



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of)
)
Peabody Energy Corporation,)
a public company,)
)
and)
)
Arch Coal, Inc.,)
a public company,)
)
Respondents.)

Docket No. 9391

SCHEDULING ORDER

- August 18, 2020 - Complaint Counsel provides preliminary witness list (not including experts) with a brief summary of the proposed testimony.
- August 25, 2020 - Respondents' Counsel provides preliminary witness list (including experts) with a brief summary of the proposed testimony.
- September 1, 2020 - Complaint Counsel provides expert witness list.
- September 10, 2020 - Respondents' Counsel provides expert witness list.
- September 17, 2020 - Deadline for issuing document requests, interrogatories, subpoenas *duces tecum* except for discovery for purposes of authenticity and admissibility of exhibits.
- October 13, 2020 - Deadline for issuing requests for admissions, except for requests for admissions of the admissibility of exhibits.
- October 16, 2020 - Close of discovery, other than discovery permitted under Rule 3.24(a)(4), deposition of experts, and discovery for purposes of authenticity and admissibility of exhibits.

- October 23, 2020 - Deadline for Complaint Counsel to provide expert witness reports.

- November 2, 2020 - Complaint Counsel provides to Respondents' Counsel its final proposed witness and exhibit lists, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Complaint Counsel's basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.

Complaint Counsel provides courtesy copies to ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.

- November 5, 2020 - Deadline for Respondents' Counsel to provide expert witness reports. Respondents' expert report shall include (without limitation) rebuttal, if any, to Complaint Counsel's expert witness report(s).

- November 9, 2020 - Respondents' Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Respondents' basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.

Respondents' Counsel provides courtesy copies to ALJ its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.

- November 9, 2020 - Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).¹

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¹CS Appendix A to Commission Rule 3.31, the Standard Protective Order, states that if a party or third party wishes *in camera* treatment for a document or transcript that a party intends to introduce into evidence, that party or third party should

To the extent the parties have agreed to stipulate to any issue of law, facts, and/or authenticity of exhibits, the parties shall prepare a list of such stipulations and submit a copy of the stipulations to the ALJ one business day prior to the conference. At the conference, the parties' list of stipulations shall be marked as

electronic mail is not possible, the parties may serve each other through any method authorized under the Commission's Rules of Practice.

3. Each pleading that cites to unpublished opinions or opinions not available on LEXIS or WESTLAW shall include such copies as exhibits.

4. Each motion (other than a motion to dismiss, motion for summary decision, or a motion for in camera treatment) shall be accompanied by a separate signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised in the motion and has been unable to reach such an agreement. In addition, pursuant to Rule 3.22(g), for each motion to quash pursuant to § 3.34(c), each motion to compel or determine sufficiency pursuant to § 3.38(a), each motion for sanctions pursuant to § 3.38(b), the required signed statement must also include the date, time, and place of each . . . conference between counsel, and the names of all participants participating in each such conference." Motions that fail to include such separate statements shall be denied on that ground.

5. Rule 3.22(c) states:

All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 1000 words, including the motion itself. (e)1.1 (t)-1h2 ua,)1 (d)1 (e)-1 (t)-2 2 (n)5 2 (he)4-1 (m)8 (o)42 (i)

8. Compliance with the scheduled end of discovery requires that the parties serve

13. Motions *in limine* are strongly discouraged. Motion *in limine* refers “to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.” *In re Daniel Chapter One*, 2009 FTC LEXIS 85, *18-20 (April 20, 2009) (citing *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). Evidence should be excluded in advance of trial on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Id.* (citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *Sec. Exch. Comm’n v. U.S. Environmental, Inc.*, 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. Oct. 16, 2002)). Moreover, the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the judge is capable of assigning appropriate weight to evidence.

14. The final witness lists shall represent counsel’s good faith designation of all

(b) At the time an expert report is produced, the producing party shall provide to the other party all documents and other written materials relied upon by the expert in formulating an opinion in this case, subject to the provisions of 19(g), except that documents and materials already produced in the case need only be listed by Bates number.

(c) It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition in keeping with this Scheduling Order. Unless otherwise agreed to by the parties or ordered by the Administrative Law Judge, expert witnesses shall be deposed only once and each expert deposition shall be limited to one day for seven hours.

(d) Each expert report shall include a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information relied on by the expert in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the expert; and the compensation to be paid for the study and testimony.

(e) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of this litigation or preparation for hearing and who is not designated by a party as a testifying witness.

(f) At the time of service of the expert reports, a party shall provide opposing counsel:

- (i) a list of all commercially-available computer programs used by the expert in the preparation of the report;
- (ii) a copy of all data sets used by the expert, in native file format and processed data file format; and
- (iii) all customized computer programs used by the expert in the preparation of the report or necessary to replicate the findings on which the expert report is based.

(g) Experts' disclosures and reports shall comply in all respects with Rule 3.31A, except that neither side must preserve or disclose:

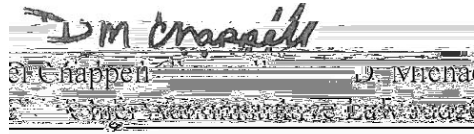
- (i) any form of communication or work product shared between any of the parties' counsel and their expert(s), or between any of the experts themselves;
- (ii) any form of communication or work product shared between an expert(s) and persons assisting the expert(s);
- (iii) expert's notes, unless they constitute the only record of a fact or an assumption relied upon by the expert in formulating an opinion in this case;
- (iv) drafts of expert reports, analyses, or other work product; or
- (v) data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert in the opinions contained in his or her final report.

19. If the expert reports prepared for either party contain confidential information that has been granted *in camera* treatment, the party shall prepare two versions of its expert report(s) in accordance with 16 C.F.R. § 3.45(e).

20.

parties shall agree in advance as to which exhibit number they intend to use. Counsel shall contact the court reporter regarding submission of exhibits.

ORDERED:



DM Craselli
Chapman
Michigan
Law Office

Date: July 10, 2020

Notice of Electronic Service

I hereby certify that on July 10, 2020, I filed an electronic copy of the foregoing Scheduling Order, with:

D. Michael Chappell
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600 Pennsylvania Ave., NW
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Washington, DC, 20580

Donald Clark
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Washington, DC, 20580

I hereby certify that on July 10, 2020, I served via E-Service an electronic copy of the foregoing Scheduling Order, upon:

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