UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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

PLAINTIFF STATES' OPPOSITION TO DEFENDANTS' RULE 65(a)(2) MOTION FOR CONSOLIDATION OF PRELIMINARY AND PERMANENT INJUNCTION

At the status conference on April 14, 2004, the Court expressed its preliminary view that it was disinclined to consolidate the Plaintiff States' preliminary injunction hearing now scheduled for the week of June 21, 2004 with a trial on the merits unless the parties established the Court's authority to also conclusively resolve the Federal Trade Commission's separate administrative action through the cases now pending before it. [1] On April 19, 2004, the

[1] In its concluding comments the Court expressed skepticism as to whether it has such authority: "And along with that, when I do issue that order based on what the parties submit, I will be consolidating

Defendants filed a "Supplemental Memorandum" arguing anew for consolidation of the preliminary injunction motions and the case on the merits in the Plaintiff States' case as well as in the FTC's action. Construing Defendants' further pleadings as a request for the Court to reconsider its views, Plaintiff States submit the following suggestions in opposition to Defendants' motion.

Notwithstanding this Court's insistence that the Defendants provide a legally supported motion that identified the basis for this Court to enter a final judgment when consolidating the FTC's Section 13(b) action for preliminary injunction, the Defendants have submitted a restatement of their previous argument, embellished only by additional unsubstantiated assertions of potential future delay in an administrative hearing. On this basis alone, the Defendants' motion for consolidation under Rule 65(a)(2) should fail.

But there are additional reasons Defendants' motion for consolidation of Plaintiff States' action under Rule 65(a)(2) should be denied. The Defendants' nearly contemporaneous agreement with Plaintiff States on a limited pre-hearing discovery schedule in preparation for the expedited June 21st preliminary injunction hearing gives rise to an unseemly inference of an attempt to manipulate this Court's handling of this matter.[2] Moreover, consolidation of the

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the cases for purposes of the June 21st proceding, which will be for preliminary injunction only.

Unless someone wants to argue to me now – I don't mean this moment, but through the filing of a motion – that I have authority to do more than that with respect to the FTC case and that I should exercise that authority. So if the defendants wish to take that position, they can file something with me in a motion, asking me to in effect reconsider that preliminary judgment and consider having a hearing that consolidates the merits with the preliminary injunction beginning on June 21st.

But I tell you, I'm very skeptical of my authority to do that and somewhat skeptical of the ability to do that on this fast a track."
Scheduling Conference (4-14) Tr. p. 37.

[2]Just hours before Defendants filed their motion for Rule 65(a)(2) merits consolidation, they had reached agreement with Plaintiff States on a limited discovery and pre-hearing scheduling with an

preliminary injunction hearing and final trial will increase the burden of proof and persuasion for the States at that hearing. As the authority cited by Defendants makes clear, there *is* a significant difference between a preliminary injunction and a permanent injunction. *University of Texas v. Camenisch*, 451 U.S. 390 (1981). The result of a Rule 65(a)(2) consolidation would be that the Plaintiff States would be required to prove their full case on the merits while the FTC would only be required to satisfy the evidentiary threshold for entry of a preliminary injunction. Issues would be necessarily injected into the States' case that are appropriate *only* in the context of a final judgment and specific injunctive relief. Consolidation of the merits trial impacts the burden of proof and persuasion on the Plaintiff States and could require an extension of the hearing. It would also require a merits determination by this Court which is already being pursued through an administrative adjudication.

The principal argument made by Defendants for consolidation of the merits is their "worst fear" that there will be no "meaningful Clayton 7 review" of the "Arch-Triton-Kiewit" transactions.[3] Defendants complain that the administrative proceeding -- the findings of which will also largely determine the outcome of the State Plaintiff's action before this Court[4] – will not begin until this court rules on the FTC's request for a preliminary injunction. But rather than try

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expedited preliminary injunction.

[3] That "meaningful review" would likely *never* be in this court because the third party, Kiewit, is *only* involved in a *post*-merger contract, not in the underlying acquisition by Arch of the two Triton mines which are the subject of the merger described in the Hart-Scott Rodino notification.

[4] The Plaintiff States have aptly demonstrated their willingness to expedite this matter for the convenience of the defendants: while each State could have brought a separate state court lawsuit under similar state laws, or individual lawsuits in their own nearest federal district court, the States invited the defendants to consent to jurisdiction and consolidation so that the State actions could be combined and filed in this Court. See Exhibit "A" (Letter consenting to jurisdiction, venue and consolidation provided by Wm. Bradford Reynolds dated March 26, 2004.)

to further expedite the preliminary injunction hearing,[5] the Defendants seek to duplicate judicial proceedings and try their case twice.

The Plaintiff States further object to what they perceive as the Defendants' attempted use of the States' presence as plaintiffs in a related action as a means of indirectly challenging the FTC's statutorily required process. The Plaintiff States filed this action because this is a particularly troubling transaction which threatens to substantially increase the cost of electricity generation, disproportionately within their jurisdictions. Filing in coordination with the FTC, and recognizing in these circumstances the primacy of the FTC administrative procedure, the Plaintiff States have agreed to defer to the FTC's adjudication of the merits of the Clayton 7 claim.

Defendants' motion appears to be simply an opportunistic effort to sidestep the statutorily required procedures for adjudicating FTC merger challenges and must be rejected. As Defendants' counsel conceded during the April 14, 2004, status conference, in the absence of other plaintiffs, the FTC could *not* be forced to try the action on the merits in federal district court. Transcript p. 18. The FTC's statutory process does not change merely because other plaintiff(s) are present in a related action, and Defendants have offered absolutely no authority to the contrary. Thus, even if a Rule 65(a)(2) consolidation might bring to final resolution the States' action it would not impact the FTC's ongoing administrative action and the ultimate determination of legality of the acquisition. In these circumstances, it is not appropriate for the Court to use Fed. R. Civ. P. 65(a)(2) to consolidate the Plaintiff States' preliminary injunction

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[5] The Plaintiff States and FTC offered submission on the papers; another alternative would be to stipulate to preliminary injunctions and move immediately to that administrative proceeding.

hearing with a full merits hearing. There is no economy to be gained by the Court's application of Rule 65(a)(2) in this situation. Judicial economy favors non-application.

Plaintiff States respectfully ask this Court to deny Defendants' request that it abuse its discretionary authority under Rule 65(a)(2) to consolidate the Plaintiff States' in an effort to usurp the authority and procedures of Federal Trade Commission.

Respectfully submitted,

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ATTORNEY GENERAL

March 26, 2004

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BY FACSIMILE AND REGULAR MAIL

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Re: Arch Coal, Inc. Proposed Acquisition of Triton Coal Company, LLC and New Vulcan Holdings, LLC

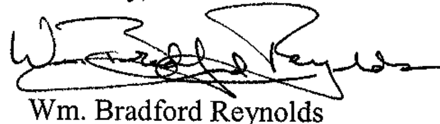
Dear Ms. Schneider:

This is to confirm that Arch Coal has committed not to close the above-referenced transaction before 12:01 a.m. on April 2, 2004.

Pursuant to our conversation Wednesday, if the State of Missouri determines to contest the transaction, Arch Coal will waive objections to jurisdiction and venue in the event that the State's suit to enjoin the acquisition is filed as a related action in the United States District Court for the District of Columbia within 24 hours of the filing of a similar suit by the Federal Trade Commission.

Should the transaction be contested by the State and the FTC as set forth above, Arch agrees to consent to a consolidation of the two actions.

Sincerely,



Wm. Bradford Reynolds

cc: Roxann E. Henry
Richard Parker
Bernhard A. Nigro
Melvin H. Orlans

Exhibit "A"