence of Paragraph 13 are admitted. Arch further admits that coal produced in the Powder River Basin ("PRB"), including the SPRB, like coal produced in other regions throughout the United States, is burned by electric generators. The approximations contained in the last sentence of Paragraph 13 are just that, approximations, and require neither an admission nor a denial.

14. Arch admits that the PRB, including SPRB, is a region in the United States that serves as a source of low sulfur coal for consumers in the United States, and states that such coal typically has an energy content along a spectrum that includes approximately 8100 and 8900 Btu per pound, which complies with current sulfur emission limits imposed on coal-fired generators by the 1990 Clean Air Act. Arch further admits that coal mined in the SPRB is low in ash and sodium content. In all other respects, the allegations contained in Paragraph 14 are denied.

**The Three Tiers in the SPRB**

15. Arch denies the allegations contained in the first sentence of Paragraph 15. Arch admits that the allegations contained in the second sentence are generally correct.

16. Arch denies the allegations contained in Paragraph 16.

17. Arch admits that mines north, south, and east of Gillette, Wyoming, produce 8400 Btu coal, and that some of these mines to the south of Gillette, Wyoming, also produce 8800 Btu coal. In all other respects, the allegations in Paragraph 17 are denied.

18. Arch denies the allegations contained in Paragraph 18.

19. Arch admits that Arch, Peabody, Kennecott, and Triton are four of the largest coal producers in the SPRB. All operate mines in the southern portion of the PRB, as well as elsewhere in the PRB. Arch's Black Thunder mine and Triton's North Rochelle mine are both located in the southern portion of the PRB. Arch's Coal Creek mine and Triton's Buckskin mine are located near Gillette, Wyoming. Arch further admits that R.A.G. is another significant producer of coal that has mines located in the PRB, including SPRB. In all other respects, the allegations in Paragraph 19 are denied.

**Use of SPRB Coal**

20. Arch denies the allegations contained in Paragraph 20.

21. Arch denies the allegations contained in Paragraph 21.

22. Arch denies the allegations contained in Paragraph 22.

23. Arch admits that coal mined in the PRB, including SPRB, is available to customers in states nationwide, but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 23, and therefore denies them.

24. Arch admits the allegations contained in the second sentence of Paragraph 24. In all other respects, the allegations contained in Paragraph 24 are denied.

25. Arch denies the allegations contained in Paragraph 25.

**Arch and Triton Each Control Significant Excess Capacity for Production of SPRB Coal**

26. Arch admits that, in or about July 2000, it idled its coal-mining operations at Coal Creek. In all other respects, the allegations contained in Paragraph 26 are denied.

27. Arch denies the allegations contained in Paragraph 27.

28. Arch denies the allegations contained in Paragraph 28.

**The SPRB Coal Market is Susceptible to Coordination**

29. Arch denies the allegations contained in Paragraph 29.

30. Arch denies the allegations contained in Paragraph 30 insofar as they have reference to Arch. In all other respects, Arch lacks knowledge or information sufficient to form a belief as to said allegations, and therefore denies them.

31. Arch denies the allegations contained in Paragraph 31.

32. Arch denies the allegations contained in Paragraph 32.

33. Arch denies the general allegations in Paragraph 33. With respect to the several subparagraphs, Arch states:

(a) Arch admits it issued a press release on or about May 18, 2000, which contained the sentence quoted. Arch further admits that Mr. Leer spoke at the Western Coal Council Spring Forum on or about May 23, 2000, and noted that coal prices had been trending downward and that Arch's production levels were lower. In all other respects, the allegations contained in subparagraph (a) are denied.

(b) Arch admits that Mr. Leer delivered an address at the Western Coal Transportation Association meeting on or about April 17,

2001, during which he stated, "We've had offers to open up Coal Creek for one year at extremely attractive pricing. And the answer is no. I think other producers are in the same boat." In all other respects, the allegations contained in subparagraph (b) are denied.

- (c) Arch admits that the PRNewswire-FirstCall published material on or about March 18, 2002, and, without averring to its truth or accuracy, refers to the publication of that data to determine what was reported. In all other respects, the allegations contained in subparagraph (c) are denied.
- (d) Arch admits that Coal & Energy published material on or about July 18, 2002, and, without averring to its truth or accuracy, refers to the publication of that date to determine what was reported. In all other respects, the allegations contained in subparagraph (d) are denied.
- (e) Arch admits that, on or about April 21, 2003, it issued a release announcing Arch's First Quarter 2003 results, in which it stated, "We continue to believe that our strategic decision to leave uncommitted tons in the ground, rather than sell them at a price that does not provide an adequate return, is sound." In all other respects, the allegations contained in subparagraph (e) are denied.

34. Except as otherwise set forth by way of specific response below, Arch lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 34, and therefore denies them. In all other respects, Arch states:

- (b) Irl Engelhardt, Chairman and CEO of Peabody Coal, spoke to the Western Coal Transportation Association on April 25, 2000, and his reprinted remarks are a matter of record. Without averring to the truth or accuracy of those remarks, Arch refers to the published remarks to determine what they state.
- (d) Arch admits that on May 15, 2000, Coal Outlook published an article, and, without averring to its truth or accuracy, refers to said publication to determine what it states.
- (e) Insofar as the allegations contained in subparagraph (e) have reference to discussions in which Arch was, or may have been, a participant, said allegations are denied. In all other respects, Arch lacks knowledge or information sufficient to form a belief as to their truth, and therefore denies them.

To the extent not otherwise answered above, the remaining allegations contained in Paragraph 34 are denied.

**Prior to the Proposed Acquisition, Triton's North Rochelle Mine Has Been the Principal Source of Output Expansion in the SPRB During the Past Five Years**

35. Arch admits there has been consistent and substantial expansion of output by coal producers with mines in the PRB, including SPRB, since 1998, but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 35, and therefore denies them.

36. Arch lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 36.

37. Arch denies the allegations contained in Paragraph 37.

**Likelihood of Success on the Merits and Need for Relief**

38. The allegations contained in Paragraph 38 state a legal conclusion to which no response is required.

39. Arch denies the allegations in Paragraph 39 in their entirety, including the allegations contained in the subparts thereof.

40. Arch denies the allegations in Paragraph 40.

41. Arch denies the allegations in Paragraph 41 in their entirety, including the allegations contained in the subparts thereof.

42. Arch denies the allegations in Paragraph 42.

Except as specifically admitted above, the allegations contained in the Complaint are denied.

**FIRST DEFENSE**

The Complaint fails to state a claim upon which relief can be granted.

**SECOND DEFENSE**

An injunction would not be in the public interest.

**THIRD DEFENSE**

A preliminary injunction is not necessary to preserve an effective remedy for the FTC.



**FOURTH DEFENSE**

The Transactions will result in substantial merger-specific efficiencies.

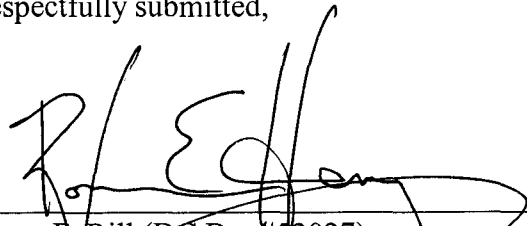
**OTHER DEFENSES**

Arch reserves the right to assert other defenses as discovery proceeds.

WHEREFORE, Arch respectfully requests that the Court (i) deny the FTC's request for a preliminary injunction, (ii) dismiss the Complaint in its entirety with prejudice, (III) award Arch its cost of suit, including attorneys' fees, and (iv) award such other and further relief as the court may deem proper.

April 5, 2004

Respectfully submitted,



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Attorneys for Defendant  
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**CERTIFICATE OF SERVICE**

I HEREBY certify that copies of the Answer of Defendant Arch Coal, Inc., to Federal Trade Commission's Complaint for Preliminary Injunction were served electronically and by first-class mail to all counsel of record this 5th day of April, 2004.



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Stephen Weissman