

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MISSOURI**

**FEDERAL TRADE COMMISSION,**

Plaintiff,

v.

**PEABODY ENERGY CORPORATION**

and

**ARCH COAL, INC.,**

Defendants.

Civil Action No. 4:20-cv-00317-SEP

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**PLAINTIFF'S [CORRECTED] MEMORANDUM OF LAW  
IN SUPPORT OF PRELIMINARY INJUNCTION**

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## INTRODUCTION

Defendants are the two largest coal-mining companies in the United States. They propose to combine their operations into a joint venture that would control nearly 70% of all Southern Powder River Basin (“SPRB”) coal. SPRB-coal-burning power plants need SPRB coal to generate electric power, and if the joint venture (“JV”) proceeds, nothing would stop the JV from increasing SPRB coal prices. Power producers who own SPRB-coal-burning power plants would simply have to pay more – and, often, so would the millions of American households they serve.

The Federal Trade Commission (“Plaintiff” or “FTC”) respectfully asks the Court for a preliminary injunction to temporarily prevent this combination, in order to preserve the status quo until the FTC has had an opportunity to adjudicate the transaction’s legality under the antitrust laws in an administrative proceeding. *See generally* 15 U.S.C. § 53(b).

The Court should issue the requested preliminary injunction. This proposed transaction is presumptively unlawful, as Defendants control an overwhelming share of SPRB coal, which is a properly defined antitrust market that satisfies the well-established analytical tests that identify a relevant antitrust market, just as Judge Bates held in *FTC v. Arch Coal*, 329 F. Supp. 2d 109, 123 (D.D.C. 2004). *See infra* Section II.A (SPRB coal satisfies the Supreme Court’s *Brown Shoe* factors and the well-accepted “hypothetical monopolist test”). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] But Defendants’ loss is consumers’ gain, as power producers attest that they have [REDACTED]

[REDACTED] *see also* PX7002 ¶ 9 (power producer “believes that it and its customers have benefited from the competition between Peabody and Arch and is concerned that elimination of that competition through the JV would result in higher coal prices”). These customers affirm that Defendants’ head-to-head competition has led to lower SPRB coal prices, benefiting the millions of ordinary American households who rely on SPRB-generated electric power. The JV would immediately eliminate head-to-head competition between Defendants, sharply reduce competition between SPRB suppliers overall, and leave SPRB-coal-reliant power producers and the households they serve vulnerable to higher prices. As power producers attest, [REDACTED]

[REDACTED]

[REDACTED] *see also* [REDACTED]

Defendants claim that their extraordinarily high shares in the relevant market for SPRB coal are immaterial, because fuels besides SPRB coal (such as natural gas) can be used to generate electricity, and the availability and price of these fuel sources can impact the total demand for SPRB coal. This argument fails, as the uncontested existence of other fuel sources does not answer the concrete, empirical question at the heart of this antitrust case: is the price of SPRB coal *sufficiently* constrained by other fuels to prevent a small-but-significant increase in the price of SPRB coal, such as a 5% price increase? The answer to that question is “no.” The FTC’s robust factual showing and rigorous expert analysis demonstrate that power producers that operate SPRB coal-fired power plants: (i) need SPRB coal because it provides a reliable, environmentally attractive, and low-cost fuel; (ii) achieve lower prices through competition between SPRB coal suppliers, and in particular head-to-head competition between Defendants; and (iii) would not significantly reduce their SPRB coal purchases if this competition were reduced and a small-but-significant price increase imposed. This demonstration is more than sufficient to raise “serious, substantial” questions regarding the antitrust merits of this

transaction, and under controlling law, Defendants therefore should be enjoined from concluding the proposed JV until the FTC has had an opportunity to reach a conclusion on the merits. *See FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1051 (8th Cir. 1999) (quotation omitted). A preliminary injunction in this matter is entirely appropriate, as “[t]here can be little doubt that the acquisition of the second largest firm in the market by the largest firm in the market will tend to harm competition in that market.” *FTC v. Staples, Inc.* (“*Staples II*”), 190 F. Supp. 3d 100, 138 (D.D.C. 2016) (quoting *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 88 (D.D.C. 2015)).

The stakes in this matter are high. While coal provides a declining share of electricity generation based on national figures, it remains the backbone of reliable electric power in many states: for example, in Missouri, coal-fired power plants provided 73% of net generation in 2018, and the overwhelming majority of the coal burned was supplied from the SPRB.<sup>1</sup> The SPRB basin offers the lowest-cost source of a distinct and environmentally attractive fuel that power producers will demand in huge quantities for many years to come. [REDACTED]

[REDACTED],<sup>2</sup> [REDACTED]<sup>3</sup> [REDACTED]

[REDACTED]

[REDACTED].<sup>4</sup> [REDACTED]

[REDACTED]. If the JV is permitted to erase this constraint

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<sup>1</sup> PX9169-002; PX8001 (Hill Report) ¶ 53, Figure 6 (over 60% of Missouri net generation provided by SPRB coal).

<sup>2</sup> [REDACTED]

<sup>3</sup> Peabody touts its success in “continuing to emphasize value over volume, particularly in the US thermal operations, and maintaining our commitment to returning cash to shareholders.” PX9062-005.

<sup>4</sup> PX9063-070 (“Through December 31, 2019, [Peabody] repurchased 41.5 million shares of our Common Stock for \$1,340.3 million.”); *id.* at -098 (in 2019 alone, Peabody paid dividends of \$258.1 million); PX9086-003 (from May 2017 to December 2019, Arch paid \$913 million “to shareholders via buybacks and dividends”).



and impose even a small price increase, consumers will pay hundreds of millions of dollars in higher electricity bills. This is exactly the type of anticompetitive harm the Clayton Act is designed to prevent.

### **BACKGROUND**

The SPRB and the much smaller Northern Powder River Basin (“NPRB”) make up the Powder River Basin (“PRB”). Located in northeast Wyoming and southeast Montana, the PRB is the largest coal-producing basin in the United States. SPRB mines, which produce over 90% of the coal mined in the PRB,<sup>5</sup> sell coal primarily to SPRB-consuming electric power producers, which burn the coal to generate electricity.<sup>6</sup>

#### **I. Defendants Control Two-Thirds of SPRB Coal Production**

Together, Peabody and Arch control nearly 70% of SPRB coal production. *See infra* Section II.A.3. Peabody is by far the largest coal supplier in the SPRB and in the United States as a whole.<sup>7</sup> In 2019, Peabody sold 108 million tons of SPRB coal from its three SPRB mines: North Antelope Rochelle (“NARM,” the world’s largest coal mine), Rawhide, and Caballo. PX8001 (Hill Report) ¶ 30. Arch is the second-largest coal supplier in the SPRB and the United States.<sup>8</sup> In 2019, Arch sold 75 million tons of SPRB coal produced by its two SPRB mines: Black Thunder (the second most productive mine in the United States) and Coal Creek. PX8001 (Hill Report) ¶ 31.

The other five SPRB coal suppliers are significantly smaller than Peabody and Arch. Two producers, Black Hills and Western Fuels Association (“WFA”), are each single-mine operators that primarily supply coal to affiliated entities. PX7012 ¶¶ 3, 4; [REDACTED] Black Hills operates the

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<sup>5</sup> PX8001 (Hill Report) ¶ 28 (in 2018, 93% of coal shipped from the PRB came from the SPRB).

<sup>6</sup> *Arch Coal*, 329 F. Supp. 2d at 118 (“Virtually all SPRB coal is purchased by electric power companies for use in their coal-fired steam generating units.”).

<sup>7</sup> PX8001 (Hill Report) ¶ 30. In 2019 Peabody sold over 164 million tons of coal worldwide, generating \$5.58 billion in revenues. PX9063-061, -057.

<sup>8</sup> PX8001 (Hill Report) ¶ 31. In 2019, Arch sold approximately 88 million tons of coal worldwide, generating about \$2.3 billion in revenues. PX9055-015, 054.

Wyodak mine, which in 2019 sold nearly all of its output (3.6 million out of 3.7 million tons) to an affiliated power plant located next to the mine. PX7012 ¶ 6. [REDACTED]

[REDACTED]

[REDACTED]

Only three other firms operate SPRB mines. While they are larger than WFA and Black Hills, each is considerably smaller than Peabody or Arch.<sup>9</sup> The largest of the three, Navajo Transitional Energy Company (“NTEC”), operates the Antelope and Cordero Rojo mines.<sup>10</sup> The next largest, FM Coal, operates the Eagle Butte and Belle Ayr mines.<sup>11</sup> Peter Kiewit Sons’ Inc. (“Kiewit”), the fifth-largest producer in the SPRB, owns the Buckskin mine. PX8001 (Hill Report) ¶ 34.

## **II. Characteristics and Uses of SPRB Coal**

SPRB coal has many desirable properties compared with coal found in other regions of the United States. First, because SPRB coal sits in thick beds close to the surface of the land, SPRB mines are more cost effective than most coal basins.<sup>12</sup> Indeed, the spot price of SPRB coal in January 2020 was about half as expensive in dollars per energy output (mmBTU) as coal from the next lowest-cost coal production basin.<sup>13</sup> SPRB coal has long enjoyed this cost advantage. PX8001 (Hill Report) ¶ 91.

Second, SPRB coal has low sulfur content relative to other coal basins, which is desirable for

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<sup>9</sup> See PX8001 (Hill Report) ¶ 37, Figure 3 (2019 SPRB production by mine); *id.* at Appendix D, Figure 37 (2018 SPRB production by mine).

<sup>10</sup> PX8001 (Hill Report) ¶ 37. NTEC acquired its SPRB mines in October 2019 through the bankruptcy proceedings of their prior owner, Cloud Peak Energy. *Id.* ¶ 32.

<sup>11</sup> PX8001 (Hill Report) ¶ 37, Figure 3. FM Coal acquired these mines in 2019 through the bankruptcy of former owner Blackjewel. Javelin Global [REDACTED] owns the marketing rights to all coal produced at both mines. *Id.* ¶ 33.

<sup>12</sup> *Arch Coal*, 329 F. Supp. 2d at 117.

<sup>13</sup> PX9026-002 (reporting \$0.67 per mmBtu for PRB 8800 BTU versus \$1.34 per mmBtu for Uinta Basin 11,700 BTU for the week ending January 24, 2020).

coal plants operating under environmental regulations.<sup>14</sup> Third, SPRB coal has low sodium and ash content, which are also properties sought after by coal customers.<sup>15</sup> Peabody's NARM mine and Arch's Black Thunder mines are particularly advantaged because, in addition to low sulfur and ash content, they have a higher heat content than most other SPRB mines (measured in British Thermal Units per pound ("BTU/lb")). [REDACTED]

[REDACTED]<sup>16</sup>

Although use of other energy sources has increased in recent decades, coal remains indispensable for power producers in many regions of the country because it provides low-cost, reliable power.<sup>17</sup> For example, in Missouri, coal-fired power provided 73% of net electricity generation in 2018. PX9169-002. Power producers can stockpile sufficient coal on-site to power a plant for months, and they value the

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<sup>14</sup> *Arch Coal*, 329 F. Supp. 2d at 117 ("SPRB coal is known for its low sulfur content. . . . SPRB coal is the most economical source of fuel that complies with Clean Air Act sulfur limitations."); [REDACTED]

[REDACTED] PX6021 at 112, 138; [REDACTED]

<sup>15</sup> *Arch Coal*, 329 F. Supp. 2d at 117-18 (SPRB coal has "low ash content. . . . [A]sh content affects the grindability of the coal and the performance of air quality equipment, and thus customers prefer coal with low ash content."); PX6021 at 112-113, 134-136 (grindability, ash content, sodium content make SPRB coal beneficial); [REDACTED]

<sup>16</sup> See PX8001 (Hill Report) ¶ 38, Figure 4; see also [REDACTED]

<sup>17</sup> See, e.g., PX7008 ¶ 6 ("While Evergy can, and does, generate power through wind energy and natural gas, and purchases power in the market, none of these options currently provide sufficient reliable capacity to meet Evergy's responsibilities . . . and none of these options can serve as an effective alternative to purchasing and consuming coal in the short and near-term."); [REDACTED]

reliability this provides.<sup>18</sup> Unlike renewable energy sources, coal is not subject to natural fluctuations in sunlight, wind, or precipitation; moreover, renewable energy cannot be transported or cost-effectively stored.<sup>19</sup> Natural gas is likewise vulnerable to supply interruptions: it cannot be stockpiled by power producers,<sup>20</sup> and gas pipelines can freeze in cold temperatures or become capacity constrained when demand is high (which can occur in colder months because natural gas is used as a home heating fuel as well as an electricity source).<sup>21</sup> In addition, natural gas prices are highly volatile, in part because natural gas production varies with crude oil production and crude oil prices.<sup>22</sup>

### III. SPRB Coal Suppliers Compete Through Requests for Proposals

Power producers typically buy SPRB coal by initiating a request for proposal (“RFP”) process that solicits SPRB coal-specific bids, in an effort to secure the best pricing and other terms.<sup>23</sup> RFPs typically solicit bids for contracts lasting six months to three years. After soliciting bids, coal customers may decide to buy from a single supplier or, more commonly, to split their volumes between suppliers, with the latter choice reflecting most power producers’ desire to be “dual-sourced” on a crucial input

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<sup>18</sup> [REDACTED]

PX7002 ¶ 4 (“substantial volumes of coal can, and typically are, stockpiled on site”); [REDACTED]

<sup>19</sup> [REDACTED] PX9120-004 (“One of the challenges with wind and solar is that large-scale storage really hasn’t become a cost-effective, reliable resource.”).

<sup>20</sup> PX7008 ¶ 10 (“While Everygy can maintain an inventory of coal fuel on site, which enhances the reliability and resilience of coal-fired operation, there is no available storage capacity for natural gas or firm natural gas transportation.”); [REDACTED].

<sup>21</sup> PX7008 ¶ 9 (“When temperatures drop to near freezing (32 degrees), natural gas is often curtailed and thus is not a reliable fuel alternative for power production.”); [REDACTED]

<sup>22</sup> PX9120-004 (“Natural gas was, and still is, more expensive and much more volatile in terms of fuel price than coal.”); [REDACTED]

<sup>23</sup> [REDACTED] PX6013 at 121; [REDACTED]; [REDACTED]

such as SPRB coal.<sup>24</sup> Some customers provide the bidders feedback during the RFP process, allowing them to refresh their bids, or “sharpen their pencils,” with improved offer terms.<sup>25</sup> Other customers require “best and final offers” from SPRB suppliers in the first round of the RFP, forcing suppliers to anticipate their rivals’ bids and adjust their terms accordingly prior to submitting their bid.<sup>26</sup>

RFP bids, and subsequent negotiations,<sup>27</sup> are based on the “mine mouth” price of SPRB coal, which does not include the significant cost of transporting coal from the SPRB mines to the power producers.<sup>28</sup> Power producers typically negotiate coal transportation directly with the railroads that serve the SPRB region (Union Pacific and BNSF Railway), in confidential negotiations to which coal suppliers are not a party.<sup>29</sup> Transportation and other costs typically account for over half, and for some customers over two-thirds, of delivered SPRB coal pricing.<sup>30</sup>

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<sup>24</sup> See, e.g., PX6021 at 152 (sourcing from multiple SPRB suppliers has provided lower prices and supply reliability); PX7008 ¶ 14 (“Evergy has maintained a coal purchasing strategy that emphasizes diversity of supply for many years.”); [REDACTED]; [REDACTED]; [REDACTED]

<sup>25</sup> [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]

<sup>26</sup> See, e.g., PX6038 at 213-214 (WFA seeks best and final offer; SPRB coal suppliers improve their bids across RFPs events); [REDACTED]  
[REDACTED]; PX6021 at 149-50.

<sup>27</sup> [REDACTED]  
[REDACTED]

<sup>28</sup> PX9063-012 (“Coal consumed in the U.S. is usually sold at the mine with transportation costs borne by the purchaser.”); PX9055-019 (“We generally sell coal used for domestic consumption free on board (f.o.b.) at the mine or nearest loading facility. Our domestic customers normally bear the costs of transporting coal by rail, barge or truck.”).

<sup>29</sup> [REDACTED]  
[REDACTED]

<sup>30</sup> [REDACTED] PX6015 at 135-136 (the

#### **IV. Most SPRB Coal is Burned by Power Producers in the Central United States that Often Run Their Coal Units Continuously**

Most SPRB coal is burned at power plants located in the central United States and upper Midwest. *See* PX8001 (Hill Report) ¶ 54, Figure 7. Each power plant contains one or more generation units that are almost always built for a single type of fuel. Coal-fired generation units (“coal units”) are typically configured to burn one type or blend of coal, and cannot easily be adapted to use other coals.<sup>31</sup> They also cannot burn natural gas, or be readily converted to do so.<sup>32</sup>

In most circumstances, power producers run SPRB coal units as continuously operated “baseload” units,<sup>33</sup> because coal units require a long time to heat up and to cool down and are not designed to be turned on and off quickly.<sup>34</sup> Cooling down a coal unit takes a minimum of 12-24 hours,<sup>35</sup>

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commodity price of coal accounts for 30-35% of the delivered cost; transportation is one of the factors that make up the remaining 60-65%).

<sup>31</sup> *See, e.g.*, PX6021 at 114-116;

*see also infra* Section II.A.1.a.(2).

<sup>32</sup> *See, e.g.*,

<sup>33</sup> *See, e.g.*, PX6015 at 137-139 (coal-fired plants are “large baseload units that are not designed to cycle ... they’re thought of as baseload resources that should be on the majority of the time.”); PX7011 ¶ 5 (Minnesota Power runs its coal-fired units “as ‘baseload’ units to serve loads around the clock”);

<sup>34</sup>



while starting up a coal unit after it has been cooled down can take 24 hours to several days.<sup>36</sup> Turning coal units on and off also degrades expensive equipment and leads to higher maintenance costs.<sup>37</sup> Moreover, some coal units must be run due to a power producer's commitment to provide steam. *See, e.g.,* [REDACTED].

#### V. Many SPRB-Reliant Power Producers Participate in RTOs/ISOs

Many power producers that buy SPRB coal participate in Regional Transmission Organizations (“RTOs”) or Independent System Operators (“ISOs”), which are multi-state power transmission system operators that coordinate a region's electric grid.<sup>38</sup> Power producers that participate in two RTOs/ISOs – Midcontinent Independent System Operator (“MISO”) and Southwest Power Pool (“SPP”) – accounted for 64% of SPRB coal consumption in 2018. PX8001 (Hill Report) ¶ 63; *see id.* Figure 8 (geographic areas served by MISO and SPP).

Power producers count on reliable SPRB coal units to meet their obligations to RTOs/ISOs. For example, [REDACTED]

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<sup>35</sup> [REDACTED] PX4983-005-06 (January 2020 Missouri Public Utility Commission testimony referencing a three day minimum shutdown period for Ameren SPRB coal plants).

<sup>36</sup> [REDACTED] PX6015 at 42-43 (testifying that it takes 36 hours to bring one of Evergy's coal-fired power units online); [REDACTED].

<sup>37</sup> PX4983-006-07 (“Each time a power plant is cycled, its major and minor auxiliary components experience significant thermal and pressure stresses, which cause damage. This is most concerning for equipment that is subjected to high temperatures and pressures, and other mechanical forces. Over time and repeated cycles, this can result in failure of critical components.”); [REDACTED]

<sup>38</sup> Although RTOs and ISOs have different regulatory origins and legal statuses, these differences are not relevant to the instant case. *See* PX9171-027-028.

[REDACTED]

[REDACTED]

SPRB coal not only provides reliability to power producers that participate in RTOs/ISOs, it also provides a consistently economical fuel source, even relative to other fuel sources such as natural gas. This is demonstrated by SPRB coal units' performance in the "wholesale" electricity markets administered by RTOs/ISOs, in which power producers submit bids specifying the minimum price at which they are willing to supply power to the regional electric grid. *See* PX9171-030; PX9011-017-18. Based on these bids and on other criteria for reliability,<sup>39</sup> RTOs/ISOs identify the market-clearing price at which a sufficient amount of power will "dispatch" to satisfy overall projected demand. RTOs/ISOs accept bids in both a day-ahead and a real-time market, with the day-ahead market controlling most decisions.<sup>40</sup>

As noted above, it often makes sense for power producers to run their SPRB coal units as continuously operated baseload units, regardless of temporary fluctuations in the market-clearing price for electricity.<sup>41</sup> Two features of RTOs/ISOs day-ahead markets are important to baseload SPRB coal units:

- First, a power producer can effectively submit a bid of zero for a given level of power output by "self-committing" a unit to run at that level. This choice essentially guarantees that the unit will

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<sup>39</sup> *See* PX9193-004-005 (Bids are not the only factor considered by RTOs/ISOs because, due to transmission constraints and other complicating factors, the bid market may not properly balance supply and demand. In those circumstances, the RTO/ISO may "dispatch" a unit to ensure grid reliability, and "RTOs and ISOs provide make-whole payments, or uplift payments, to resources whose commitment and dispatch resulted in a shortfall between the resource's offer and the revenue earned through market clearing prices.").

<sup>40</sup> *See* PX9173-020 ("Most of the energy volume is traded in day-ahead markets, where market participants submit bids and offers for electric energy delivered on the next day. In real-time markets, the volume of energy traded is the difference between energy commitments cleared in day-ahead markets and the energy actually needed in the system to meet demand.").

<sup>41</sup> *See* [REDACTED]



dispatch a minimum level of power regardless of the market-clearing price determined by the day-ahead market. PX4983-002 (describing MISO “must run (self-commit)” status as “informing MISO that the unit will be on-line at its unit minimum irrespective of the results of any margin calculation MISO’s day-ahead model performs”); *id.* at -003 (Ameren “utilizes a must run” [self-commit] status for “all of Ameren Missouri’s coal-fired units” except the Meramec Energy Center.”).

- Second, each unit that dispatches receives the market-clearing price,<sup>42</sup> regardless of its bid. Thus, a producer who submits a bid of zero (or self-commits) receives the same price as if the producer bid exactly at (or a fraction below) the market-clearing price. *See* PX9011-017-18.

Thus, a coal unit can theoretically use self-commitment to insulate its dispatch from changes in the market-clearing wholesale price of electricity. However, even when power producers self-commit their coal units, these coal units usually dispatch economically—*i.e.*, as the *lowest-cost* option available to the RTO/ISO. In a recent MISO analysis, 88% of dispatched coal generation represented the *lowest-cost* option; *i.e.*, lower-cost than any additional power available to the RTO/ISO from natural gas or renewable generation that was offered to the RTO above the market-clearing price. PX9191 (76% of coal-fired dispatch came from self-committed coal units that were in fact the lowest-cost option, and another 12% came from non-self-committed coal units that were dispatched as the lowest-cost option based on the bid submitted by the owner of the unit); *see also* [REDACTED]

### **ARGUMENT**

As described below, the FTC has developed a robust factual record, supported by well-accepted methods of expert analysis, demonstrating that the JV will eliminate competition between close competitors that, together, control an overwhelming share of a properly defined antitrust market for SPRB coal. The “only question” before this Court is whether, given this demonstration, it is in the public interest to preserve the status quo until the FTC has concluded its administrative adjudication of the JV’s

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<sup>42</sup> PX9011-017-018. More precisely, each unit that “dispatches” receives the market-clearing price *if* its bid was at or below the market-clearing price. As noted above, in some circumstances, the RTO/ISO may dispatch a unit that did not bid at or below the market price in order to ensure grid reliability, and in such circumstances the RTO/ISO may provide additional “make-whole payments, or uplift payments.” PX9193-004-005.

legality under the antitrust laws. *FTC v. Sanford Health*, No. 1:17-CV-133, 2017 WL 10810016, at \*23 (D.N.D. Dec. 15, 2017), *aff'd* 926 F.3d 959 (8th Cir. 2019); *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1073-74 (N.D. Ill. 2012). The answer to that question is “yes.” The FTC is likely to succeed on the merits at the administrative proceeding by demonstrating that the JV will substantially lessen competition in the market for SPRB coal, leading to higher prices. The Court should temporarily enjoin the JV to ensure that no such harm occurs until the FTC has resolved the merits of this transaction in its administrative proceeding.

**I. A Preliminary Injunction is Proper Where the FTC Raises Serious and Substantial Questions Suitable for Adjudication in the FTC’s Administrative Proceeding**

Section 7 of the Clayton Act prohibits business combinations where “the effect . . . may be substantially to lessen competition, or to tend to create a monopoly” in “any line of commerce or in any activity affecting commerce in any section of the country.” 15 U.S.C. § 18. The FTC has initiated an administrative suit to adjudicate whether the JV would have such a prohibited effect. In this Court, the FTC seeks a preliminary injunction to prevent the JV from closing until that administrative proceeding is resolved. At this stage, the FTC is not required to prove, nor is this Court required to find, that the proposed transaction would violate the antitrust laws. *FTC v. Staples, Inc.* (“*Staples I*”), 970 F. Supp. 1066, 1070-71 (D.D.C. 1997) (Hogan, J.). “That adjudicatory function is vested in the FTC in the first instance.” *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) (quoting *FTC v. Food Town Stores, Inc.*, 539 F.2d at 1342).

This Court must decide only whether it would be “in the public interest” to enjoin the JV on a preliminary basis, under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). In crafting Section 13(b), “Congress further demonstrated its concern that injunctive relief be broadly available to the FTC by incorporating a unique ‘public interest’ standard . . . rather than the more stringent, traditional ‘equity’

standard for injunctive relief.” *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980) (internal citations and quotations omitted). This “unique” standard focuses the Court’s inquiry on the public’s interest in effective enforcement of the antitrust laws, and the FTC’s likelihood of success once it “has had an opportunity to adjudicate the merger’s legality in an administrative proceeding.” *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 35 (D.D.C. 2009); *see also Heinz*, 246 F.3d at 726; *Staples I*, 970 F. Supp. at 1071-72. The FTC satisfies Section 13(b)’s public interest standard where – as it has done here – the FTC marshals evidence that “rais[es] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance.” *Tenet*, 186 F.3d at 1051 (quotation omitted). Once the FTC has done so, “the public interest in effective enforcement of the antitrust laws” trumps any private interests and requires preliminary relief. *Sanford*, 2017 WL 10810016, at \*24 (quoting *Heinz*, 246 F.3d 726, *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981)).

## **II. The FTC is Likely to Prevail on the Merits at the Administrative Proceeding**

The FTC is likely to prevail at the merits proceeding. The proposed JV is presumptively illegal because it will dramatically increase concentration in a properly defined relevant antitrust market for SPRB coal, and the presumption of harm is bolstered by unanswerable evidence that current competition between Arch and Peabody benefits customers, as well as by detailed economic analysis showing a likelihood of anticompetitive effects.

### **A. The Proposed Joint Venture is Presumptively Illegal**

Courts evaluate the FTC’s likelihood of success on the merits using a burden-shifting framework. *Sanford*, 926 F.3d at 962; *see also Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008); *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 197 (D.D.C. 2018). The FTC establishes a presumption of illegality by showing that the transaction will lead to undue concentration in a relevant

antitrust market. *Sanford*, 926 F. 3d at 962. A relevant antitrust market has two dimensions: the relevant product market and the relevant geographic market. *See id.*; *see also CCC Holdings*, 605 F. Supp. 2d at 37; Horizontal Merger Guidelines § 4.<sup>43</sup> “[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence” of contrary evidence. *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 363 (1963).

To rebut the concentration-based presumption of harm, Defendants must present evidence showing that “‘the market-share statistics [give] an inaccurate account of the [merger’s] probable effects’ on competition.” *Heinz*, 246 F.3d at 715 (quoting *United States v. Citizens & Southern Nat’l Bank*, 422 U.S. 86, 120 (1975)). For example, market share statistics may not accurately reflect the competitive significance of suppliers if market shares are volatile and based on a small number of sales. *See, e.g., United States v. Baker Hughes Inc.*, 908 F.2d 981, 986 (D.C. Cir. 1990). Naturally, “[t]he more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully.” *Sanford*, 926 F. 3d at 963 (quoting *Baker Hughes*, 908 F.2d at 991). Here, Defendants will be unable to rebut the FTC’s compelling prima facie case, or undermine the FTC’s additional direct evidence of head-to-head competition and likely anticompetitive effects.

### **1. The Relevant Product Market is SPRB Coal**

A “relevant product market” is a term of art in antitrust law. *United States v. H&R Block*, 833 F. Supp. 2d 36, 50 (D.D.C. 2011); Merger Guidelines (PX9192) § 4 (“Market definition focuses . . . on customers’ ability and willingness to substitute away from one product to another in response to a price

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<sup>43</sup> When examining market definition—as well as concentration levels, competitive effects, and affirmative defenses such as entry—courts commonly rely on the Horizontal Merger Guidelines jointly issued by the U.S. Department of Justice and the Federal Trade Commission. The most recent version of the Horizontal Merger Guidelines was issued in 2010 (hereinafter, “Merger Guidelines,” attached as PX9192). *See, e.g., Sanford*, 926 F.3d at 964-66; *St. Alphonsus Med. Ctr. - Nampa, Inc. v. St. Luke’s Health Sys.*, 778 F.3d 775, 784 n.9 (9th Cir. 2015); *Sysco*, 113 F. Supp. 3d at 38.

increase or a corresponding non-price change.”). Nearly all commercial products have a range of closer and more distant substitutes, but the existence of functional substitutes does not determine the relevant antitrust market in which to assess whether a transaction is likely to lead to anticompetitive effects. For example, in *H&R Block*, the court enjoined a proposed merger between producers of “digital do-it-yourself” (“DDIY”) tax preparation software products. 833 F. Supp. 2d at 44. The defendants argued that widely available alternative tax return preparation technologies (e.g., the do-it-yourself “pen and paper method,” and assisted preparation involving a tax professional) performed the same function as DDIY products, and should be included in the relevant product market. *See id.* at 50-60. The court rejected this argument, holding that the availability of alternative technologies capable of producing the same output (a completed tax return) was not dispositive of the relevant market; instead “the key question” is whether the alternative technologies are “sufficiently close substitutes to constrain any anticompetitive [] pricing after the proposed merger.” *Id.* at 55; *see also* Merger Guidelines (PX9192) § 4.

To answer the “key question” identified by *H&R Block*, courts often identify the *narrowest* relevant market in which both merging parties sell their products, particularly when the relevant product could be said to compete with more distant substitutes in a broader market. *H&R Block*, 833 F. Supp. 2d at 59-60; *Sysco*, 113 F. Supp. 3d at 26; *Arch Coal*, 329 F. Supp. 2d at 120.<sup>44</sup> The intuition behind this approach is that broader markets can almost always be proposed that would meet the analytical criteria for a “relevant market,” but those broader markets are not informative regarding the competitive effects of a transaction. As an illustration, consider a transaction that merged all producers of green table grapes

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<sup>44</sup> “The analysis begins by examining the most narrowly-defined product or group of products sold by the merging firms to ascertain if the evidence and data support the conclusion that this product or group of products constitutes a relevant market. If not, the analysis shifts to the next broadest product grouping to test whether that is a relevant market. This process continues until a relevant market is identified.” *Arch Coal*, 329 F. Supp. 2d at 120.

into a single green-grape monopolist. Such a transaction might or might not lead to anticompetitive effects; this is an empirical question that depends on consumers' willingness to switch from green grapes to substitutes (red grapes, other fruits) in the event of a price increase on green-grapes. In resolving this question, the likely competitive consequences of the transaction are best examined by applying well-settled economic and legal tests to identify an antitrust market that consists of the *narrowest* group of products that a monopolist would have to control to profitably increase green grape prices. (This antitrust market may or may not include any products apart from green grapes.) It would not be helpful to attempt to assess the consequences of a green-grape merger in a market for "all food." While there is little doubt that an "all food" market would satisfy the analytical tests that identify a relevant antitrust market (in other words, little doubt that a monopolist of "all food" could profitably raise prices), an "all food" market is far too broad to represent the *appropriate* antitrust market in which to analyze a green-grape-producer merger. Some courts have historically invoked the term "submarkets" to describe the fact that products can compete in a narrower cognizable relevant antitrust market subsumed within a broader market; a showing of harm in the narrower market renders the merger unlawful, regardless of whether harm is shown in a broader market.<sup>45</sup>

Like the defendants in *H&R Block*, Defendants here suggest that their overwhelming share of the SPRB coal market is immaterial because SPRB coal competes to some extent with other fuels (renewables, natural gas, nuclear) that perform the same electricity-generating function as SPRB coal. Defendants miss the mark, because even if a broader "all energy" market may satisfy analytical tests that identify a market, it is black-letter antitrust law that the existence of a broader energy market cannot negate a narrower relevant antitrust market for SPRB coal. *See Staples I*, 970 F. Supp. at 1075 (Hogan,

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<sup>45</sup> *Arch Coal*, 329 F. Supp. 2d at 120 n.6 ("In *Brown Shoe*, the Supreme Court found that a relevant product market could exist within a larger market. Although courts have sometimes referred to this as a "submarket," the term "submarket" can be used interchangeably with "relevant product market" and the analysis is the same regardless of which term is used.").

J.) (explaining that “the mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes”); *Sysco*, 113 F. Supp. 3d at 26 (same); *see also Brown Shoe Co. v. United States*, 370 U.S. 294, 325-26 (1962); *United States v. General Dynamics Corp.*, 415 U.S. 486, 514 (1974) (Douglas, J., dissenting) (“the existence of an energy market is not inconsistent with and does not negate the existence of a narrower coal market”). As shown below, just as in *Arch Coal*, the SPRB coal market today satisfies all criteria for an appropriate relevant antitrust market: (1) the “practical indicia” identified by the Supreme Court in *Brown Shoe*, and (2) the hypothetical monopolist test outlined in the Merger Guidelines and widely accepted by courts and antitrust economists. *See, e.g., FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 47 (D.D.C. 2018); *Staples II*, 190 F. Supp. 3d at 118-122; *Sysco*, 113 F. Supp. 3d at 27, 33-34.

**a. The Brown Shoe Factors Show SPRB Coal is a Relevant Product Market**

In *Brown Shoe*, the Supreme Court explained that an antitrust product market may be identified by “industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.” 370 U.S. at 325. The *Brown Shoe* “‘practical indicia’ of market boundaries may be viewed as evidentiary proxies for proof of substitutability and cross-elasticities of supply and demand.” *H&R Block*, 833 F. Supp. 2d at 51 (citing *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986) (Bork, J.)). These factors demonstrate that SPRB coal is a relevant product market.

**(1) Industry or Public Recognition.**

[REDACTED]

46

[REDACTED]

[REDACTED] Industry analysts [REDACTED] discuss SPRB-specific supply and demand dynamics and make price predictions for SPRB coal separately from analysis of other coals, natural gas, and other fuels.<sup>48</sup> Government bodies also recognize the differences between coal from different basins; the U.S. Energy Information Administration (“EIA”) tracks prices for PRB 8800 BTU/lb coal, which is a standard heat content found in SPRB (not NPRB) coal, separately from price data regarding other coals or other fuels, such as natural gas. *See* PX9026.

(2) *Peculiar Characteristics and Uses.* As noted in Section II, SPRB coal has particular characteristics that distinguish it from other coals, including distinctive heat content, and relatively low sulfur, sodium, and ash content.<sup>49</sup> As the *Arch Coal* court explained, “[t]he SPRB provides a critical source of plentiful, inexpensive coal having a strong combination of these important characteristics.”

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[REDACTED]

<sup>47</sup> [REDACTED] *E.g.*, [REDACTED]

<sup>48</sup> *See, e.g.*, [REDACTED]

<sup>49</sup> [REDACTED]



*Arch Coal*, 329 F. Supp. 2d at 118. As noted above, SPRB coal's relatively low sulfur content is desirable for coal plants operating under environmental regulations. SPRB coal's relatively low sodium content compared to coals in other basins (e.g., NPRB coal)<sup>50</sup> is attractive to customers because crystalized pieces of sodium can form in the boiler ("slagging"), causing operational difficulty or even knocking the unit offline entirely.<sup>51</sup> SPRB coal's low ash content is attractive to customers because higher ash coal can "plug" the boilers, require customers to remove ash from the flue gas stream, and cause erosion.<sup>52</sup> Moreover, the more ash a coal contains, the less energy a power producer will get from the same amount of coal. [REDACTED]. As discussed below in Section II.A.1.a.(4), power producers that rely on SPRB coal have configured their coal units specifically for SPRB coal's characteristics.

SPRB coal also differs from non-coal fuels. Power generation units designed to burn coal simply cannot generate power from solar energy, wind, hydro power, or nuclear fuels.<sup>53</sup> And coal-fired generation units cannot readily be converted to burn non-coal fuels, such as natural gas: [REDACTED]

[REDACTED]

[REDACTED]

SPRB coal is valued by power producers, and by RTOs/ISOs, because, unlike renewable fuels

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<sup>50</sup> [REDACTED]  
[REDACTED] PX7008 ¶ 12 (Every would not switch to NPRB coal "because it typically has a higher sulfur and/or sodium content, than coal from the SPRB") [REDACTED]

<sup>51</sup> [REDACTED] F [REDACTED]  
[REDACTED]

<sup>52</sup> [REDACTED]

<sup>53</sup> See, e.g., [REDACTED]

such as solar, wind, or hydro power, SPRB coal can be stockpiled at the power producers' plants and provides power producers with a reliable around-the-clock source of power.<sup>54</sup> [REDACTED]

[REDACTED] SPRB coal is not only more reliable than natural gas in many regions,<sup>55</sup> it allows power producers to provide more predictable pricing to their customers, as SPRB coal is not subject to the dramatic fluctuations in supply and demand that make natural gas pricing so volatile.<sup>56</sup> For these reasons, among others, natural gas and renewable fuels are not close substitutes for SPRB coal from the point of view of power producers who have invested in SPRB coal units.<sup>57</sup>

(3) *Specialized Vendors and Unique Production Facilities.* SPRB coal is supplied only by the coal producers operating in the SPRB. Due to geological factors, no other coal vendors can produce

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<sup>54</sup> PX7008 ¶ 10; PX6015 at 137 (“Coal is a generator that when it’s online you expect it to stay online for extended periods of time.”).

<sup>55</sup> PX7008 ¶ 9 (“When temperatures drop to near freezing (32 degrees), natural gas is often curtailed and thus is not a reliable fuel alternative for power production.”); [REDACTED]

[REDACTED] PX6015 at 148 (“Similar to a transmission grid where it’s built to move a certain amount of capacity or has a certain amount of capacity to move the electrons, it’s the same way with the gas infrastructure. There are pipelines that have a certain amount of capacity to move the gas molecules, and when it’s basically using all of that capacity, it impacts our ability to get natural gas.”).

<sup>56</sup> See, e.g., PX9120-004 (“Natural gas was, and still is, more expensive and much more volatile in terms of fuel price than coal.”); [REDACTED]

<sup>57</sup> [REDACTED] PX7008 -012 (“Substituting natural gas, renewable energy, or purchased power from the electric grid for coal simply is not a viable option for two reasons: (1) insufficient reliability and (2) infrastructure constraints”); see also *id.* at ¶ 8 (“With limited exceptions, Evergy’s generating stations are not constructed in a way that would allow Evergy to switch fuels from coal to burning natural gas.”); *id.* at ¶ 7 (“Maintaining coal capacity is essential in ensuring that SPP has reliable power supplies [REDACTED]”)

coal with the “strong combination of important characteristics,” *Arch Coal*, 329 F. Supp. 2d at 118, found in SPRB coal. *See supra* Section II.A.1.a.(2). Further, SPRB coal is extracted from surface mines that permit far less expensive coal production than the underground mines found in other U.S. coal basins. *See id.*; *Arch Coal*, 329 F. Supp. 2d at 117. Moreover, SPRB coal vendors’ production facilities—*i.e.*, coal mines and related processing facilities—are entirely different from facilities related to the production of natural gas or other fuels.

(4) ***Distinct Customers.*** Nearly all SPRB coal is purchased by power producers who operate power plants containing one or more SPRB coal units. (They may also operate other power plants that do not burn SPRB coal.) These SPRB coal units have typically been configured for the distinct characteristics—including sulfur, sodium, ash, and heat content—of SPRB coal,<sup>58</sup> and cannot easily be re-configured to use other coal types or blends.<sup>59</sup> As described above, the owners of coal units configured to burn SPRB coal cannot easily switch from SPRB coal to non-SPRB coal,<sup>60</sup> nor can they switch to non-coal fuel sources without extremely expensive alterations to their existing infrastructure.

[REDACTED]

(5) ***Distinct Prices.*** SPRB coal prices are distinct from the prices of other fuels. As noted above, SPRB coal prices are tracked separately by industry participants, and have for years provided the lowest mine-mouth prices of any coal region in the United States. SPRB coal prices are even farther

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<sup>58</sup> Indeed, most power plants prefer a sufficiently narrow BTU range that they accept only specific types of SPRB coal. For example, Consumers Energy coal plants burn 8800 BTU/lb coal. PX6032 at 100. *See also* [REDACTED]

<sup>59</sup> [REDACTED]

<sup>60</sup> [REDACTED]

afield from the prices of non-coal fuels, which have entirely different production costs and distinct supply and demand influences. For example, the price of natural gas is driven by factors largely unrelated to coal pricing: natural gas is a byproduct of crude oil extraction, so significant amounts of supply are impacted by dynamics in the oil markets unrelated to electricity generation.<sup>61</sup> On the demand side, natural gas prices are also influenced by demand for natural gas used to heat homes in winter. PX9188; PX9189. Moreover, SPRB coal prices are determined through RFPs and follow-on negotiations between SPRB suppliers and customers that do not involve natural gas and renewable energy suppliers.<sup>62</sup>

(6) *Sensitivity to Price Changes.* As discussed further in Section II.A.1.b.(1) below, demand for SPRB coal is relatively “inelastic,” meaning that SPRB-coal reliant power producers are relatively insensitive to price changes and thus less likely to switch to other fuel sources in response to an increase in SPRB coal prices. This feature, which is also central to the “hypothetical monopolist test” discussed in the next section, supports a finding that SPRB coal is a relevant antitrust market. *See Staples I*, 970 F. Supp. at 1075-78 (analyzing “*Brown Shoe*’s ‘sensitivity to price changes’ factor” and finding that the FTC made “a compelling showing that a small but significant increase in Staples’ prices will not cause a significant number of consumers to turn to non-superstore alternatives for purchasing their consumable office supplies”).

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<sup>61</sup>

[REDACTED] Crude oil is not a major source of electrical power.

<sup>62</sup> PX7002 ¶ 5; PX6021 at 145-146 (OPPD does not invite suppliers from “coal basins beside the SPRB,” nor natural gas suppliers, to respond to RFPs); *id.* at 156 (OPPD does not invite renewable energy suppliers to participate in RFPs with “SPRB coal producers who supply SPRB coal”); PX6015 at 209-10 (when Evergy issues an RFP for coal, it does not invite natural gas suppliers); [REDACTED]

**b. SPRB Coal Satisfies the Hypothetical Monopolist Test**

The other principal method courts use to define the relevant market is the “hypothetical monopolist test,” outlined in the Merger Guidelines and case law. *H&R Block*, 833 F. Supp. 2d at 51-52; *Sanford*, 926 F.3d at 963; *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 (3d Cir. 2016); *Sysco*, 113 F. Supp. 3d at 33-34. Like the *Brown Shoe* factors, the “hypothetical monopolist test” distinguishes the close substitutes for the merging parties’ products from more distant substitutes. It does so by examining whether a hypothetical monopolist controlling a group of products could profitably impose a small but significant and non-transitory increase in price (a “SSNIP”)—typically 5%—on at least one product in the market. A monopolist would do so unless enough customers would switch to products outside the market to make such a price increase unprofitable. *See* Merger Guidelines (PX9192) § 4.1.1; *Sanford*, 926 F.3d at 963; *H&R Block*, 833 F. Supp. 2d at 51-52. If the hypothetical monopolist could profitably impose a SSNIP on at least one product in the candidate market, that market is a relevant antitrust market. Here, quantitative analyses, customer testimony, and natural experiments show that a hypothetical monopolist of SPRB coal could profitably impose a SSNIP.

***(1) Quantitative Analysis of Demand Elasticity Shows SPRB Coal Satisfies the Hypothetical Monopolist Test***

Dr. Nicholas Hill, the FTC’s economic expert, implemented the hypothetical monopolist test by (1) using multiple data sources to estimate the elasticity of demand for SPRB coal, and (2) analyzing whether the elasticity of demand for SPRB coal would make it profitable for a hypothetical monopolist of SPRB coal to impose a SSNIP. This is a standard and well-accepted method of defining a market that has routinely been found persuasive by courts. *See, e.g., Tronox*, 332 F. Supp. 3d at 204-206.

The elasticity of demand for a product measures the extent to which customers would substitute away from a product in response to a price increase, and thus determines whether a monopolist that imposed a price increase would lose so many sales that the price increase would prove unprofitable.

Merger Guidelines (PX9192) § 4.1.3. Dr. Hill estimated SPRB coal's actual elasticity of demand using multiple data sources relied upon by Defendants and by power producers, including: [REDACTED] (2) monthly EIA data on SPRB coal shipments from 2009 to 2018; (3) data on the dispatch of SPRB coal power plants; and (4) "PROMOD," a leading commercially available electricity market simulation model relied on by power producers to model coal burn and other aspects of power generation.<sup>63</sup> See PX8001 (Hill Report) ¶¶ 122-146. Each of these data analyses revealed that SPRB coal demand is considerably less elastic (that is, more inelastic) than would be necessary to render a price increase unprofitable, which means that a monopolist of SPRB coal could profitably impose a SSNIP. *Id.* Dr. Hill's analyses account for factors including natural gas prices, other non-coal fuel prices, and the closure of coal-fired plants.<sup>64</sup>

Dr. Hill's conclusion that a 5% price increase in the mine-mouth price of SPRB coal would lead to only a modest reduction in SPRB coal purchases is unsurprising, given real-world factors that suggest power producers' demand should be relatively inelastic. First, due to high transportation costs, the mine-mouth price of SPRB coal is only a small part of the *delivered* price paid by power producers.<sup>65</sup> As Dr. Hill's analysis demonstrates, a 5% increase in the mine-mouth price of SPRB coal would increase the delivered price by only [REDACTED] on average, and the average SPRB coal-fired unit's marginal cost by at most [REDACTED]. PX8001 (Hill Report) ¶¶ 118-121.

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<sup>63</sup> PX6015 at 150-152 [REDACTED] See generally *United States v. Duke Energy Corp.*, 981 F. Supp. 2d 435, 443 (M.D.N.C. 2013) (describing a power company's use of PROMOD "to forecast near-term fuel needs and long-term future additions to capacity") (internal quotation omitted). In addition to power producers who rely on it in the ordinary course of business, PROMOD has also been relied on by analysts performing government-sponsored research. PX9037-035 note z (National Energy Technology Laboratory simulations used PROMOD).

<sup>64</sup> In particular, [REDACTED] PX8001 (Hill Report) ¶ 130.

<sup>65</sup> See, e.g., PX6015 at 135-136 (the commodity price of coal accounts for 30-35% of the delivered cost); [REDACTED]



Second, power producers are often able to pass on their fuel costs to their rate-paying customers. Many SPRB coal-buying power producers are regulated by state and local utility commissions that employ rate-setting formulas intended to cover the costs that the power producers reasonably incurred,<sup>66</sup> *including* fuel costs. [REDACTED] Under these formulas, when the costs of fuel such as coal and natural gas increase (or decrease), utilities often pass the increase (or decrease) through to ratepayers through a mechanism known as a “fuel adjustment clause.”<sup>67</sup> Thus, while regulated utilities unquestionably attempt to source SPRB coal at competitive prices to ensure they are delivering value to their rate-paying customers, it is those customers (households and business who pay for electric power) who bear the brunt of increases in SPRB coal prices. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

## ***(2) Customer Testimony and Natural Experiments Confirm Dr. Hill’s Conclusions***

Major SPRB customers attest that they would not change their purchasing behavior in the event of a SSNIP. Evergy (owner of Kansas City Power & Light) testifies that “a 10% increase in *delivered*

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<sup>66</sup> See, e.g., PX9181-004 (rate setting “provid[es] a reasonable opportunity to earn a rate of return that recovers costs that were prudently incurred and necessary for the provision of safe and reliable utility services . . .”).

<sup>67</sup> “Automatic fuel adjustment clauses are widely-accepted rate making tools utilized to allow a utility to recoup fluctuating fuel costs on an ongoing basis.” *Daily Advertiser v. Trans-La, a Div. of Atmos Energy Corp.*, 612 So.2d 7, 22 (La. 1993). See also [REDACTED]; PX9121-036 (“Evergy Kansas Central, Evergy Metro and Evergy Missouri West have fuel recovery mechanisms in their Kansas and Missouri jurisdictions, as applicable, that allow them to defer and subsequently recover or refund, through customer rates, substantially all of the variance in net energy costs from the amount set in base rates without a general rate case proceeding.”).

cost would not substantially affect the coal purchases that Evergy would need to make.”<sup>68</sup> Likewise,

[REDACTED]

[REDACTED].<sup>69</sup> Moreover, a SSNIP imposed on power producers would have a direct impact on their rate-paying customers: [REDACTED]

[REDACTED]

[REDACTED]<sup>70</sup>

[REDACTED] confirms power producers’ vulnerability to a SSNIP both through testimony, and through its real-world actions in a natural experiment. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>68</sup> PX7008 ¶ 19 (emphasis added).

[REDACTED]

<sup>69</sup> [REDACTED]

<sup>70</sup> [REDACTED] *see also* [REDACTED]

<sup>71</sup> [REDACTED]

[REDACTED]



[REDACTED]<sup>72</sup> [REDACTED],<sup>73</sup> [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>74</sup>

## 2. The Relevant Geographic Market is the SPRB

The relevant geographic market is defined using the same principles and analytic tools as the relevant product market. *See* Merger Guidelines (PX9192) § 4 (“the same principles apply to geographic market definition”). In cases where the customers receive goods at the suppliers’ locations, as with SPRB coal, the relevant geographic market is usually defined based on the locations of suppliers. Merger Guidelines (PX9192) § 4.2.1. All SPRB coal suppliers are located in the SPRB region and all (or nearly all) SPRB coal sales are made in the SPRB. As shown in the previous section, a hypothetical monopolist controlling all sales of SPRB coal made in the SPRB could profitably impose a SSNIP. Thus, there is a relevant geographic market coextensive with the relevant product market: “because the relevant product market is defined in geographic terms as SPRB coal, which is produced and sold in that region, the product market and geographic market analysis are really the same.” *Arch Coal*, 329 F. Supp. 2d at 123; *see also id.* (“[t]he parties agree that the relevant geographic market has the same scope as the relevant product market—the SPRB”).

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<sup>72</sup> [REDACTED]

<sup>73</sup> [REDACTED]

<sup>74</sup> *See* [REDACTED]

### **3. Market Shares and Concentration Levels Far Exceed a Presumption of Illegality**

Defendants' combined market share substantially exceeds the harm threshold established by the Supreme Court, which is exceeded if a transaction produces a single entity controlling 30% of the relevant market. *See Philadelphia Nat. Bank*, 374 U.S. at 364 (“Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.”); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 166 (D.D.C. 2000) (“In *Philadelphia National Bank*, the Court specifically held that a post-merger market share of thirty percent triggers the presumption.”). The JV would far exceed that threshold, creating an SPRB coal behemoth controlling nearly 70% of production, and over 60% of all reserves.

In addition to market shares, courts look to the change in market concentration caused by the proposed transaction, utilizing a metric known as the Herfindahl-Hirshman Index (“HHI”). *See, e.g., Heinz*, 246 F.3d at 716 (“[s]ufficiently large HHI figures establish the FTC’s prima facie case that a merger is anti-competitive”); *Penn State Hershey*, 838 F.3d at 346-47 (“The Government can establish a prima facie case simply by showing a high market concentration based on HHI numbers.”). The HHI calculates market concentration by summing the squares of each market participant’s individual market share. *See, e.g., Penn State Hershey*, 838 F.3d at 346; *Sysco*, 113 F. Supp. 3d at 52. A joint venture is presumptively anticompetitive if it increases the HHI by more than 200 points and results in a market with a post-acquisition HHI exceeding 2,500, which is deemed a “highly concentrated market.” *Penn State Hershey*, 838 F.3d at 347; *St. Alphonsus*, 778 F.3d at 786; *Sysco*, 113 F. Supp. 3d at 52-53.

Market Shares and Concentration				
Supplier	2017 Volume	2018 Volume	2019 Volume	2019 Reserves
Peabody Energy				
Arch Coal				
NTEC				
FM Coal				
Peter Kiewit				
Western Fuels				
Black Hills				
<b>JV Combined Share</b>	<b>66%</b>	<b>68%</b>	<b>68%</b>	<b>61%</b>
HHI without the JV	2,665	2,698	2,707	2,702
Increase in HHI	2,099	2,189	2,258	1,493
HHI with the JV	4,764	4,888	4,965	4,195

As shown in the table above, based on either production or reserves, the JV blows past these thresholds, and is presumptively illegal by a wide margin.<sup>75</sup> Concentration in the market for SPRB coal has increased significantly since *Arch Coal*, where the court found an existing market concentration of only 2054 (measured by reserves) and an HHI increase of only *49-224 points*,<sup>76</sup> yielding a post-merger HHI approximately half the level this transaction would create. The dramatically higher concentration statistics in this case match or exceed the HHIs in other proposed combinations that courts have enjoined in the past decade,<sup>77</sup> and just as in those cases, the HHIs here create a presumption of anticompetitive effects. Moreover, the stability of production shares over time lends added weight to the market share figures, strengthening the presumption of illegality. *See* Merger Guidelines (PX9192) § 5.3.

<sup>75</sup> PX8001 (Hill Report) ¶ 155, Figure 22 (production-based market shares and concentration); Appendix G Figure 64 (market shares and concentration based on 2019 recoverable reserves).

<sup>76</sup> *Arch Coal*, 329 F. Supp. 2d at 127-29 (considering different measures of concentration based on reserves, production, and capacity measures, which resulted in a range of HHI delta).

<sup>77</sup> *See, e.g., H&R Block*, 833 F. Supp. 2d at 72 (post-transaction HHI of 4,691); *Tronox*, 332 F. Supp. 3d at 207 (post-transaction HHI of 3,046); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 568 (6th Cir. 2014) (post-transaction HHI of 4,391); *FTC v. Advocate Health Care* 2017 WL 1022015, at \*7 (post-transaction HHI of 3,943).

**4. Head-to-Head Competition and a Widely Accepted Economic Model Bolster the Strong Presumption of Illegality**

Direct evidence that the JV will eliminate valuable competition strengthens the presumption of harm arising from the Defendants’ enormous combined share of the relevant market. *See Sysco*, 113 F. Supp. 3d at 71-72 (“the FTC has bolstered its prima facie case with additional proof that the merger would harm competition in [the relevant] markets”); *United States v. Aetna, Inc.*, 240 F. Supp. 3d 1, 74 (D.D.C. 2017) (“[i]n further support of that presumption, there is clear evidence that the proposed merger would eliminate valuable head-to-head competition between two close rivals”). Moreover, the widely accepted Cournot model quantifies the JV’s enormously anticompetitive consequences.

**a. The JV Would Eliminate Head-to-Head Competition between Close Competitors**

“Mergers that eliminate head-to-head competition between close competitors often result in a lessening of competition.” *Staples II*, 190 F. Supp. 3d.<sup>78</sup> It is intuitively obvious that a JV combining frequent head-to-head competitors can give rise to anticompetitive effects, as it “prevents buyers from playing those sellers off against each other in negotiations. This alone can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger.” Merger Guidelines (PX9192) § 6.2. Here, data, documents, and testimony confirm that Peabody and Arch—the two largest firms in the relevant market—are close competitors who routinely compete head-to-head to win business, that this competition has benefited consumers, and that the JV would lessen competition. *See, e.g., Staples II*, 190 F. Supp. 3 at 131 (“Plaintiffs therefore highlight additional evidence, including

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<sup>78</sup> *See also Sysco*, 113 F. Supp. 3d at 61; *Heinz*, 246 F.3d at 717–19 (eliminating competition between second- and third-largest competitors would weaken competition); *Swedish Match*, 131 F. Supp. 2d at 169 (eliminating one of defendant’s “primary direct competitors” likely to yield price effects); *Staples I*, 970 F. Supp. at 1083 (finding anticompetitive effects where the “merger would eliminate significant head-to-head competition between the two lowest cost and lowest priced firms in the ... market.”).

bidding data [], ordinary course documents, and fact-witness testimony. This additional evidence substantiates Plaintiffs' claim that this merger, if consummated, would result in a lessening of competition.”).

***(1) Peabody and Arch compete head-to-head in the RFP processes through which power producers buy the bulk of their coal, and routinely undercut one another***

Power producers commonly issue RFPs to force suppliers to offer both lower prices<sup>79</sup> and better non-price terms,<sup>80</sup> including provisions that allow flexibility on timing or volumes.<sup>81</sup> These RFPs are limited to SPRB coal providers<sup>82</sup> and “[REDACTED] a power producer can use to get the lowest price or a better deal on coal supply is [REDACTED] [REDACTED]. Indeed, some SPRB coal customers send RFPs only to Arch, Peabody, and one or two other SPRB producers.<sup>83</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>79</sup> [REDACTED]

<sup>80</sup> [REDACTED]

<sup>81</sup> PX6024 at 135 (competitive RFP process has been a useful tool in achieving volume flexibility for Alliant). *See also* [REDACTED]

<sup>82</sup> PX6015 at 209-210 (when Evergy issues an RFP for SPRB coal, it does not invite natural gas suppliers); PX6021 at 156 (when OPPD issues an RFP for SPRB coal, it does not invite renewable energy suppliers to bid); [REDACTED]

<sup>83</sup> For example [REDACTED]

*See also* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] EIA shipment data shows that when Arch and Peabody lose share at a customer, they primarily lose it to one another, consistent with their market shares and closeness as competitive alternatives. PX8001 (Hill Report) ¶¶ 174-178. Courts have found that similar evidence of RFP wins and losses convincingly shows close competition. *See, e.g., Staples II*, 190 F. Supp. 3d at 132; *Sysco*, 113 F. Supp. 3d at 62-4.

Here, the Court should likewise credit systematic evidence of competition for RFPs, all the more so because it is bolstered by [REDACTED]

[REDACTED] To provide only a few examples:<sup>84</sup>

- [REDACTED]
- [REDACTED]

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<sup>84</sup> [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]  
In a  
OPPD RFP event for SPRB coal to be delivered in 2020 and 2022, Peabody ranked first and Arch second, and the bid was [REDACTED] given to Peabody. PX6021 at 168, 186.<sup>85</sup>
- [REDACTED]

*(2) Competition has benefited customers*

[REDACTED]

[REDACTED]

[REDACTED] But customers have benefited: indeed, the Court does not need to draw any inferences to establish that Defendants' competition has accrued to the benefit of power producers, because multiple SPRB coal customers attest that they have "benefitted from head-to-head competition between Peabody and Arch."<sup>86</sup> Absent the JV, [REDACTED]

<sup>85</sup> [REDACTED]

<sup>86</sup> PX7008 ¶ 15; [REDACTED] *see also* PX7002 ¶ 9 (LCRA).

[REDACTED]

[REDACTED]

[REDACTED] On the other hand, if the JV is allowed to proceed, the two largest SPRB coal suppliers will stop competing with each other immediately, and raise prices and worsen non-price terms at customers' expense.

**b. Economic Modeling Shows Consumers Will Suffer Significant Financial Harm**

In further support of the FTC's presumption of harm, Dr. Hill simulated the effects of the JV using the Cournot model, "a 'fundamental economic' tool used to analyze oligopolies" and transactions that increase market concentration. *Tronox*, 332 F. Supp. 3d at 211. Dr. Hill employed assumptions that are extremely favorable to Defendants, such as assuming that Defendants will achieve *far greater* cost savings than even Defendants' own expert now claims they will achieve, and that *all* cost savings will be passed through to consumers.<sup>88</sup> Even with these conservative assumptions, Dr. Hill's Cournot analysis demonstrates that the proposed JV will result in significantly higher prices,<sup>89</sup> [REDACTED]

[REDACTED].

Dr. Hill's Cournot model accounts for projections that SPRB coal demand will decline, and also for the possibility that the other SPRB suppliers would increase output in response to the JV's anticompetitive price increases. Again, this assumption is highly conservative in Defendants' favor because, in fact, other SPRB suppliers are either constrained in their ability to increase output or lack the incentive to do so, as discussed below in Section II.B.3. Thus, the actual harm the JV would inflict likely

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<sup>87</sup> [REDACTED]

<sup>88</sup> PX8001 (Hill Report) ¶¶ 179, 191-201, Figures 30-34. Many of Defendants' supposed efficiencies are not cognizable, as discussed *infra* at Section II.B.4.

<sup>89</sup> "Higher prices" refers to prices higher than would exist absent the JV. *See Staples I*, 970 F. Supp. at 1083 n.14 ("when the Court discusses 'raising' prices it is also with respect to raising prices with respect to where prices would have been absent the merger, not actually an increase from present price levels").



exceeds Dr. Hill's estimates.

**B. Defendants Cannot Rebut the Strong Presumption of Illegality**

The FTC's market concentration evidence, standing alone, creates a compelling *prima facie* case and a strong presumption of illegality. The burden therefore shifts to Defendants to demonstrate that the high market share figures are not predictive of the JV's likely effects on competition. *Heinz*, 246 F.3d at 715. "The more compelling the *prima facie* case, the more evidence the defendant must present to rebut it successfully." *Sanford*, 926 F. 3d at 963 (quoting *Baker Hughes*, 908 F.2d at 991).

Defendants cannot rebut the strong presumption of illegality by pointing to declining demand for SPRB coal, or an increase in the availability of alternative fuels, because the FTC's *prima facie* case already takes these circumstances into account. Moreover, the FTC has demonstrated that the presumption of illegality is well-founded through robust evidence of head-to-head competition, and Dr. Hill's quantification of harm based on the well-accepted Cournot model.

In addition, Defendants cannot rebut the presumption because entry and expansion in SPRB coal are unlikely, and because their claimed efficiencies are not substantiated, not specific to the JV, or not likely to be passed on to customers in any magnitude that could offset the harm from the JV.

**1. Declining Demand for SPRB Coal Does Not Rebut the FTC's Prima Facie Case**

There is no dispute that total demand for SPRB coal has generally declined over the past decade, although much less so than demand for other types of coal.<sup>90</sup> There is also no dispute that SPRB coal suppliers currently face challenges such as low natural gas prices and government policies and public trends that encourage lower-carbon energy sources. Such circumstances neither rebut the FTC's *prima facie* case, nor suggest that the JV will refrain from anticompetitive price increases. All of the FTC's

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<sup>90</sup> PX8001 (Hill Report) ¶ 64 and Figure 9. Notably, [REDACTED]

proof of market shares and of the critical importance of head-to-head competition between Peabody and Arch are based on the past few years, and thus necessarily take into account current trends and policies and declining demand for SPRB coal. Dr. Hill's expert analysis also accounts for these factors.

None of the challenges faced by SPRB coal suppliers suggest that the JV will be unable to raise prices; indeed, faced with current challenges, Peabody has repeatedly and recently publicly committed to a "value over volume" strategy, which prioritizes high prices over expanding production, informing its investors in February 2019 that Peabody's "U.S. thermal operations" "continue to emphasize value over volume in the face of reduced coal demand,"<sup>91</sup> in order to return cash to shareholders.<sup>92</sup> Pursuant to this strategy, Peabody has taken steps to cut production in pursuit of higher margins—in January 2019, CEO Glenn Kellow committed Peabody to reducing SPRB production because "at current spot pricing levels, we are not generating margins we find acceptable for our investors."<sup>93</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>91</sup> PX9104-007 (emphasis added); *see also* PX9098-004 ("New Peabody isn't about volumes but about margins and return.").

<sup>92</sup> Peabody's 2019 10-K filing likewise vowed that its "focus" is on "continuing to emphasize value over volume, particularly in the US thermal operations, and maintaining our commitment to returning cash to shareholders." PX9062-005. *See also, e.g.,* [REDACTED]

<sup>93</sup> PX9104-007 (In February 2019, Peabody informed investors "[a]cross our U.S. thermal operations, we're targeting lower 2019 sales volumes relative to 2018. In the PRB, we are reducing planned production from our flagship North Antelope Rochelle mine by 10 million tons. At current market levels, we are not generating margins we find acceptable for our investors.").

<sup>94</sup> [REDACTED]



Instead, competition *among SPRB producers* is the main constraint on prices.

**2. More Distant Competition from non-SPRB Fuels Does Not Rebut the FTC’s Prima Facie Case**

Defendants appear to suggest that current competition between Peabody and Arch has no impact on SPRB coal prices, due to electricity markets that feature competition between *electricity producers*—i.e., Defendants’ customers—using multiple fuel sources. *See* ECF No. 54 (Peabody Answer) at 1-2. But, as demonstrated above, these RTO/ISO electricity markets already operate today and do not constrain the price of SPRB coal as closely as direct competition among SPRB coal suppliers. For the same reasons that it is not appropriate to include competition from non-SPRB fuel sources within the relevant product market, downstream electricity market competition from power producers using non-SPRB fuel sources is not sufficient to rebut the FTC’s *prima facie* case, nor to demonstrate that eliminating close competition between Peabody and Arch will not harm consumers.

**3. Entry Will Not Be Timely, Likely, or Sufficient to Counter the Harm to Competition**

Defendants “bear the burden of demonstrating the ability of other [firms] to ‘fill the competitive void’ that will result” from the JV. *Sysco*, 113 F. Supp. 3d at 80 (citing *Swedish Match*, 131 F. Supp. 2d at 169). Defendants cannot meet that burden here. New entry into SPRB coal is highly improbable, and the current SPRB suppliers lack the ability and incentive to expand sufficiently to “fill the competition gap that would be left in the wake” of the JV. *Staples II*, 190 F Supp. 3d at 136. Indeed, Defendants themselves admit in their Answers that entry of new SPRB coal suppliers is “unlikely.” ECF No. 54 (Peabody Answer) ¶ 5; ECF No. 57 (Arch Answer) ¶ 5 (same).

“The expansion of current competitors is regarded as ‘essentially equivalent to new entry,’ and is

therefore evaluated according to the same criteria.” *Wilhelmsen*, 341 F. Supp. 3d at 67 (quoting *CCC Holdings*, 605 F. Supp. 2d at 57). Defendants are unable to meet their burden of showing expansion of existing SPRB competitors that will be timely, likely, and sufficient to counteract the harms caused by the JV. Entry or expansion “of competitors into a market can offset anticompetitive effects . . . only if the entrance is ‘timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.’” *Sanford*, 926 F.3d at 965 (quoting Merger Guidelines § 9).<sup>97</sup> The “relevant timeframe” in which expansion must deter or counteract such harm is “two to three years.” *Wilhelmsen*, 341 F. Supp. 3d at 67 (quoting *Staples II*, 190 F. Supp. 3d at 133).

Such timely expansion is unlikely here. The next largest SPRB producer—although still only one-fifth the size of the JV—is NTEC, [REDACTED]. NTEC’s largest mine, Antelope, is [REDACTED]

[REDACTED].<sup>98</sup> [REDACTED]  
[REDACTED]

[REDACTED]<sup>99</sup> Indeed, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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<sup>97</sup> See also *Sysco*, 113 F. Supp. 3d at 80 (“The prospect of entry into the relevant market alleviates concerns about adverse competitive effects “only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers.”) (quoting Merger Guidelines § 9).

<sup>98</sup> [REDACTED]  
[REDACTED]

<sup>99</sup> [REDACTED]  
[REDACTED]

FM Coal's two mines, Belle Ayr and Eagle Butte, are each smaller than NTEC's Antelope,<sup>100</sup> as is Kiewit's Buckskin mine.<sup>101</sup> These mines are unable to replace the close competition that the JV would eliminate, [REDACTED]

[REDACTED]<sup>102</sup> [REDACTED]

[REDACTED]. It is even less likely that [REDACTED] Black Hills' Wyodak [REDACTED] could replace any meaningful portion of the competition the JV will destroy.<sup>103</sup>

Indeed, [REDACTED]

And [REDACTED]

#### 4. Defendants' Efficiencies Defense Fails

Where, as here, the market is highly concentrated with high barriers to entry, Defendants "must provide 'proof of extraordinary efficiencies' in order to rebut the presumption of anticompetitive

<sup>100</sup> See PX8001 (Hill Report) Figure 37 (2018 production volumes); PX8001 (Hill Report) ¶ 37, Figure 3 (2019) (explaining that these mines were closed for a portion of 2019).

<sup>101</sup> Buckskin supplied only [REDACTED] in 2019, PX8001 (Hill Report) ¶ 37, Figure 3 (2019), and [REDACTED] 2020 business plan projects production of [REDACTED] in 2020. [REDACTED]

<sup>102</sup> See PX8001 (Hill Report) ¶ 38, Figure 4; [REDACTED]

<sup>103</sup> [REDACTED] Wyodak [REDACTED] produce coal with high sulfur content and a heat content so low (around 8000 BTU/lb), that it cannot be used by many power producers. [REDACTED]; PX7012 ¶¶ 3, 6; [REDACTED]

effects.” *CCC Holdings*, 605 F. Supp. 2d at 72 (quoting *Heinz*, 246 F.3d at 720). Moreover, “[c]ourts have ‘rarely, if ever, denied a preliminary injunction solely based on the likely efficiencies.’” *Tronox*, 332 F. Supp. 3d at 215 (quoting *Sysco*, 113 F. Supp. 3d at 82). As detailed below, Defendants have failed to demonstrate that their claimed efficiencies meet the required legal standards for (1) independent verifiability; (2) merger-specificity; and (3) consumer pass-through.

A defendant raising an efficiencies defense must show that each asserted efficiency is cognizable. Not all cost savings associated with a business transaction qualify as cognizable efficiencies for antitrust purposes. To be cognizable, claimed efficiencies “must be independently verifiable” and merger-specific, meaning that they represent actual cost savings that “cannot be achieved by either company alone.” *Sanford*, 926 F.3d at 965 (quoting *Heinz*, 246 F.3d at 721-22); *see also Tronox*, 332 F. Supp. 3d at 215; *H&R Block*, 833 F. Supp. 2d at 89; Merger Guidelines (PX9192) §10. Further, the “claimed efficiencies must be passed through to consumers,” so that customers avoid the harms that the JV would otherwise impose. *Sanford*, 2017 WL 10810016, at \*27; *see also* PX9192 (Merger Guidelines) § 10; *Sysco*, 113 F. Supp. 3d at 82 (“Defendants must also demonstrate that their claimed efficiencies would benefit customers.”). Defendants’ claimed efficiencies fail each of these requirements.

First, Defendants fail the independent verifiability requirement because many of their claims are either speculative or otherwise do not permit “the estimate of the predicted savings [to] be reasonably verifiable by an independent party.” *H&R Block*, 833 F. Supp. 2d at 89. For many of Defendants’ claims, the claimed efficiencies will not be achieved (under their own projections) for many years, often more than a decade. Such distant forecasts are usually unreliable and unverifiable. Indeed, the projections at issue here, termed a “life of mine plan,” will be updated *at least* every two years to take account of new mining data, changes in market conditions, and changes in corporate strategy, among



many other things. [REDACTED]

[REDACTED]<sup>104</sup> Defendants’ longer-term claims about supposed efficiencies in the distant future “are too far afield and too speculative to overcome the strong presumption of anticompetitive effects created by the large HHIs.” *CCC Holdings*, 605 F. Supp. 2d at 73-75 (analyzing claimed cost savings that would not be achieved for as long as 10 years).

Second, many of Defendants’ claimed efficiencies are not merger specific because Defendants have not shown that these efficiencies “cannot be achieved by either company alone.” *Sanford*, 926 F.3d at 965 (quoting *Heinz*, 246 F.3d at 721-22). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>105</sup> [REDACTED]

[REDACTED]

[REDACTED] *FTC v. ProMedica Health Sys., Inc.*, No. 3:11 CV 47, 2011 WL 1219281, at \*39 (N.D. Ohio, Mar. 29, 2011).

Finally, Defendants have not shown, as they must, “what proportion [of the claimed savings] they will pass on and how that will defeat the likely price increases in this market.” *Swedish Match*, 131 F. Supp. 2d at 172. While Defendants have taken the position in front of the FTC and now this Court that they will pass cost savings on to their customers, [REDACTED]

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<sup>104</sup> See, e.g., [REDACTED]

<sup>105</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Moreover, their recent actions demonstrate that any achieved cost savings will simply go towards shoring up Defendants’ profit margins to satisfy their investors. From 2017 to 2019 alone, Defendants paid out more than \$2 billion dollars to investors via share repurchases and dividends (and also paid millions to their own executives, including \$35 million just to Peabody’s CEO).<sup>106</sup> The value of these sums is far greater than the total net present value of *all* of Defendants’ claimed efficiencies from the JV *over the life of its mines*—a period longer than a decade.

In a transparent effort to influence this FTC enforcement action, in February 2020—the same month the FTC filed suit—Defendants for the first time offered to temporarily lower SPRB coal prices for certain customers by 15 cents per ton. *See, e.g.,* [REDACTED] Notably, Defendants made no such offers when the JV’s purported cost savings were first announced to the public in June 2019—nor at any time before February 2020, on the eve of this litigation.<sup>107</sup> Similar promises made outside the ordinary course of business, in the context of a merger challenge, have been universally discredited by the courts. *See, e.g., H&R Block*, 833 F. Supp. 2d at 82; *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 64-65 (D.D.C. 1998); *OSF Healthcare*, 852 F. Supp. 2d at 1086. Further, as shown by Dr. Hill, this temporary price cut comes nowhere close to reversing the harm the JV is likely to inflict. *See* PX8001 (Hill Report) ¶¶ 191-201 and Figures 30-34 [REDACTED]

### III. The Equities Heavily Favor a Preliminary Injunction

Upon finding a likelihood of success on the merits, the Court must then “weigh the equities” to determine whether injunctive relief is in the public interest. *Heinz*, 246 F.3d at 726-27. “The principal

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<sup>106</sup> PX9063-070, 098; PX9086-003; PX9178-056 (2017 and 2018 compensation of \$27.9 million); PX9179-057 (2019 compensation of \$7.6 million).

<sup>107</sup> [REDACTED] PX6029 181-84.

public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws.” *Id.* at 726. A second public interest lies in “ensuring that the FTC has the ability to order effective relief if it succeeds at the merits trial.” *Sysco*, 113 F. Supp. 3d at 86; *see also Sanford*, 2017 WL 10810016, at \*31 (“There is a strong public interest in effective enforcement of the antitrust laws and in the FTC having the ability to order effective relief if it succeeds in an administrative proceeding.”). Without a preliminary injunction, Defendants can “scramble the eggs”—that is, combine their operations and make it extremely difficult, if not impossible, for the FTC to restore competition if the JV is subsequently found unlawful. *See Weyerhaeuser*, 665 F.2d at 1085-86 n.31. Any harm that customers suffer in the interim likely would be irreversible.

Defendants cannot offer any equities that override the strong public equities favoring preliminary relief. Indeed, “[w]here the FTC has demonstrated a likelihood of success on the merits, no court has denied a Section 13(b) motion for a preliminary injunction based on weight of the equities.” *Sanford*, 2017 WL 10810016, at \*31. In weighing the equities, “public equities are paramount,” *ProMedica*, 2011 WL 1219281, at \*60, and private equities, such as the Defendants’ commercial interests in concluding a transaction, are “subordinate to public interests[.]” *FTC v. Illinois Cereal Mills, Inc.*, 691 F. Supp. 1131, 1146 (N.D. Ill. 1988) (citing *Weyerhaeuser*, 665 F.2d at 1083). Accordingly, to protect interim competition and preserve the FTC’s ultimate ability to order effective relief, a preliminary injunction should issue.

### **CONCLUSION**

For the reasons set forth above, the FTC respectfully requests that the Court issue the requested preliminary injunction. A Proposed Order is attached.

Dated: June 4, 2020

Respectfully Submitted,

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