

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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FEDERAL TRADE COMMISSION,		)
		)
	Plaintiff,	)
v.		)
ARCH COAL, INC., <i>et al.</i> ,		)
		)
	Defendants.	)
_____		)
STATE OF MISSOURI, <i>et al.</i> ,		)
		)
	Plaintiffs,	)
v.		)
ARCH COAL, INC., <i>et al.</i> ,		)
		)
	Defendants.	)
_____		)

1:04CV00534 (JDB)

**FILED**

APR 08 2004

NANCY MAYER WHITTINGTON, CLERK  
U.S. DISTRICT COURT

**PROTECTIVE ORDER**

In the interest of ensuring that matters raised by this proceeding are open to the public, and at the same time to ensure that confidential information submitted by a defendant or any third parties, whether pursuant to compulsory process or voluntarily, is not improperly disclosed, IT IS HEREBY ORDERED THAT:

1. As used in this Order, "Confidential Information" or "Confidential Material" shall refer to any document or portion thereof that contains competitively sensitive information, including trade secrets or other confidential research, development, commercial or financial information, as such terms are used in Rule 26(c)(7) of the Federal Rules of Civil Procedure and

Section 6(f) of the Federal Trade Commission Act, as amended, and in the cases so construing them, and in any rules promulgated pursuant to or in implementation of them. "Document" shall refer to any discoverable writing or recording, as defined in Rule 1001 of the Federal Rules of Evidence, or transcript of oral testimony in the possession of a party or a third party, as well as to any discoverable materials previously obtained by the Federal Trade Commission ("FTC") during its pre-complaint investigation.

2. Any document or portion thereof submitted to the FTC during its investigation by a defendant or by a third party pursuant to compulsory process, or voluntarily in lieu of compulsory process that has been or is designated as confidential by the submitting party, or that is subject to a request for confidentiality, or any information taken from the confidential portion of such a document, or any documents or information submitted to the FTC pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Clayton Act § 7A, 15 U.S.C. § 18a, shall be

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treated as "Confidential" (as provided in Paragraph 6 hereof) for purposes of this Order. The identity of a third party submitting such confidential material also shall be treated as Confidential for the purposes of this Order where the third-party submitter has requested such confidential treatment, but such protection shall expire 24 hours after notice has been given that defense counsel wish to disclose the identity of that third party submitter to a defendant, unless the third party or the FTC applies to the Court for an order precluding such disclosure.

3. The parties, in complying with informal discovery requests or discovery requests served upon them pursuant to the Federal Rules of Civil Procedure, may designate any document or portion thereof submitted in response to such discovery requests as Confidential Material,

including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.

4. The parties, in conducting discovery from third parties, shall attach to such discovery requests a copy of this Order so as to apprise such third parties of their rights herein. A third party may designate as Confidential Material any document or portion thereof submitted by it in response to discovery in this proceeding.

5. A designation that a document is Confidential shall constitute a representation to the Court, in good faith and after careful determination, that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes Confidential Material as defined in Paragraph 1 of this Order.

6. Material may be designated as Confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), a notice indicating that the material is "CONFIDENTIAL" or "FILED UNDER SEAL" or any other appropriate notice. Masked copies of documents may be produced where the portions masked contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Material designated as "CONFIDENTIAL" shall be disclosed only to: (a) the Court and necessary Court employees and staff; (b) FTC counsel, their associated attorneys, and other employees or consultants (including expert witnesses) of the FTC; (c) the Plaintiff States' Attorneys General, their associated attorneys, other employees of their offices, and any consultants (including expert witnesses) of the Plaintiff States; (d) outside counsel of record for

defendants ("outside counsel"), their associated attorneys and other employees of their law firm(s), provided they are not employees of a defendant; and (e) anyone retained to assist outside counsel in the preparation or trial of this action (including expert witnesses and other consultants), provided they are not currently affiliated in any way with one of the defendants or with any other company or person producing or selling coal in the United States.

8. Disclosure of Confidential Information to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation, hearing, and any appeal of this proceeding and any subsequent administrative proceeding arising from this transaction, and for no other purpose whatsoever.

9. Notwithstanding Paragraphs 7 and 8, the FTC may, subject to taking appropriate steps to preserve the confidentiality: (1) disclose and use information that is confidential under Paragraph 2 of this Order to the extent permitted by the confidentiality provisions of applicable law and Commission rules, and (2) disclose and use confidential information obtained pursuant to this Order in responding to a formal request or subpoena from either House of Congress or from any committee or subcommittee of the Congress, consistent with applicable law, including Section 7A(h) of the Clayton Act or Sections 6(f) and 21 of the Federal Trade Commission Act.

10. If a party desires to disclose Confidential Material to any person other than those referred to in Paragraphs 7-9 hereof (a "New Person"), the party seeking disclosure shall inform both the party that produced the material and the submitter of the material to this effect. Such notice shall identify those materials sought to be disclosed with specificity (*i.e.*, by document control numbers, deposition transcript page and line reference, or other means sufficient easily to

locate such materials), and the specific New Person (by name and business affiliation) to whom such material is to be disclosed. The producing party and/or the submitter may object to the disclosure of the Confidential Material to the New Person by providing the party seeking disclosure with a written statement of the reasons for the objection. If the producing party and/or the submitter objects within five (5) business days, the party seeking disclosure shall not disclose the Confidential Material to the New Person, absent written agreement with the objector(s) or order of the Court. If no objection is made to the proposed disclosure of the Confidential Material within five (5) business days, such material may be disclosed to the New Person.

11. In the event that any Confidential Material is contained in any pleading, motion, exhibit or other paper (collectively the "papers") filed or to be filed with the Clerk of the Court, the Clerk shall be so informed by the party filing such papers, and such papers shall be filed under seal. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential Material contained in the papers (including materials from both parties and third parties) shall remain under seal until further order of this Court; provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to paragraphs 7, 8, 9 or 10. Upon or after filing any paper containing Confidential Material, the filing party may file on the public record a duplicate copy of the paper that does not reveal such material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

12. If counsel for a defendant or any other party plans to introduce into evidence any document or transcript containing Confidential Material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted in camera treatment. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where in camera treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

13. At the time that participation in this proceeding or any subsequent administrative proceeding by any person described in Paragraph 7 or 10 of this Order concludes, all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing Confidential Information, shall be returned by such person to counsel, provided, however, that the FTC's obligations under this paragraph shall be governed by the provisions of Rule 4.12 of the FTC's Rules of Practice, 16 C.F.R. § 4.12.

14. The inadvertent or mistaken disclosure by a producing party of Confidential Information shall not constitute a waiver of any claim of confidentiality except where: (a) the producing party notifies a receiving party in writing of such inadvertent or mistaken disclosure within ten (10) business days of becoming aware of such disclosure, and (b) within thirty (30) days of such notice, the producing party fails to provide properly re-designated documents to the receiving party. During the thirty (30) day period after notice, the materials shall be treated as designated in the producing party's notice. Upon receipt of properly re-designated documents,

the receiving party shall return all unmarked or incorrectly designated documents and other materials to the producing party within five (5) business days. The receiving party shall not retain copies thereof and shall treat information contained in said documents and materials and any summaries or notes thereof as appropriately marked pursuant to the producing party's notice.

15. Nothing in this Order shall be construed to effect an abrogation, waiver, or limitation of any kind on the right of the parties or third parties to assert any applicable discovery or trial privilege, or to seek an order modifying the terms of this Order.

  
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UNITED STATES DISTRICT JUDGE

Dated: April 8, 2004