UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, **Plaintiff,** **v.** **ARCH COAL, INC., et al.,** **Defendants.**	**Civil Action No. 04-0534 (JDB)**
STATE OF MISSOURI, et al., **Plaintiffs,** **v.** **ARCH COAL, INC., et al.,** **Defendants.**	**Civil Action No. 04-0535 (JDB)** **(Consolidated Cases)**

ORDER

Defendants Arch Coal, Inc., New Vulcan Coal Holdings LLC and Triton Coal Company LLC ("defendants") seek to consolidate the hearings on the motions for preliminary and permanent injunctive relief filed by the States of Missouri, Arkansas, Kansas, Illinois, Iowa and Texas ("States"). This Court has already consolidated the motions for preliminary injunctive relief filed by the States and the Federal Trade Commission ("FTC"), and has thus consolidated for that purpose the separate cases filed by the States and the FTC. Both the States and the FTC oppose the current effort at consolidation, which is brought pursuant to Federal Rule of Civil Procedure 65(a)(2).

It is plain that this Court cannot address in this action whether the FTC is entitled to permanent injunctive relief under either the Federal Trade Commission Act or the Clayton Act. The FTC seeks relief solely under section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which allows for preliminary injunctive relief only and places the resolution of the FTC's antitrust case on the merits outside the scope of this Court's jurisdiction. All parties now agree with that proposition. The sole issue here, therefore, is whether the Court should exercise its discretion under Rule 65(a)(2) and consolidate the States' requests for preliminary and permanent injunctive relief under the Clayton Act.

The Court is not prepared, at least at this time, to exercise its discretion and order the consolidation defendants seek. The preliminary injunction hearing is set to begin June 21, 2004, following expedited discovery, and will address the claims of both the FTC and the States. Neither the FTC nor the States agree that full merits claims can be presented on that expedited schedule beginning June 21. Hence, practically speaking, it may not be plausible to achieve the consolidation that defendants desire. Moreover, it would be administratively awkward to hear the States' claims for permanent injunctive relief with the claims for preliminary relief of both the FTC and the States, but not also hear the FTC's claims on the merits.

To be sure, there is a certain inevitable inefficiency here. Absent the consolidation requested, a full preliminary injunction evidentiary hearing, lasting a week or more, will occur. If a preliminary injunction is granted, that would presumably be followed by the lengthy FTC proceeding on the merits of the FTC's claims.[1] If, on the other hand, a preliminary injunction is

[1] The States have agreed to be bound by the merits determination from the FTC proceeding.

denied, presumably the same lengthy FTC proceeding on the merits would ensue. But even if the preliminary and permanent injunction proceedings on the States' claims were consolidated, there is no reason to conclude that the FTC merits proceeding would not follow this Court's resolution of the States' claims on the merits in any event, whatever this Court were to decide. Neither the FTC nor defendants have agreed that a decision by this Court on the States' claims would control the FTC's claims on the merits as well.

Defendants' primary concern, it seems, is that there will never be a decision on the merits. That concern stems from their belief that it would take a year or longer to complete an FTC proceeding, with even more time until resolution by the Commission (and perhaps the Court of Appeals); defendants also observe that rarely, if ever, has an FTC merits proceeding actually occurred following a preliminary injunction proceeding in district court. Defendants suggest that mergers or acquisitions challenged by the FTC simply do not survive such drawn-out proceedings. The possibility that the FTC merits proceeding would be delayed and that defendants could not keep the proposed acquisition alive over that period may be real -- certainly this Court is not in a position to assess defendants' financial and other circumstances into the future. The FTC has countered defendants' concerns with facts and assertions designed to allay fears of a drawn-out, delayed FTC proceeding, noting the FTC rules for an expedited hearing and their willingness to work to expedite the FTC administrative hearing. This Court accepts those commitments as being in good faith. Ultimately, however, the Court cannot control either the progress of any FTC merits proceeding or defendants' circumstances while awaiting completion of those proceedings.

Defendants' real complaint, therefore, is with the statutory scheme Congress created through the enactment of section 13(b), which allows these bifurcated proceedings with a

preliminary injunction decided in district court and the merits of the FTC's case resolved before the Commission. But that, too, is beyond the Court's control. Neither side has suggested any clear authority that would either compel this Court to consolidate the States' claims for preliminary and permanent injunctive relief or disable this Court from doing so. On the other hand, it remains clear that this Court cannot force the FTC to litigate before this Court the merits of its claims under the FTC Act or the Clayton Act.

In the end, then, this Court must exercise its discretion under Rule 65(a)(2) in deciding whether it makes good sense to consolidate the merits of the States' claims with the preliminary injunction claims of both the States and the FTC. The Court is not prepared to do so at this juncture, both for practical reasons and because doing so might jeopardize the FTC's ability to address the merits of the antitrust claims. However, it would seem to make the most sense to reserve final resolution of this question until the scheduled June 21 preliminary injunction evidentiary hearing has been completed, or at least has progressed substantially. Conceivably, defendants and the States might agree then that the claims for both preliminary and permanent relief had been fully litigated, or the Court might so conclude even without such agreement, which could present a context calling for a different decision on consolidation. Defendants now agree that such a deferred approach is the "most sensible approach" to take here. Defs.' Reply at p. 5. Accordingly, defendants' renewed motion for consolidation of preliminary and permanent injunctions is DENIED without prejudice to renewal.

/s/ John D. Bates
JOHN D. BATES
United States District Judge

Dated: May 6, 2004

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