DISSENTING STATEMENT OF
COMMISSIONER PAMELA JONES HARBOUR

IN THE MATTER OF ARCH COAL, INC., ET AL.
DOCKET NO. 9316 / FILE NO. 031-0191

I. INTRODUCTION

A majority of the Commission today has voted to discontinue administrative litigation in the *Arch Coal* matter, primarily because a federal district court and a federal appeals court denied the Commission's application for a preliminary injunction in the same case.[1] I respectfully dissent from this vote. I would have preferred to see the Commission exercise its expert adjudicative function after a full administrative trial on the merits.

When a unanimous Commission voted to challenge this transaction in April 2004, the administrative complaint alleged that the Commission had "reason to believe" that the acquisition of Triton by Arch would violate Section 5 of the FTC Act and Section 7 of the Clayton Act.[2] Over a year later, with the benefit of hindsight as well as additional fact-finding by staff, my view remains unchanged. The evidence still supports – and, if anything, more strongly supports – a "reason to believe" that Arch's acquisition of Triton's North Rochelle mine may substantially lessen competition in the Southern Powder River Basin ("SPRB") coal market, and therefore may have violated the antitrust laws.

The majority statement correctly notes the factual findings and legal conclusions of the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit, which I will not repeat here.

My disagreement with the majority's position has both substantive and procedural dimensions. Substantively, I believe that there remains a strong factual and legal basis for an antitrust challenge, regardless of the district court and appellate court findings. I base this conclusion not only on the existing evidentiary record, but also on substantial new evidence that tends to further support the likelihood of coordinated interaction. I further believe that the district court made numerous errors of fact and economic inference, and also applied the law incorrectly. If the Commission does not continue its enforcement action, we run the risk that the

---

[1]Fed. Trade Comm'n v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004); Order, Federal Trade Comm'n v. Arch Coal, Inc., No. 04-5291 (D.C. Cir. Aug. 20, 2004).

[2]FTC News Release, *FTC Issues Administrative Complaint Challenging Arch Coal's Proposed Acquisition of Triton Coal Company* (April 7, 2004), *available at* http://www.ftc.gov/opa/2004/04/archcoalcomp.htm; administrative complaint *available at* http://www.ftc.gov/os/2004/04/archcoalcmp.pdf.

district court opinion will impose an unnecessarily high burden of proof for future merger challenges predicated on coordinated effects.

Procedurally, I believe that the pursuit of administrative litigation would fulfill our Congressionally-mandated responsibility – as expert antitrust fact-finders and adjudicators – to further develop the factual record, clarify the law of mergers with respect to coordinated effects, and offer much-needed guidance to the legal and business communities.

II. SUBSTANTIAL NEW EVIDENCE SUPPORTS A "REASON TO BELIEVE" THAT THE ACQUISITION MAY HAVE VIOLATED THE ANTITRUST LAWS

In the thirteen months since the Commission's Part 3 complaint was voted out (including eight months since the case was withdrawn from administrative adjudication), staff has uncovered substantial new evidence that bolsters the allegations in the original administrative complaint. Based on the key factors outlined in the coordinated effects section of the joint FTC/DOJ *Merger Guidelines*,[3] this additional evidence reinforces the Commission's initial conclusion that the acquisition may have made coordinated interaction both more effective and more likely to occur.[4] Specifically, this new evidence supports the Commission's earlier belief that the acquisition may increase prices, facilitate coordination, and enhance incentives to coordinate.

The primary theory of the Commission's challenge was that Arch's acquisition of Triton's North Rochelle mine would increase the likelihood that the "Big Three" producers of SPRB coal – Arch, Peabody, and Kennecott – would engage in coordinated interaction to reduce SPRB production, either by forbearing from expanding output to meet expected increases in demand, or by idling existing capacity. The dynamics in the SPRB market continue to suggest that this type of coordination is likely, regardless of whether there is evidence of explicit collusion.

---

[3]U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (Apr. 2, 1992; as revised, Apr. 9, 1997), 4 Trade Reg. Rep. (CCH) ¶ 13,104 [hereinafter *Merger Guidelines*], at § 2.1.

[4]The *Merger Guidelines* identify several key factors that the Commission considers in determining whether a merger is likely to facilitate coordination, including: (1) availability of key information concerning market conditions, transactions, and individual competitors; (2) the extent of firm and product heterogeneity; (3) pricing or marketing practices typically employed by firms in the market; (4) characteristics of buyers and sellers; (5) characteristics of typical transactions; and (6) previous express collusion. *Merger Guidelines* § 2.1.

Prior to the acquisition, several SPRB producers publicly encouraged output restrictions and signaled their production plans to each other.[5] These producers made many public statements concerning the benefits of production discipline and their plans to curtail output. In my view, these statements constituted powerful evidence that the producers not only recognized their mutual incentives to coordinate, but also understood the means by which they could accomplish such coordination. Since the Arch/Triton transaction was consummated, the SPRB market has become even more transparent, and there is evidence that price signaling may be occurring, demonstrating that coordination and monitoring have become even easier post-merger. This evidence alone would convince me to vote in favor of continued administrative adjudication.[6]

The Commission's theory of coordinated interaction also depended upon a showing that the so-called "fringe" producers – Kiewit and Foundation[7] – would be unlikely or unable to expand their coal production sufficiently to defeat the effects of an output reduction by the Big Three. The district court evidentiary record included strategic plans for both Kiewit and Foundation. These plans indicated that both companies intended to expand capacity. The district court relied upon these plans in determining that, in the event of a coordinated output reduction by the "Big Three" SPRB producers, expansion by the fringe producers would be sufficient to accommodate customer demand and defeat the output restriction.[8]

Recent developments indicate that the district court may have been overly optimistic; the fringe producers now appear unlikely to serve as the "viable constraint on producer coordination in the post-merger SPRB market" the district court hoped they would be.[9] According to the Department of Energy's Energy Information Administration ("EIA"), demand for SPRB coal is expected to grow by 30 million tons in 2005 and by an additional 23 million tons by the end of 2007.[10] Even if Kiewit and Foundation were to expand production, the growth in demand far outpaces the rate at which the district court found both firms could expand SPRB coal

---

[5]*See, e.g.*, *FTC v. Arch Coal*, 329 F. Supp. 2d at 148-49.

[6]Proof of explicit collusion is not required in order to prevail on a coordination theory. In most cases, coordination involves signaling or some other mechanism that encourages collusion, short of explicit, overt collusion. David Scheffman & Mary Coleman, *Quantitative Analyses of Potential Competitive Effects from A Merger* (June 9, 2003), at 7, *available at* http://www.ftc.gov/be/quantmergeranalysis.pdf.

[7]Foundation was formerly known as RAG.

[8]*Id.* at 147-49.

[9]*FTC v. Arch Coal*, 329 F. Supp. 2d at 150.

[10]Energy Information Administration, Annual Energy Outlook 2005, Reference Case Forecast, Coal Production by Region and Type, *available at* http://www.eia.doe.gov/oiaf/aeo/supplement/pdf/suptab_111.pdf.

production.[11] Moreover, post-acquisition, neither Kiewit nor Foundation has effectuated its stated plans to expand production capacity.[12] In fact, coal production by both companies has slowed.[13] Expansion by fringe competitors, therefore, is unlikely to provide effective market discipline if Kennecott, Peabody, and Arch coordinate a reduction in output.

In the face of growing demand and post-acquisition supply reduction, it is not surprising that prices for SPRB coal have increased significantly. Between January 7, 2005, and April 20, 2005, the Over-The-Counter ("OTC") price for delivery in 2006 of 8800-Btu SPRB coal has increased by 40.8 percent.[14] Based on the anticipated annual shipment rate of 8800-Btu coal, this price increase will result in an additional cost to consumers of approximately $650 million per year. While it is unclear whether the merger has contributed to this increase, it has contributed to an environment in which this increase can be sustained.

For these reasons, I continue to have "reason to believe" that Arch's acquisition of Triton's North Rochelle mine violated Section 5 of the FTC Act and Section 7 of the Clayton Act.

III. OPPORTUNITY TO CORRECT ERRORS BY THE DISTRICT COURT

I respect the district court judge's efforts to amass a thorough record upon which to base his application of the antitrust laws, even though the case was presented in a preliminary injunction posture. Unfortunately, I believe that the district court committed several serious errors of fact and law.

---

[11]The district court recognized that the fringe firms can expand by at most 26 million tons by 2008. *FTC v. Arch Coal*, 329 F. Supp. 2d at 148-49. Even at this rate, the fringe would still fall short of meeting demand for SPRB coal by more than 25 million tons.

[12]Given that business planning documents may be manipulated, where actual market occurrences contradict the evidence of a firm's plans or intentions, it is reasonable to give more weight to the actual market occurrences. *See* Eastman Kodak Co. v. Image Technical Svcs, Inc., 504 U.S. 451, 466-67 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.").

[13]In the first quarter of 2005, Kiewit's Buckskin mine produced 11.14% less SPRB coal than the quarterly production level in the third quarter of 2004, when the acquisition occurred. In 2004, Foundation reduced its output by 2% at its two SPRB mines. See U.S. Dep't of Labor, Mine Safety & Health Admin., Data Retrieval System, *available at* http://www.msha.gov/drs/drshome.htm (production data for individual mines may be located via company name search).

[14]*Compare* Forward OTC Market Assessments, ARGUS COAL DAILY, January 7, 2005, and April 20, 2005 (showing an increase of $2.63/ton in the OTC price for delivery in 2006 of 8800-Btu SPRB coal).

I am particularly concerned that the district court was too quick to dismiss the significance of evidence demonstrating the likelihood of coordination, such as the SPRB producer statements mentioned above. The district court opinion explicitly faulted the Commission for supposedly failing to prove that coordination to limit production had "actually occurred."[15] In so doing, the district court appears to have demanded greater certainty than the law requires under the "incipiency" standard of Section 7 of the Clayton Act.[16] As I understand Section 7, the Commission was held to too high a standard for proving the likelihood of coordinated effects, because the Commission should not have been required to prove that future coordination undoubtedly will occur, or that it will take a specific form.[17] On appeal, the district court's interpretation of the burden of proof required under Section 7 was not reversed, and it remains unclear whether this standard will be applied in future preliminary injunction proceedings.[18] Were administrative litigation to continue, the Commission would be free to draw its own – perhaps different – inferences about the transaction's competitive effects, based on the appropriate evidentiary standard.

Similarly, the district court discounted the testimony of customers who did not know "what *will* happen in the SPRB market,"[19] even though the vast majority of customers of SPRB coal had expressed concerns about the merger. Yet, in finding an SPRB product market, the district court decision affirmatively relied upon, and cited repeatedly to, customer testimony. Given the Commission's extensive experience reviewing mergers, the Commission might choose

---

[15]*FTC v. Arch Coal*, 329 F. Supp. 2d at 139, 140.

[16]*See* Fed. Trade Comm'n v. Arch Coal, Inc., et al., State of Missouri, et al. v. Arch Coal, Inc., et al., Emergency Motion of the Federal Trade Commission and Plaintiff States for an Injunction Pending Appeal and to Expedite Appeal (D.C. Cir. Aug. 17, 2004), at 4-5, *available at* http://www.ftc.gov/os/caselist/0310191/040804emergencymotion0310191.pdf.

[17]The *Merger Guidelines* expressly recognize that anticompetitive coordination need not be perfect, nor fully durable, to be effective. "Terms of coordination need not perfectly achieve the monopoly outcome in order to be harmful to consumers. Instead, the terms of coordination may be imperfect and incomplete . . . and still result in significant competitive harm." *Merger Guidelines* § 2.11.

[18]The district court appears to have imposed a higher burden of proof based on the perceived novelty of the Commission's theory of competitive harm. *FTC v. Arch*, 329 F. Supp. 2d at 132 ("The novel approach taken by the FTC in this case makes its burden to establish anticompetitive effects in the post-merger SPRB market more difficult."). On appeal, the district court's assertion that the theory of competitive harm was novel was rejected. It is unclear, however, whether the appellate court, in determining that the Commission failed to meet its burden under Section 13(b), applied the higher standard imposed by the district court. Order, *FTC v. Arch*, *supra* note 1 ("Although the court agrees with the FTC that there is nothing novel about the theory it has advanced in this case, the court concludes that it has not met the standard for an injunction pending appeal.").

[19]*FTC v. Arch Coal*, 329 F. Supp. 2d at 146 (emphasis added).

to place greater weight on the statements of SPRB customers regarding the potential competitive effects of this transaction – especially under the proper incipiency standard, as described above.

If the Commission is unable to consider these (and other) issues during administrative litigation, the flawed district court decision is even more likely to be cited as precedent against future merger challenges predicated on coordinated effects. Absent a Commission opinion that clearly elucidates the relevant standards for analyzing coordinated effects cases under Section 7, I fear that other district and appellate courts may be similarly confused.

IV. CLOSING THE INVESTIGATION UNDERMINES THE COMMISSION'S EXPERT ADJUDICATIVE ROLE AND DEPRIVES THE LEGAL AND BUSINESS COMMUNITIES OF MUCH-NEEDED GUIDANCE ON COORDINATED INTERACTION

In light of the sizeable potential for consumer harm, the Commission has a responsibility to fulfill its unique, Congressionally-mandated public interest role: to serve as an adjudicative body with specialized antitrust expertise. The Commission should take advantage of this opportunity to conduct a thorough, independent review of the evidence, to determine whether an antitrust violation has occurred, and to write an opinion clarifying the law relating to coordinated interaction.

The Commission was established as "an administrative agency [] especially suited to resolving difficult antitrust questions,"[20] including complex issues relating to merger analysis. As Judge Posner, for example, has observed:

> One of the main reasons for creating the Federal Trade Commission and giving it concurrent jurisdiction to enforce the Clayton Act was that Congress distrusted judicial determination of antitrust questions. It thought the assistance of an administrative body would be helpful in resolving such questions and indeed expected the FTC to take the leading role in enforcing the Clayton Act.[21]

---

[20]Fed. Trade Comm'n, *Commission Statement to Accompany Statement of Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction*, 60 Fed. Reg. 39,741 (Aug. 3, 1995), at 39,742 [hereinafter *FTC Policy Statement*].

[21]Hospital Corp. of America v. FTC, 807 F.2d 1381, 1386 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987) [hereinafter *HCA]*; *accord*, *FTC Policy Statement* at 39,742 ("Congress intended that the Commission would play 'a leading role in enforcing the Clayton Act, which was passed at the same time as the statute creating the Commission.' It was expected that an administrative agency was especially suited to resolving difficult antitrust questions, and that the FTC should be the principal fact finder in the process: it is 'within the Commission's primary responsibility' to draw inferences of competitive consequences from the underlying facts.") (citing *HCA*).

The forum of administrative adjudication fully enables the Commission to bring its unique expertise to bear in merger cases. Without the Commission's ability to pursue administrative litigation in selected cases, "[t]he business community would be denied the guidance provided by merger decisions based on a complete analysis of a full evidentiary record, and Congress' vision of the FTC's central role in merger enforcement would be subverted."[22]

The complexity of the facts and analytical theories presented in this case – as well as the district court's apparent misapprehension of both – appear to create precisely the sort of scenario that Congress envisioned when it created the Commission. Staff presented a strong *prima facie* case to the district court, including evidence demonstrating a likelihood that the merger would enhance the ability of SPRB producers to coordinate their output. This evidence went directly to the key factors outlined in the coordinated interaction section of the *Merger Guidelines*.[23] Even if the record in administrative litigation were identical to the district court record, the Commission could – and should – play an important role by drawing its own inferences about the legal significance of the same facts. Stated another way, new evidence is not required to justify continued administrative litigation following the denial of a preliminary injunction in federal court.[24] By closing this investigation, however, I fear that the majority is sending a contrary message to staff and to the public.[25]

Closing this investigation, based in large part on the asserted "nearly . . . full trial on the merits"[26] in the district court, advances the improper use of the preliminary injunction

---

[22]*FTC Policy Statement* at 39,743; *see also id.* at 39,742 ("Administrative cases provide valuable guidance on how the Commission applies the relevant legal standards and analytical principles as they evolve over time. Application of these standards and principles to concrete factual situations, developed in a full record, can provide insight into why certain mergers are likely to harm competition and result in consumer injury, and why others may not.") (citations omitted).

[23]*Merger Guidelines* § 2.1.

[24]While the discovery of new evidence is one of five factors that the Commission weighs in determining whether to issue an administrative complaint after the denial of a preliminary injunction, new evidence is not essential. *FTC Policy Statement* at 39,743. Indeed, the Commission has used the preliminary injunction record as its basis for issuing an administrative complaint in a case where no additional evidence was been uncovered. In *Occidental Petroleum Corp.*, both parties stipulated to place into the administrative record the entire record from the preliminary injunction action; the case was then submitted to the ALJ without a live hearing. In the Matter of Occidental Petroleum Corp., et al., 115 F.T.C. 1010, 1011-12 (1992).

[25]Here, staff has uncovered additional evidence suggesting that, post-acquisition, price signaling is occurring, and output restriction may have become easier to accomplish. But even if the majority discounts the significance of this new evidence, continued administrative litigation still is warranted.

[26]Commission Statement, In the Matter of Arch Coal, Inc., et al., at 2.

proceeding as a substitute for the Part 3 administrative process. Under Section 13(b) of the FTC Act, the purpose of a preliminary injunction application is to maintain the *status quo* pending adjudication on the merits by the Commission itself, based on the Commission's extensive experience in analyzing mergers. No matter how abundant the preliminary injunction record was in this case, it should not be viewed as an adequate substitute for a full administrative trial. Otherwise, there would never be a good reason for the Commission to proceed beyond the preliminary injunction stage. The Commission has considered this conundrum before, and determined that "[t]he problem with such an approach is that the significant benefits of administrative litigation [] would be lost in such a change in enforcement policy."[27]

I am especially concerned that the Commission is missing a valuable opportunity to clarify the analysis of coordinated effects cases – an important, but sparsely discussed, area of antitrust law and policy. Other than the *Merger Guidelines*, the Commission has provided scant guidance on its approach to coordinated interaction. Regardless of whether the Commission ultimately would have found liability in this case, I am confident that the Commission would have issued a useful adjudicative opinion. By closing the case, we forfeit our chance to further the development of the law of coordinated effects. Hopefully, a future coordinated effects case will provide a similar opportunity.

V. CONCLUSION

This case always has been – and remains – a close and complicated one. I recognize that, even assuming substantial agreement about the facts and the law, reasonable minds might differ in their conclusions about the Commission's best approach at this juncture. I commend Commission staff for their extraordinarily hard work, especially during the preliminary injunction proceeding. I was quite pleased that Commission staff worked so closely and effectively with antitrust enforcers from several States during the investigation and the federal court litigation, and I am optimistic that the Commission and the States will find additional opportunities to engage in equally cooperative antitrust enforcement efforts in the future.

For all of the reasons discussed above, I believe that, on balance, the public interest would be better served if the Commission pursued further administrative litigation to explore the competitive effects of the Arch/Triton transaction. Therefore, I respectfully dissent.

[27] *FTC Policy Statement* at 39,743.