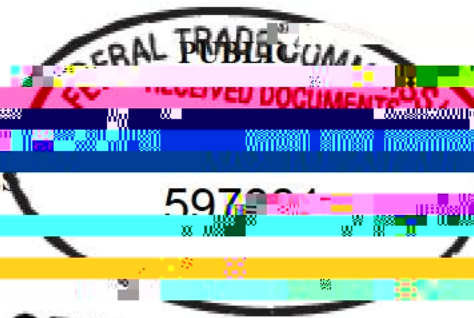


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of:

Peabody Energy Corporation,
a public company,

and

Arch Coal, Inc.,
a public company.

DOCKET NO. 9391

ORIGINAL

PUBLIC

RESPONSE TO PUBLIC COMMENT ON ORDER AND PETITION

Stephen
Michael Perry
William Lavery
Matthew Adler
Elisa Beneze
Jarad D
Steven Pet
Baker BOUWELL P
700 K St NW
Washington, DC 20001
Telephone: (202) 639-7700

Case 1:13-cv-00011-0001

ARCH'S ANSWER AND AFFIRMATIVE DEFENSES

Respondent Arch Coal, Inc. (“Arch”) hereby answers plaintiff Federal Trade Commission’s (“FTC”) Complaint, related to the proposed joint venture (“Joint Venture”) between itself and Peabody Energy Corporation (“Peabody”) (collectively with Arch, “Respondents”), and asserts affirmative and other defenses.

PRELIMINARY STATEMENT

The FTC’s challenge, brought over Commissioner Wilson’s dissent, is mired in the past. It ignores dynamics that have rocked the wholesale energy markets over the last 10-15 years, slashing thermal coal sales. Thermal coal, including coal mined in the Southern Powder River Basin (“SPRB”), competes directly with other U.S. energy forms used to generate electricity. A megawatt of electricity produced from SPRB coal is indistinguishable from one produced using any other energy source. So how do U.S. electricity markets choose between diverse electricity generating sources? Whether a generation unit fueled by coal, natural gas, solar array or wind turbines is called upon to supply electricity is decided by a marketplace that selects and rewards the lowest cost producer. When a light switch is flipped on, the demand for electricity is filled by the lowest cost units first, regardless of the fuel used to generate that electricity. The electricity markets *force* head-to-head competition between fuels.

Coal, and SPRB coal in particular, is losing that competition at an unprecedented pace. The rise of hydraulic fracturing (“fracking”) has made cheap natural gas the fuel of choice for electricity generation in the U.S. And the growth of wind- and solar-powered electricity has further displaced coal, including SPRB coal. Just a decade ago, thermal coal powered 50% of all electricity generated in the United States. Together, natural gas and renewables now account for over 56% of all electricity generation. Monthly coal-fueled generation dipped below 20% of

total electricity generation for the first time in 2019, and plant retirements and low natural gas prices have further reduced this share in early 2020.

Specifically, coal production in the SPRB is down by more than 50% since 2008 and

projects that it will remain well below that mark for the foreseeable future. In fact, today, natural gas prices are *below \$2/mmBTU*. As natural gas prices fall, generating electricity from coal becomes even more uneconomic. And renewable fuel sources like wind and solar are expected to continue to grow and displace coal throughout the U.S. The prospects for coal have deteriorated further in 2020.

The parties cannot alter these forces. Instead, to compete, coal producers must lower their costs. Peabody and Arch have wrung costs out of their businesses, but they still struggle to compete with increasingly low-priced natural gas. They—and three of the other five companies mining coal in the SPRB—were forced into bankruptcy in recent years as a result of these dynamics.

Peabody and Arch formed this Joint Venture to combine their mines in Colorado and the SPRB to lower their costs in an attempt to remain competitive in a declining market. Critically, the Joint Venture will dissolve a seven-mile border that separates their largest two mines, slashing costs across the supply chain. Highly skilled personnel, industry experts, and recent experience integrating two contiguous mines involving the very same mining complex substantiate the parties' conservative estimates of over \$1 billion in net present value of merger-specific cost savings over the venture's first ten years. These synergies are particularly necessary for the Joint Venture to remain competitive in today's declining market. In sum, the Joint Venture will lower the parties' costs thereby lowering prices to customers enabling coal-fueled units to compete more effectively for dispatch against natural gas and renewables.

The FTC does not dispute these dynamics; in fact, stunningly, it ignores them. It asks this court to put blinders on and join the FTC in a "SPRB coal-only" world to block the Joint Venture. If the FTC prevails, it will prevent the Joint Venture from achieving those efficiencies

5. Arch admits that, to the extent new entry means greenfield entry of new producers of SPRB coal, such new entry is unlikely to occur in the near term under current market conditions. Arch denies the remainder of Paragraph 5.

6. Arch denies Paragraph 6 of the Complaint.

II. JURISDICTION

7. Arch avers that Paragraph 7 states legal conclusions to which no response is required. To the extent a response is required, Arch admits it is engaged in commerce.

8. Arch avers that Paragraph 8 states legal conclusions to which no response is required. To the extent a response is required, Arch admits the Joint Venture is a transaction.

III. RESPONDENTS

9. Arch admits the first four sentences of Paragraph 9 except that it is without knowledge or information about the FTC's meaning of "reserves" to respond. Arch is without knowledge or information sufficient to form a belief as to the truth of the allegations in the fifth and sixth sentences.

10. Arch admits the first two sent

V. RELEVANT MARKETS

A. Relevant Product Market

12. Arch avers that Paragraph 12 states legal conclusions to which no response is required. To the extent a response is required, Arch denies Paragraph 12 of the Complaint.

13. Arch is without knowledge or information sufficient to form a belief as to why all electric power producers choose to buy coal from the SPRB. Arch admits that SPRB coal tends to be relatively close to the earth's surface, that SPRB mines tend to yield subbituminous coal with a heat content typically that ranged from 8400 to 8800 BTU per pound, and that SPRB coal tends to have relatively low sulfur content. Arch either is without knowledge or information sufficient about the remainder of the Paragraph 13, or avers that the figures are misleading as stated.

14. Arch denies Paragraph 14 of the Complaint.

15. Arch is without knowledge or information sufficient to form a belief as to the FTC's meaning of the phrases "Industry and public recognition," "[p]ublic sources of information" or "market participants and industry analysts." To the extent a response is required, Arch denies Paragraph 15 of the Complaint.

16. Arch denies Paragraph 16 of the Complaint except that it admits that customers may issue RFPs as part of a process to purchase thermal coal.

17. Arch admits that it knows the identity of the customers who issue RFPs to Arch seeking to purchase SPRB coal, denies that it can "customize [its] bids based on a customer's circumstances," and is without knowledge or information sufficient to form a belief as to the

greater distances typically result in greater shipping costs. Arch is without knowledge or information sufficient to form a belief as to the truth of the last sentence of Paragraph 17.

ILLEGALITY

24. Arch denies the first sentence of Paragraph 24. Arch admits that public sources indicate that Respondents produced more than 60% of all SPRB coal mined in 2018 but otherwise is without knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence.

25. Arch admits that besides Arch and Peabody there are five other producers of SPRB coal but otherwise is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence. Arch admits the second sentence. Arch is without knowledge or information sufficient to form a belief as to the meaning of the phrase “meaningfully compete” and otherwise is without knowledge or information sufficient to form a belief as to the truth of the allegations in the third sentence. Arch admits the fourth sentence. Arch is without knowledge or information sufficient to form a belief as to the truth of other producers’ future scale or reserves, or the measure used to compare SPRB coal “reserves” but admits that public information would confirm the remainder of the fifth sentence.

26. Arch admits that the Merger Guidelines measure concentration using HHIs but deny that those Guidelines are binding on the agency, let alone courts. Arch admits that the second, third and fourth sentences accurately summarize how “HHI” is described in the non-binding Merger Guidelines. Arch denies the remainder of Paragraph 26.

VII. ANTICOMPETITIVE EFFECTS

27. Arch denies Paragraph 27.

28. Arch denies Paragraph 28.

29. Arch denies Paragraph 29.

30. Arch denies Paragraph 30.

31. Arch denies Paragraph 31.

32. Arch denies Paragraph 32.

VIII. LACK OF COUNTERVAILING FACTORS.

A. Barriers to Entry and Expansion

33. Arch denies Paragraph 33.

34. Arch denies Paragraph 34.

35. Arch denies Paragraph 35.

B. Efficiencies

36. Arch denies Paragraph 36.

IX. VIOLATION

Count I – Illegal Agreement

37. Arch avers that no response is required to Paragraph 37.

38. Arch avers that Paragraph 38 states legal conclusions to which no response is required. To the extent a response is required, Arch denies Paragraph 38 of the Complaint.

Count II – Illegal Joint Venture

39. Arch avers that no response is required to Paragraph 39.

40. Arch avers that Paragraph 40 states legal conclusions to which no response is required. To the extent a response is required, Arch denies Paragraph 40 of the Complaint.

ARCH'S AFFIRMATIVE FD53-2 (3 -25.8 Tdn327.59 (onGst)-4S P

3. The Complaint fails to allege a plausible relevant product market.
4. The Complaint fails to allege a plausible geographic market.
5. The Complaint fails to allege undue share in any plausibly defined relevant market.
6. The Complaint fails to allege any plausible harm to competition.
7. The Complaint fails to allege any plausible harm to consumers.
8. The Complaint fails to allege any plausible harm to consumer welfare.
9. Expansion by existing competitors, including non-coal sources of electricity, can be swift, likely, and sufficient such that it will ensure that there will be no harm to competition, consumers, or consumer welfare.
10. Customers have a variety of tools available to ensure that they receive competitive pricing and terms.
11. The Joint Venture will be procompetitive. It will result in substantial merger-specific efficiencies, including cost synergies, which will allow Peabody and Arch to compete more effectively than they can alone against competition from other electricity-generating fuels, particularly natural gas and renewables.
12. Arch reserves the right to assert any other defenses, as they become known to it.

NOTICE OF CONTEMPLATED RELIEF

WHEREFORE, Arch requests that the Administrative Law Judge enter a judgment in its favor as follows:

- A. The Complaint be dismissed with prejudice;
- B. None of the Complaint's contemplated relief issue to the FTC;
- C. Any and all other relief as the Commission may deem just and proper.

Dated: March 10, 2020

Respectfully submitted,

/s/ William Lavery
Stephen Weissman (

CERTIFICATE OF SERVICE

I certify that on March 10, 2020, I filed the foregoing document electronically using FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Acting Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W., Rm. H-113
Washington, D.C. 20580

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., N.W., Rm. H-110
Washington, D.C. 20580

I also certify that I cause the foregoing documents to be served via email to:

Daniel Matheson
Amy E. Dobrzynski
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
(202) 326-2075
dmatheson@ftc.gov
adobrzynski@ftc.gov

Ted Hassi
Leah Martin
Debevoise & Plimpton LLP
801 Pennsylvania Avenue N.W.
Washington, D.C. 20004
(202) 383-8135
thassi@debevoise.com
lmartin@debevoise.com

Counsel Supporting the Complaint

Michael Schaper
J. Robert Abraham
Tristan M. Ellis
Debevoise & Plimpton, LLP
919 Third Ave.
New York, NY 10022
(212) 909-6000
mschaper@debevoise.com
jrabraham@debevoise.com
tmellis@debevoise.com

Gorav Jindal
Akin Gump Strauss Hauer & Feld LLP
20001 K St. NW
Washington, DC 20006
(202) 887-4234
gjindal@akingump.com

Counsel for Respondent Peabody Energy
Corporation

Dated: March 10, 2020

By: /

CERTIFICATE FOR ELECTRONIC FILING

I hereby certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

March 10, 2020

By: /s/0. / Eh 10, 2fmiaCBCB1(a)3.9

Notice of Electronic Service

I hereby certify that on March 10, 2020, I filed an electronic copy of the foregoing 2020-03-10 RESPONDENT ARCH Answer and Affirmative Defenses, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark

Respondent

Daniel Matheson
Attorney
Federal Trade Commission
dmatheson@ftc.gov
Complaint

Amy E. Dobrzynski
Attorney
Federal Trade Commission
adobrzynski@ftc.gov
Complaint

Edward D. Hassi
Esq.
Debevoise & Plimpton LLP
thassi@debevoise.com
Respondent

Leah S. Martin
Esq.
Debevoise & Plimpton LLP
lmartin@debevoise.com
Respondent

Michael Schaper
Esq.
Debevoise & Plimpton LLP
mschaper@debevoise.com
Respondent

J. Robert Abraham
Esq.
Debevoise & Plimpton LLP
jrabraham@debevoise.com
Respondent

Tristan M. Ellis
Esq.
Debevoise & Plimpton LLP
tmellis@debevoise.com
Respondent

Gorav Jindal
Akin Gump Strauss Hauer & Feld LLP
gjindal@akingump.com
Respondent

Corey Roush
Partner
Akin Gump Strauss Hauer & Feld LLP
croush@akingump.com
Respondent

Matthew Schmitten
Akin Gump Strauss Hauer & Feld LLP
mschmitten@akingump.com
Respondent

Steven Pet
Attorney