1. Background

Arch and Triton both operated coal mines in the Southern Powder River Basin ("SPRB"), which is located in Wyoming. On March 29, 2003, Arch and Triton entered into a Merger and Purchase Agreement, pursuant to which Arch intended to acquire all of Triton's assets, including Triton's North Rochelle mine. Arch also entered into an executory contract to transfer another mine that it had acquired from Triton (the Buckskin mine) to Peter Kiewit Sons, Inc. ("Kiewit").

The final transaction was unlike most mergers challenged by the Federal Trade Commission because it did not reduce the number of producers of the alleged relevant product, SPRB coal. Prior to the transaction, there were five producers of SPRB coal: Arch, Triton, Kennecott, Peabody, and Foundation. Because Arch sold the Buckskin mine to Kiewit, there continued to be five producers after the merger, with Kiewit taking Triton's place as the fifth producer.[2] Nonetheless, the Commission authorized Staff to file the complaint because there was reason to believe that the effect of the transaction may have been to reduce competition substantially, in violation of Section 7 of the Clayton Act.[3]

On April 1, 2004, the Commission filed a complaint in the United States District Court for the District of Columbia seeking a preliminary injunction to block the acquisition.[4] The

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[2]The fact that a transaction does not reduce the number of competitors in a market, of course, does not immunize the transaction from an antitrust enforcement action. For example, a transaction that leaves the same number of competitors in a weakened condition could violate the Clayton Act. It is for this reason that the Commission typically retains the right to approve the buyer of a divested asset in its consent agreements with merging parties.

[3]One of the reasons for the Commission's concern about the transaction was that the North Rochelle mine had been the primary source of output expansion of SPRB coal in recent years.

[4]Complaint for Preliminary Injunction Pursuant to FTC Act 13(b), *Fed. Trade Comm'n v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004).

district court conducted a lengthy preliminary injunction hearing that included testimony from eighteen lay witnesses, five experts, 1,067 exhibits, and seven substantive briefs. On August 13, 2004, the district court denied the Commission's motion for a preliminary injunction.[5] The Court of Appeals for the District of Columbia Circuit then denied the Commission's motion for an injunction pending appeal, and the parties subsequently consummated the transaction.[6] On September 10, 2004, the Commission withdrew the matter from administrative litigation.[7]

2. Application of Policy Statement Factors

a. *District Court's Factual Findings and Conclusions of Law*

The district court's factual findings and legal conclusions do not warrant administrative litigation of this matter. The district court conducted a lengthy preliminary injunction hearing that amounted to nearly a full trial on the merits. The record included the large majority of the Commission's relevant evidence. The district court then made detailed factual findings about competitive issues, including the substitutability of different types of coal, the bidding process, pricing and output decisions of the market participants, alleged prior coordinated conduct, and the transaction's alleged efficiencies. The evidence did not persuade the district court, after "weighing the equities and considering the Commission's likelihood of ultimate success, [that an injunction] would be in the public interest."[8]

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[5]*Fed. Trade Comm'n v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004).

[6]Order, *Fed. Trade Comm'n v. Arch Coal, Inc.*, No. 04-5291 (D.C. Cir. August 20, 2004) ("Court of Appeals Order").

[7]Order Withdrawing Matter from Adjudication, *In the Matter of Arch Coal, Inc.*, Docket No. 9316 (Sept. 10, 2004).

[8]Federal Trade Commission Act, 15 U.S.C. § 53(b).

[9]A principal reason cited in the *Policy Statement* for administrative litigation is that a "preliminary injunction proceeding is generally much shorter in duration than a full trial, and, because of its expedited nature, the thoroughness of the evidentiary presentation and analysis may be less than would be expected in a full trial." 60 Fed. Reg. 39,743. This reason largely does not apply here because the preliminary injunction hearing involved a thorough evidentiary presentation.

[10]*FTC v. Arch Coal*, 329 F. Supp.2d at 115, 131-32.

that there is nothing novel about the theory it has advanced in this case."[11] Consequently, it appears unlikely that this legal error will reappear in a way that would be harmful to the Commission (and thus, the public) in future cases.

b. Existence of New Evidence

After the Commission withdrew the matter from administrative litigation, Staff reevaluated the evidence presented at the district court hearing, and conducted additional investigation into the transaction. During the course of this investigation, Staff obtained new evidence about one of the central issues – the capacity, expansion plans and production levels of

[11]Court of Appeals Order, *supra.*

[12]*See, e.g.*, Average Weekly Coal Commodity Spot Prices, Business Week Ended May 13, 2005, *available at*

[14]The Commission disagrees with Commissioner Harbour's assessment that the district court required the Commission to prove that "future coordination undoubtedly will occur." Dissent at 7 (emphasis in original). The district court largely articulated the correct general standards for proving a violation under Section 7 of the Clayton Act (the effect of the transaction "may be substantially to lessen competition"). *See FTC v. Arch*, 329 F. Supp.2d at 115 (citations and quotations omitted). It is, of course, possible that the Commission might apply these standards differently, and give more weight to particular evidence, at an administrative trial.

administrative litigation does not always advance the public interest.[16] The benefits of administrative litigation can be reduced greatly when the large majority of the relevant evidence already has been presented by Staff at the preliminary injunction hearing, and when the preliminary injunction decision does not raise issues that are likely to impede future antitrust merger enforcement.

In this matter, the Commission expended substantial resources in the district court litigation because of the lengthy hearing. The higher standard of proof prescribed by a full trial on the merits would require the Commission to expend at least an equivalent level of resources to pursue a trial before an administrative law judge.[17] Incurring these costs would not serve the public interest because: (1) Staff would essentially duplicate its prior efforts by presentation of largely the same record evidence that the district court found insufficient to warrant an injunction; and (2) the court of appeals corrected the most significant legal error by the district court that might have impeded the Commission's merger enforcement responsibility.

The dissent fails to consider the direct and indirect costs on Staff and the Commission (and therefore, on the public) of an additional trial before an administrative law judge, a likely appeal to the full Commission, and a potential appeal to the court of appeals.[18] The Commission has concluded that, in this instance, the burdens of such a substantial resource commitment are

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[16]*See id.* at 39,743 ("automatic pursuit of administrative litigation following denial of a preliminary injunction is not required to serve the public interest").

[17]The Commission also would likely expend additional resources on an appeal to the full Commission, and potentially thereafter to the court of appeals.

[18]Nor does the dissent weigh the possibility that, even after these expenses are incurred, continued litigation may produce factual findings and legal conclusions similar to those in the district court's opinion (as modified by the court of appeals).

great enough to weigh on the side of forgoing additional administrative litigation.

e. Other Public Interest Factors

This decision not to pursue administrative litigation is consistent with the Commission's established policy of evaluating, on a case-by-case basis, whether pursuit of administrative litigation after the denial of a preliminary injunction motion would serve the public interest. It is our conclusion that in this case, it would not. The Commission is mindful, however, that the *Arch Coal/Triton* transaction involves a significant volume of commerce in an important sector of the U.S. economy. The Commission will continue to closely monitor competition among coal and other energy producers, and aggressively enforce the antitrust laws against producers that engage in anticompetitive conduct, including the kind of coordinated conduct identified as likely in the original complaint in the case. As Commissioner Leary explains in his additional statement, the Commission remains free to enforce the antitrust laws in these markets.