IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, Plaintiff, v. ARCH COAL, INC., *et al.*, Defendants.	Case Number 1:04CV00534 (JDB)
STATE OF MISSOURI, et al., Plaintiffs, v. ARCH COAL, INC., *et al.*, Defendants.	Case Number 1:04CV00535 (JDB)

DEFENDANT ARCH COAL'S MOTION FOR FULL CONSOLIDATION OF THESE ACTIONS

Defendant Arch Coal, Inc. ("Arch") respectfully requests that the actions *State of Missouri, et al. v. Arch Coal, Inc., et al.,* Case Number 1:04CV00535 (JDB) and *Federal Trade Commission v. Arch Coal, Inc., et al.,* Case Number 1:04CV00534 (JDB) be consolidated for all purposes pursuant to Federal Rule 65(a)(2). Defendants Vulcan Coal Holdings LLC and Triton Company LLC join in this motion.

As detailed in the accompanying memorandum, the two actions are virtually identical. They both seek to enjoin Arch's proposed acquisition of the North Rochelle mine and related

assets from Triton Company LLC ("Triton") and its accompanying divestiture to Peter Kiewit Sons', Inc. ("Kiewit") of Triton's Buckskin mine. The two cases involve the same legal theories, "allege nearly identical facts," will include "overlapping" evidence such as "testimony from witnesses" and "records of defendants," and are the product of a "joint investigation since late summer 2003 into the proposed acquisition." (States' Mem. in Support of Mot. to Consolidate, at 3-4.)

To consolidate these matters for the preliminary injunction proceedings only, would needlessly delay their final resolution and waste the resources of the Court and the parties. Instead, the interests of the parties, this Court, and the public are better served by consolidation of these actions for all purposes, including combining and accelerating the trial with the hearing on the preliminary injunction to determine whether the Arch-Triton-Kiewit transactions should be permanently enjoined.

Accordingly, for the reasons stated more fully in the accompanying supporting Memorandum, Arch respectfully requests a consolidation of these actions for all purposes pursuant to Federal Rule 65(a)(2).

Respectfully submitted,

Dated: April 13, 2004

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STATE OF MISSOURI, et al., Plaintiffs, v. ARCH COAL, INC., *et al.*, Defendants.	Case Number 1:04CV00535 (JDB)

DEFENDANT ARCH COAL'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR FULL CONSOLIDATION AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL CONSOLIDATION

Defendant Arch Coal, Inc. ("Arch") files this memorandum in support of a full consolidation pursuant to Federal Rule 65(a)(2), and in opposition to partial consolidation of the States' action for preliminary and permanent injunction with the virtually identical action of the Federal Trade Commission ("FTC") for preliminary relief only.[1]

[1] Defendants New Vulcan Coal Holdings LLC and Triton Company LLC join in the Rule 65(a)(2) Consolidation Motion and this Memorandum in Support thereof.

INTRODUCTION

The Plaintiff States of Missouri, Arkansas, Kansas, Illinois, Iowa, and Texas have filed an action seeking to enjoin -- both preliminarily and permanently -- Arch's proposed acquisition of the North Rochelle mine and related assets from Triton Company LLC ("Triton")[2] and its accompanying divestiture to Peter Kiewit Sons', Inc. ("Kiewit") of Triton's Buckskin mine.[3] At the same time, the FTC filed an almost identical action under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), asking that the Arch-Triton-Kiewit transactions be preliminarily enjoined. Plaintiff States and the FTC have moved to consolidate their two actions, but only for the limited purpose of a preliminary injunction hearing.

Defendants, on the other hand, urge that this Court exercise its authority to order the full consolidation of these actions for all purposes under Federal Rule 65(a)(2). The Plaintiff States would suffer no prejudice from total consolidation. Defendants have agreed to refrain from taking any steps to consummate the Arch-Triton-Kiewit transactions until after a ruling by this Court. Accordingly, for the very reasons that the Plaintiff States and the FTC argue that this case is ripe for partial consolidation, the interests of the parties, this Court, and the public are even better served by consolidating the actions for all purposes, and, on the schedule proposed, determining whether the Plaintiff States' request for a permanent injunction of the Arch-Triton-Kiewit transactions should be granted or denied.

ARGUMENT

I. CONSOLIDATION OF ACTIONS FOR PRELIMINARY AND PERMANENT INJUNCTIONS IS WELL WITHIN THIS COURT'S DISCRETION

Federal Rule of Civil Procedure 65(a)(2) permits this Court to order a trial on the merits of the permanent injunction action to be advanced and consolidated with the hearing on the

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[2] Defendant New Vulcan Coal Holdings LLC holds all of the outstanding limited liability of Triton.

[3] Triton will sell both mines to Arch. Arch will then immediately sell the Buckskin mine to Kiewit. Kiewit's acquisition of Buckskin is specifically conditioned upon the completion of Arch's acquisition of Triton's assets.

preliminary injunction in order to expedite final resolution of the matter. Fed. R. Civ. P. 65(a)(2); *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Consolidation may be granted on a party's motion, *sua sponte*, or by stipulation of the parties. *Glacier Park Found. v. Watt*, 663 F.2d 882, 886 (9th Cir. 1981). Such an order is particularly appropriate where, as here, Defendants have agreed to "stand down" and not consummate the challenged merger until this Court has heard and decided this matter. *See, e.g., United States v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172, 179 (D.D.C. 2001); *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 125 (E.D.N.Y. 1997).

In such circumstances, so long as the Court gives the parties clear and unambiguous notice of its intent to consolidate and provides full opportunity for both sides to present their cases, Rule 65(a)(2) may be invoked. *Univ. of Tex.*, 451 U.S. at 395; *City of Rye v. Schuler*, 355 F. Supp. 17, 19 (S.D.N.Y. 1973) ("Defendants have no cause for complaint so long as they are notified of the consolidation some time during the hearing, know that the trial has been advanced and consolidated with the hearing, and that it will be their only day in court"). There is here plainly no cause to complain on notice grounds. *Compare, e.g., H & W Indus. v. Formosa Plastics Corp.*, 860 F.2d 172, 178 (5th Cir. 1988) (parties lacked notice of court's consolidation order).

Moreover, the broad pre-complaint discovery rights have afforded the Plaintiff States, together with the FTC, full opportunity over the past eight months to investigate the Arch-Triton-Kiewit transactions, accumulate and marshal their evidence, and prepare for trial -- all before the complaint was ever filed. The procedural posture of this case, in particular, thus leave the government entities in no position to reasonably assert a lack of readiness where the Defendants are prepared to proceed expeditiously (as they are). *See, e.g., United States v. Consol. Food Corp.*, 455 F. Supp. 142, 146-47 (E.D. Pa. 1978). This case is thus a prime candidate for a Rule 65(a)(2) consolidation of the preliminary and permanent injunction actions.

II. CONSOLIDATION OF ACTIONS FOR PRELIMINARY AND PERMANENT INJUNCTIONS IS FACTUALLY COMPELLED

In their papers seeking only a partial consolidation, the Plaintiff States, supported by the FTC, maintain (and Defendants agree), that the States' case for a permanent injunction and the FTC's preliminary injunction action proceed on the same legal theories (*i.e.*, that the proposed "acquisition violates Section 7 of the Clayton Act, 15 U.S.C. § 18"), and "allege nearly identical facts." Pl. Mem. 3-4. Plaintiffs further acknowledge that the States and the FTC have been conducting "a joint investigation since late summer 2003 into the proposed acquisition" (Pl. Mem. at 4), that the "testimony from witnesses" and "records of the defendants" which they "anticipate relying on" are in all material respects "overlapping," and that their "expert testimony and other similar evidence" is "substantially similar." *Id.* at 4. In their words, "virtually identical questions of law and fact will be presented to this Court by both actions." *Ibid.*

No useful purpose would be served in such circumstances by not consolidating the Plaintiff States' requests for preliminary and permanent relief into a single hearing on the merits of the Arch-Triton-Kiewit transaction. With respect to any acquisition transaction, time is of the essence. Here the acquisition agreement challenged by the States and the FTC was entered into nearly a year ago, and the proposed transaction has been in limbo since that time, causing each of the parties enormous expense, delay, and uncertainty. If permitted to languish much longer, the transaction may simply collapse under the weight of continuing doubt without ever having its merits properly adjudicated. There is thus much to the adage "justice delayed is justice denied" in this context. Antitrust review should, therefore, proceed as expeditiously as practicably possible.

Here, the government entities have undeniably had ample opportunity for discovery. During their eight months' "joint investigation" (Pl. Mem. at 4), they received production of many hundreds-of-thousands of documents, took more than a dozen depositions, and conducted

untold numbers of customer, competitor, and other interviews.[4] Thus, the principal impediment to consolidation -- the inability of the opposing parties to adequately complete discovery on the advanced trial schedule -- has no application here. *See, e.g., Anderson v. Davila*, 125 F.3d 148 (3d Cir. 1997); *Consol. Food*, 455 F. Supp. at 146-47 (consolidating preliminary and permanent injunction proceedings in government case to enjoin a merger where the government had four-and-one-half months of pre-complaint discovery).

Moreover, all parties recognize that, at both the preliminary and permanent injunction stage, "the legal issues of market definition and competitive effects caused by the proposed acquisition are identical." Pl. Mem. at 4. It is much more than "likely" that, at both stages, "much the same evidence as to those issues, including expert testimony, would be . . . presented." *Id.* It is, we submit, a virtual certainty. Advancing the hearing on the merits to coincide with the preliminary injunction hearing thus serves the interests of all, and disserves no one. *See Chang v. United States*, 217 F.R.D. 262, 265 (D.D.C. 2003) ("Consolidation may increase judicial efficiency by reducing presentation of duplicative proof at trial, eliminating the need for more than one judge to familiarize themselves with the issues presented, and reducing excess costs to all parties and the government") (citing *Stewart v. O'Neill*, 225 F. Supp. 2d 16, 20 (D.D.C. 2002)). Defendants have agreed to stay their hand and take no action to close the Arch-Triton-Kiewit transactions until after this Court decides the case on the schedule proposed. Consolidation under Rule 65(a)(2) is thus the most prudent and appropriate course to take.

III. CONSOLIDATION OF ACTIONS FOR PRELIMINARY AND PERMANENT INJUNCTIONS IS IN THE PUBLIC INTEREST

Defendants fully understand that the request for partial consolidation by the State Plaintiffs and FTC is calculated to secure for them "two bites at the apple," one before this Court preliminarily, and a second to follow in an FTC administrative hearing, with the ultimate

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[4] Defendants alone produced electronic and hard-copy documents equal to some 500 boxes of materials, the vast majority of which was produced last November. In connection with their Rule 26(a)(1) disclosures here, the government entities have thus far produced over fifty (50) boxes of investigative materials obtained from third-parties.

decision in the hands of the very Commissioners who have already voiced opposition to the transactions. *See* FTC Memo in Support of Preliminary Injunction Motion, at 7.[5] While that "two-bite" procedure may be unavoidable when the Court's jurisdiction is invoked solely for preliminary injunction purposes under Section 13(b) of the Federal Trade Commission Act (*see, e.g., FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 36-37 (D.D.C. 1998)), it is neither legally nor equitably compelled in this case.

The Plaintiff States asked this Court on April 1, 2004, to permanently enjoin the Arch-Triton-Kiewit transactions -- the first action filed asking for such relief.[6] *See generally, First City Nat'l. Bank & Trust Co. v. Simons*, 878 F.2d 76, 79 (2d Cir. 1989) ("'where there are two competing lawsuits, the first suit should have priority, absent a showing of balance of convenience . . . or . . . special circumstances . . . giving priority to the second'") quoting *Motion Picture Lab. Technicians Local 780 v. McGregor & Werner, Inc.,* 804 F.2d 16, 19 (2d Cir. 1986)); *and see, Navajo Nation v. Peabody Holding Co.*, 209 F. Supp. 2d 269, 279-80 (D.D.C. 2002) *aff'd.*, (2003 U.S. App. LEXIS 1879 (D.C. Cir. Apr. 23, 2003)) (same); *Washington Metro. Area Transit Auth. v. Ragonese*, 617 F.2d 828 (D.C. Cir. 1980) (same). The issue is thus plainly ripe for resolution by this Court. As indicated, the Plaintiff States and FTC certainly need no additional discovery beyond that provided for under the proposed scheduling order. Moreover, Defendants have committed to complete their discovery on a fast track and to be ready to fully try the case on the merits within two months. Moving forward on that consolidated basis is thus emphatically in the public interest.

What is not in the public interest is to drag out antitrust review for many more months -- without a definitive Court ruling on the merits of the Plaintiff States' request for permanent relief -- through a needlessly duplicative hearing process, extending well into next year, and

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[5] The Plaintiff States suggest that they simply hold in abeyance their permanent injunction claim and defer to the FTC administrative hearing if a preliminary injunction were to issue. *See* Pl. Motion at ¶ 5.

[6] The FTC filed its administrative complaint, virtually identical in both form and substance to the Plaintiff States' complaint here, on April 6, 2004, and served copies on Defendants on April 8, 2004. *See* App. IV to FTC Memorandum in Support of Motion for Preliminary Injunction.

perhaps beyond.[7] Nor is the public interest well served by the manner in which the Plaintiff States and the FTC propose to accomplish this objective. The suggested partial consolidation urged by the government entities argues not for this Court to fully consider the proposed Arch-Triton-Kiewit transactions, but only to give them a passing glance under the FTC's more relaxed Section 13(b) standard -- pursuant to which it is urged that the court's "task is not to make a final determination on whether the proposed [acquisition] violates Section 7, but rather to make only a preliminary assessment of the [acquisition]'s impact on competition." (*See* FTC Memo in Support of Preliminary Injunction Motion, at 11, *citing*, *FTC v. University Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991); *Cardinal Health*, 12 F. Supp. 2d 34 at 36-37).[8] Furthermore, it is argued that an essential part of the acquisition, namely, the concurrent divestiture of Triton's Buckskin mine to Kiewit, need not -- indeed should not -- even be considered by this Court at the preliminary injunction stage. *See* FTC Memo in Support of Preliminary Injunction Motion, at 42-44.

This Court, however, unlike prior cases wherein judicial authority was invoked by the FTC alone, and solely under Section 13(b) for preliminary injunction relief,[9] is not remotely so constrained. *See supra* pp. 3-4. The Plaintiff States' related action seeks both preliminary and permanent relief, and the former has effectively been removed as a point of concern with Defendants' consent to "stand down." In such circumstances the FTC's joinder of its request for

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[7] Very few transactions have continued into the administrative hearing process after issuance of a preliminary injunction, recognizing that the prolonged schedule of the FTC proceedings alone would defeat all prospects of waiting to do the deal. While the FTC has a "Fast Track" administrative procedure, that procedure cannot be invoked until after the court hearing under Section 13(b), at which point, if invoked, an administrative proceeding projected to last some 13 months is contemplated. See 16 C.F.R. § 3.11A (2004). To date, no parties to a merger have availed themselves of this alternative.

[8] The request of the Plaintiff States for partial consolidation just for purposes of the preliminary injunction, moreover, effectively seeks to afford them a standard which "is broader than the traditional equity standard" (*FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 44 (D.C. 2002)), and alleviates their need at the preliminary injunction stage to otherwise show irreparable harm. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001).

[9] As noted in *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976), in such circumstances, "[t]he district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the F.T.C. in the first instance." *And see*, *Cardinal Health*, 12 F. Supp. 2d at 36-37; *FTC v. Staples*, 970 F. Supp. 1066, 1070-71 (D.D.C. 1997).

preliminary relief only, under 15 U.S.C. § 53(b), can and should be molded "'to the necessities of the particular case,' with the '[f]lexibility rather than rigidity' that has distinguished '[t]he historic injunctive process.'" *See, FTC v. Weyerhauser Co.*, 665 F.2d 1072, 1084 (D.C. Cir. 1981) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). Accordingly, this Court need not, and, we respectfully submit, should not, shy away from fully considering the underlying issues on their merits and deciding whether the proposed Arch-Triton-Kiewit transactions violate Section 7 of the Clayton Act.[10]

Clearly, the Plaintiff States and the FTC have a dramatically different view of the issues than do Defendants. It is Defendants' position that these transactions, if allowed to go forward, will leave the relevant market with the same number of coal producers that exist today. Defendants are prepared to show this Court, that, far from lessening competition, the transactions will decidedly be competition-enhancing, bringing to the mines in question significant merger-specific efficiencies that cannot otherwise be realized. Defendants also can and will dispute the Plaintiffs' assertion, built not on fact but only on theory, that the relevant market will, post-merger, be more conducive to a coordinated restriction on the output of coal reserves by the relevant producers. Not only do market conditions make the Plaintiffs' speculation of possible coordinated activity unrealistic, but it can and will be shown why there is no credible prospect that these coal producers, who have not previously coordinated, will likely do so in the future if the Arch-Triton-Kiewit transactions are approved.

These are issues routinely addressed by the courts. *See, e.g., New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321 (S.D.N.Y. 1995). They are issues ripe for decision here. If the Plaintiff States and the FTC are correct -- and they have clearly marshalled their best evidence

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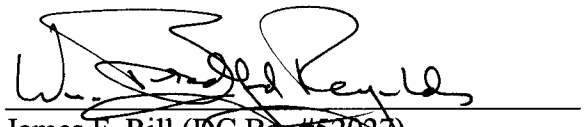
[10] Whatever the FTC's suggestion might be on why the Court should not take seriously the Kiewit part of these transactions at the preliminary injunction stage, that suggestion rings particularly hollow with reference to a trial on the merits. Even apart from the legal and factual arguments that can be arrayed against the FTC (and there are many), *see, e.g., Libby*, 211 F. Supp. 2d at 46, it is, in practical terms, ludicrous to suggest that the parties, if they successfully persuade the Court that no injunction should issue (in significant part because the Buckskin mine is being sold to Kiewit), will turn around and mock the Court by refusing to do the very transactions they have worked so hard to clear.

and are prepared to proceed -- what better way to serve the public interest than to have a definitive ruling in short order by this Court on the Section 7 issue? By the same token, the public is equally well served if Defendants are correct, and this Court allows these transactions to go forward on a finding that they will enhance competition and benefit consumers. In either event, a judicial result is far preferable to prolonging indefinitely the indecision (which is calculated to defeat the best of transactions solely by default). Consolidation of the two actions in their entirety pursuant to Rule 65(a)(2) is thus fully warranted. Neither party will be prejudiced by a full trial on the merits under the schedule proposed, and the public will decidedly be far better served.

CONCLUSION

For the reasons set out above, Defendants respectfully request that the Court consolidate the trial on the merits with the preliminary injunction hearing pursuant to Federal Rule 65(a)(2).

Respectfully submitted,



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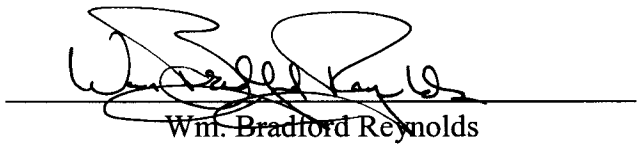
Dated: April 13, 2004

CERTIFICATE OF SERVICE

I hereby certify that a copy of Arch Coal's Memorandum in Support of Its Motion for Full Consolidation and in Opposition to Plaintiffs' Motion for Partial Consolidation was served electronically and by first-class mail to all counsel of record this 13th day of April, 2004.



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