IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FEDERAL TRADE COMMISSION, Plaintiff-Appellant, ARCH COAL, INC., *et al.*, Defendants-Appellees	Docket No. ___________ Civ. No. 1:04CV00534 (JDB)
STATE OF MISSOURI, et al., Plaintiffs-Appellants, v. ARCH COAL, INC., *et al.*, Defendants-Appellees.	Docket No. ___________ Civ. No. 1:04CV00535 (JDB) **PUBLIC COPY – MATERIAL UNDER SEAL DELETED**

EMERGENCY MOTION OF THE FEDERAL TRADE COMMISSION AND PLAINTIFF STATES FOR AN INJUNCTION PENDING APPEAL AND TO EXPEDITE APPEAL

Plaintiffs-appellants Federal Trade Commission ("FTC" or "Commission"), and the States of Missouri, Arkansas, Kansas, Illinois, Iowa, and Texas ("States"), seek emergency relief to enjoin pending appeal the acquisition by Arch Coal, Inc. ("Arch") of Triton Coal Company, LLC ("Triton") from New Vulcan Coal Holdings, LLC ("New Vulcan").[1] Plaintiffs also ask this Court to expedite these appeals and to schedule argument at the earliest possible date. This motion is filed pursuant to Fed. R. App. P. 8(a), and Circuit Rules 8(a) and 27(f). Plaintiffs sought and were denied an injunction pending appeal in the district court – although that court enjoined the transaction until noon on August 20, 2004, to afford this Court an opportunity to act on the present motion.[2]

Unless this Court issues an injunction pending appeal, defendants will be free to consummate their proposed acquisition, causing irreversible consequences. Among other things, defendants will immediately combine Arch and Triton's mining operations, eliminate key personnel and equipment, deplete Triton's coal reserves, and take other steps that could make it impossible to recreate premerger competition if the transaction is ultimately found to be illegal. As defendants' counsel conceded at closing arguments, and the district court acknowledged (Op. 88),[3] "it would be difficult to undo this transaction." Ex. C at 133. Only by granting the requested relief can this Court assure that its review is meaningful, and prevent irreparable injury to consumers.

The urgency of the present motion is unmistakable. The district court's denial of a preliminary injunction rests on reasoning that endangers merger policy in two vital respects. First, the court imposed an unjustifiably onerous burden on plaintiffs on the ground that they had advanced

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[1] The district court consolidated the States' action with that of the Commission for purposes of the preliminary injunction hearing. Hereinafter, the plaintiffs in the two actions will collectively be referred to as "plaintiffs."

[2] Order dated August 16, 2004, attached hereto as Exhibit ("Ex.") B.

[3] *See* Memorandum Opinion ("Op."), entered August 13, 2004, attached as Ex. A.

the "novel" argument that the transaction would facilitate efforts by defendants to coordinate output restrictions in a market whose performance is crucial to the nation's economic well-being. The only "novelty" in this matter is the district court's abandonment of well-established principles of merger jurisprudence – a departure inspired by the court's failure to grasp the basic economic principle that output restrictions often are the means by which rivals collectively raise prices, and punctuated by its determination to brush aside the testimony of sophisticated commercial customers who have everything to gain if the merger improves competition and much to lose if it does not. Second, the district court improperly accepted the unenforceable commitments of the defendants as adequate substitutes for the imposition of binding remedies supervised by the FTC. By relying decisively on the mere "promises" of the defendants about future behavior, the district court in effect repeals the statutory framework established over the past three decades to ensure that merger enforcement yields meaningful remedies.

PRELIMINARY STATEMENT

Coal from Wyoming's Southern Powder River Basin ("SPRB") accounts for about one-third of the nation's total coal production, used by power generating companies in at least 26 states. Because of its combination of low sulfur content (rendering it particularly clean burning) and relatively low price compared to coal mined in other regions, there are no economic substitutes for SPRB coal for the customers who purchase it. *See* Op. 8-10. SPRB coal suppliers have established two distinct price points for coal based on its energy content: 8800 Btu/lb. and 8400 Btu/lb.

Triton owns two mines: the 8800 Btu North Rochelle mine and the 8400 Btu Buckskin mine. Arch and Triton are two of only four producers of 8800 Btu coal, the most desirable coal in the region. Op. 9-10. In all, there are only five SPRB coal producers. Because the small town of Gillette, Wyoming, is the only population center near the SPRB, employees of these mines live and work within close proximity of each other. Ex. D at 69-70. In the 1990s, the SPRB market was genuinely competitive; competition drove prices down toward marginal cost, as producers sold incremental production at the best price they could get above such cost.[4] Ex. E at 91-92. Today, however, the market is significantly different; as defendants conceded below, "all producers in the SPRB are today pricing above their incremental costs." See Ex. F at 2. As producers have consolidated, the SPRB coal industry has developed a susceptibility to coordinated interaction – in particular, a form of tacit cooperation in which the major producers may seek to constrain production so that increases in supply will lag increases in demand, creating upward pressure on price. Competitors, customers, and industry analysts all repeatedly have stated the view that, as the number of producers has fallen, the market has become more conducive to coordinated interaction. Each of the firms in the SPRB has recognized the profitability, and desirability, of coordinated interaction; and producers of SBRB coal have undertaken signaling and other efforts to engage in such interaction.

If Arch's proposed acquisition of Triton is allowed to proceed, three firms – Arch, Peabody, and Kennecott – will be in a position to increase prices through coordinated interaction. These three firms will control 100% of the production of 8800 Btu coal and over 80% of all SPRB production. Ex. G at 2-3. Within the industry, Arch has been the most vocal public proponent of greater producer "discipline" to achieve higher sustained prices. Kennecott and Peabody have also publicly indicated their willingness to constrain growth in coal production. Prior to this transaction, however, Arch was not well placed to exercise market leadership. This merger would change that dynamic, not only by putting Arch at parity with Peabody and Kennecott, but by placing in Arch's hands the

[4] Antitrust law and economic theory both define a competitive market as one where prices are driven down to approximate marginal cost. *See, e.g., FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986); *Environmental Action, Inc. v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991); *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1344 (7th Cir. 1986).

remaining 8800 Btu coal capacity not currently within the control of these three firms. By also taking this capacity (Triton's North Rochelle mine) out of the hands of a competitor, the acquisition would, as Arch recognized previously, provide "an insurance policy" against the possibility of undisciplined SPRB production. Ex. H at 2. Given that Arch already controls the major source of excess available capacity for 8400 Btu SPRB coal capacity, post-merger Arch will be in a much stronger position to take the lead in implementing market discipline. The acquisition would also substantially increase the leading producers' potential gains from coordination, thereby making coordination more likely.

In its order denying the motions of the Commission and the States for a preliminary injunction, the district court actually found all of the essential elements that *should have* prompted entry of an injunction. It found: that the merger will significantly increase concentration in an already highly concentrated market (Op. 29); that the market has many of the very characteristics that facilitate coordinated interaction (*e.g.*, high entry barriers, inelastic demand, availability of key market information) (Op. 46-47); and that SPRB producers have repeatedly evinced their desire to pursue a strategy of limiting production in order to raise prices. Op. 44-45. The anticompetitive nature of the proposed merger was confirmed by the consistent testimony of electric utilities, sophisticated customers who have the most at stake and are in the best position to understand the workings of the market.

The district court's refusal to grant a preliminary injunction, in the face of such strong evidence of the merger's anticompetitive potential, was based on a fundamental misunderstanding of settled antitrust jurisprudence. Starting from the remarkable premise that a showing of likely coordination of output is a "novel theory" of harm to competition (Op. 3), the court imposed upon plaintiffs an avowedly "more difficult" burden of showing likely anticompetitive effects than the relevant case law allows. Op. 35. The court faulted plaintiffs for supposedly failing to show that coordination had "actually occurred" (Op. 48), and faulted customer witnesses for not knowing "what *will* happen in the SPRB market" (Op. 61). These rulings demonstrate that the court was requiring a level of certainty that is entirely at odds with the "incipiency" standard of Section 7 of the Clayton Act, 15 U.S.C. § 18 – much less the standard applicable to a preliminary injunction under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which calls for the maintenance of the *status quo*, pending administrative litigation, upon a showing of "serious" and "substantial" issues on the merits. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C. Cir. 2001).

Accordingly, this decision warrants close scrutiny by this Court. Any temporary inconvenience that an expedited appeal may inflict on defendants' merger plans is insignificant in light of the substantial legal issues raised by this appeal, the significant and irreparable consequences to consumers and competition that would attend the consummation of this merger, and the strong public interest in enforcing the antitrust laws and securing meaningful appellate review of the district court's decision.

STATEMENT OF THE CASE

The Commission filed its complaint and motion for a preliminary injunction on April 1, 2004. The district court consolidated these cases for purposes of the preliminary injunction hearing and all pre-hearing discovery and proceedings. After expedited discovery, the court held a ten-day evidentiary hearing from June 21 through July 1 and on July 7.

The district court found all the elements of a Section 7 violation, starting with post-merger concentration levels that, at a minimum, raise significant competitive concerns. Op. 29.[5] The court

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[5] Current market concentration, as measured by the Herfindahl-Hirschman Index ("HHI"), ranges from 2054 to 2201, depending on which measure is used to calculate concentration. The post-merger increase in market concentration resulting from the acquisition and proposed divestiture ranges from 49 points to 224 points. Op. 21-22.

also found that this market has many characteristics that make coordinated interaction feasible: there are high barriers to entry; demand is inelastic, which "means that a modest price increase in the highly concentrated SPRB market would be very profitable to producers;" the differences in coal produced at the various SPRB mines are subject to standard adjustments in pricing; key market information relating to competitors is available from numerous sources; and the small and frequent transactions for SPRB coal "increase the likelihood of coordination, decrease the incentive to deviate from coordinated interaction, and increase the likelihood that deviations from coordinated interaction will be quickly detected." Op. 46-47.

In addition, the court found that producers in the SPRB have evinced an interest in constraining growth in coal production and have publicly signaled this interest to other SPRB producers. Op. 44-45. A particularly clear example of such signaling occurred in 2000, when the CEO of Peabody stated, in a speech to the Western Coal Transportation Association (attended by other SPRB producers and utility customers), that coal companies had mined too much coal, causing profit margins to be too small, and described the steps Peabody had taken to reduce oversupply. Op. 44. A few days after this speech, Kennecott issued a press release announcing its own intent to "temporarily curtail production" at its mines. Ex. I at 2. The following month, speaking at the Western Coal Council's Spring Forum, Arch's CEO noted that "oversupply" had eroded coal prices and urged coal suppliers to "Produce Less Coal." Op. 45. The court found that these and other such statements by SPRB producers in evidence "are indicative of possible producer coordination to limit production, and warrant close scrutiny." Op. 45-46.

These findings demonstrate the increased risk of coordinated interaction as a result of the proposed merger and are further bolstered by the ample evidence showing that Arch has been, and continues to be, the leading proponent of limiting coal production. In an April 2003 internal memo, Arch's CEO acknowledged that it has been "leading this charge" on cutting back production to increase pricing. Ex. J at 2; *see* Ex. K at 1(*Coal & Energy Price Report,* July 18, 2002, reports that Arch has been "preaching and practicing discipline as fervently as a Baptist minister"). As Arch has recognized, in the SPRB there are "[f]ewer producers, so greater potential for discipline." Ex. L at 15. Documents from other SPRB competitors and other industry participants reveal that they also believe that coordination in the SPRB is feasible, and will be facilitated by increased consolidation. As an executive of * * * * * * * * * *, one of the smaller SPRB producers, has stated:

> the Powder River Basin will continue to grow and . . . the coal market will improve . . . as each of the major producers realizes that their current pricing strategy is a looser [sic] for them. It is not unlike the current OPEC production/oil price issue facing the world today.

Ex. M at 5. *See also* Ex. N at 2 (Triton's CEO notes "continued production discipline by coal producers," as "[a]mong the factors that we see contributing to a higher pricing environment"); Ex. O at 2 (Kiewit expresses the belief that "PRB producers are exhibiting restraint which has increased prices"); Ex. P at 4 (PA Consulting Group explains at a 2002 industry conference that "consolidation in the coal industry" is one of the "structural factors contributing to the run-up in coal prices"). In addition, Arch has been able to observe and monitor whether its competitors have been selling incremental tonnage in the marketplace, and has considered whether to sell its own incremental tonnage in response. Ex. Q at 2; Ex. H at 2; Ex. R. The testimony of numerous customers confirmed that the SPRB coal market is susceptible to coordinated interaction and the proposed acquisition is likely to increase the risk of such coordination. *See, e.g.,* Ex. S at 88-89, 96; Ex. I at 12, 49.

The evidence further showed that Arch views the acquisition of Triton's North Rochelle mine – the only 8800 Btu mine not owned by the leading three firms – as an integral part of its strategy to limit production in the SPRB coal market. For example, prior to its previous attempt to acquire Vulcan in 2001, one top Arch executive stated that it was: "Most important to acquire existing mines in strategic basin than open new mines. This keeps supply limited. Example: purchase Triton or North Rochelle or Jacobs Ranch in PRB vs open Coal Creek." Ex. U at 2. Similarly, Arch's Vice President for Market Research observed that eliminating Triton, which was the "variable" or "incremental" producer and had shown "no ability to scale production at either of their mines," was the "biggest motivator for Arch," and constituted an "insurance policy in the basin and for Arch." Ex. H at 2. The plaintiffs' economic expert testified that, as result of Arch's acquisition of the North Rochelle mine, Arch's "gains from coordination increase from $28.2 million before the acquisition to $79.1 million following the acquisition, an increase of 180 percent . . . [and] Kennecott's and Peabody's gains from coordination increase by 69 percent." Ex. V at ¶ 108. He explained that, by substantially increasing the potential gains from coordination, the acquisition would make coordination more likely. *Id.*

Notwithstanding this compelling evidence of the risk of coordination among SPRB producers and its own findings concerning the feasibility of coordination in the SPRB market, the court allowed the merger to proceed, because it believed that plaintiffs' theory of tacit coordination among competitors to restrict production – as opposed to coordination on prices – is such a "novel" theory (Op. 3, 33, 35, 87) that it requires a "more difficult," "sophisticated" showing of the likelihood of future coordination. Op. 35. The court concluded that plaintiffs failed to satisfy this burden, because they have not demonstrated that SPRB producers actually engaged in price or output coordination in the past, and because there is not complete transparency of pricing or other information in the SPRB market and deviation from coordination is not immediately detectable. *See* Op. 34. In so ruling, the court expressly chose to disregard the testimony of SPRB coal customers regarding their concerns about this merger, notwithstanding the fact that these customers are sophisticated and knowledgeable purchasers whose businesses spend hundreds of millions of dollars on SPRB coal and thus depend upon their ability to anticipate the behavior of the marketplace. Op. 60-61.

Although the court acknowledged that Triton is "not a failing firm," it found that Triton is a relatively weak competitor. Op. 83. However, the court did not explain why Triton's purported weakness undermines plaintiffs' showing that placing in Arch's hands the only remaining 8800 Btu coal capacity not currently within the control of the three leading firms increases the profitability from, and therefore the risk of, coordinated interaction among those firms. The court also found that "promises" by fringe companies to expand "as market opportunities develop" (Op. 86) are sufficient to resolve concerns about any merger-induced price increase (Op. 68), but failed to address whether these fringe firms might share the same incentives as other producers to constrain production to achieve higher sustained prices. The court rejected defendants' asserted efficiencies, however, finding that defendants "failed to carry their burden of proving a specific amount of efficiencies or showing the impact of the alleged savings on competitiveness in the market." Op. 75.

As to the equities, the court acknowledged that, absent a preliminary injunction, it will be difficult, and perhaps impossible, to reverse the effects of this merger. Op. 87-88. However, the court questioned the degree of harm that denying the injunction would occasion, and opined that defendants' self-serving representations that they will abandon the transaction rather than undergo an administrative proceeding weigh in favor of denying a preliminary injunction. *Id.*

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF.

A. The Standard for a Preliminary Injunction Under Section 13(b).

Section 13(b) of the FTC Act provides that the Commission is entitled to an injunction "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." This Court has held that this language means that the Commission is entitled to a preliminary injunction if it "'raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Heinz*, 246 F.3d at 714-15 (quoting *FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1229 (D.C. Cir. 1978)). If the Commission is deemed likely to succeed on the merits, a presumption arises in favor of granting the preliminary injunction. *See, e.g., FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1507 (D.C. Cir. 1986). Although the Commission's burden is not insubstantial, neither is it overwhelming. In particular, the Commission "need not prove that the proposed merger would in fact violate Section 7 of the Clayton Act," a matter "reserved for the FTC." *FTC v. Cardinal Health, Inc.*, 12 F. Supp.2d 34, 45 (D.D.C. 1998). Doubts are to be resolved against the transaction and in favor of a preliminary injunction. *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989) (citing *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362-63 (1963)).

It is important to note that Section 7 – and, by implication, any provisional relief sought in furtherance of it – does not require proof of actual anticompetitive effects. Instead, Section 7 imposes an incipiency standard. The "core question" in a Section 7 case is "whether a merger *may* substantially lessen competition . . . ."[6] As this Court stated in *Heinz*,

> All that is necessary is that the merger create *an appreciable danger* of [collusive practices] in the future. A predictive judgment, necessarily probabilistic and

[6] *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967) (emphasis added); *id.* (Section 7 "necessarily requires a prediction of the merger's impact on competition . . . . The section can deal only with probabilities, not with certainties"); *see also Philadelphia Nat'l Bank*, 374 U.S. at 355; *Heinz*, 246 F.3d at 713.

judgmental rather than demonstrable, is called for.

Heinz, 246 F.3d at 719 (emphasis added) (quoting *Hospital Corp. of America v. FTC,* 807 F.2d 1381, 1389 (7th Cir.1986)).

B. The Standard for An Injunction Pending Appeal.

In determining whether to issue an injunction pending appeal, this Court considers four factors: (1) whether the movant is likely to prevail on the merits of its appeal; (2) whether the movant will be irreparably injured without such an injunction; (3) whether other parties interested in the proceedings will be substantially harmed by an injunction; and (4) where the public interest lies. *McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

Judged by these standards, the requested injunction should be granted. As shown below, appellants are likely to succeed on the merits in this appeal. Furthermore, this case presents the same circumstances as *Heinz,* where this Court granted an injunction pending appeal: "[t]he public interest in enforcement of the antitrust laws is strong; any injury to competition from going forward with the merger would plainly be irreversible, while the same cannot be said for any loss of competition from its delay." *FTC v. H.J. Heinz Co.*, 2000 WL 1741320, at *2 (D.C. Cir. Nov. 8., 2000).

II. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS.

A. The District Court Erred in Finding that Plaintiffs Did Not Sufficiently Establish a Likelihood of Coordinated Interaction.

The entirety of the opinion below is colored by the district court's erroneous belief that a theory of tacit coordination to restrict output – as opposed to coordination to fix prices – is entirely "novel." Op. 3, 33, 35, 87. Surprisingly, the court failed to apprehend the fundamental economic principle that output is the flip side of price.[7] Nor did it comprehend that output coordination has long been a staple of antitrust enforcement. "Because the laws of supply and demand indicate that *an agreement to limit output is tantamount to an agreement to fix price,* courts have also applied the per se rule to an agreement to limit production or set quotas. . . ." ABA SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS* 87 (5th ed. 2002) (citing cases) (emphasis added). As this Court has held, "[w]here rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, *in order to restrict output* and achieve profits above competitive levels." *PPG*, 798 F.2d at 1503 (emphasis added). For example, OPEC producers agree on production quotas that limit supply, necessarily raising price.

Plaintiffs amply carried their burden in this preliminary injunction proceeding. The court's findings concerning the numerous factors that facilitate coordination in the SPRB coal market and the statements by SPRB producers evincing their interest in production discipline (Op. 44-47) alone warrant a preliminary injunction by "'rais[ing] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation" by the Commission. *Heinz,* 246 F.3d at 714-15. This conclusion is cemented by the overwhelming evidence that the SPRB producers – all working in close proximity to each other around the small town of Gillette – have recognized the profitability, and desirability, of coordinated interaction, and that Arch's acquisition of North Rochelle substantially increases the potential gains from coordination.

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[7] Similar misunderstandings of economic principles permeate the court's analysis. For example, in finding that the SPRB coal market is currently "competitive," the district court relied upon the fact that customers testified that they receive bids from multiple SPRB coal producers, and at least one of those bids was typically at a different price. Op. 36-37. From an antitrust perspective, however, the facts cited by the district court do not support the conclusion that it draws: even in a market in which the producers have gotten together in a smoke-filled room and set express quotas, one would expect such testimony. Customers testified that they lack the knowledge of producers' costs, which is necessary to make an assessment of whether pricing is at a competitive level in economic terms. Ex. T at 25; Ex. W at 35; *see* note 4, *supra*.

The district court plainly erred in holding plaintiffs to a higher standard.[8] Contrary to the district court's ruling, the relevant case law does not require plaintiffs to demonstrate that SPRB producers actually engaged in price or output coordination in the past. Nor does the relevant case law require plaintiffs to show that there is complete transparency of information in the SPRB market, to show that deviation from coordination is immediately detectable, or to establish the precise means by which deviation will be punished. *See* Op. 34. Indeed, the court's finding that a delay in discovery of deviation rebuts plaintiffs' showing of the risk of coordinated interaction is similar to an argument this Court rejected in *Heinz*. There, the Court labeled as "clearly erroneous" the district court's finding that "structural market barriers to collusion" in the baby food industry (including a "time lag" in detecting cheating) rebutted the normal presumption that increases in concentration increase the likelihood of tacit collusion, because "the district court made no finding that any of these 'cartel problems'" – identified by defendants' expert – "are so much greater in the baby food industry than in other industries that they rebut the normal presumption." The same is true here. The district court's conclusions about product heterogeneity and delay in identifying and punishing deviation (*see* Op. 51-52, 59-60) directly contradict its earlier findings regarding the characteristics of the SPRB market that make coordination feasible. Op. 46.

The court further compounded its error by failing to credit the numerous statements of SPRB coal customers who voiced concern about the likely effects of this merger. These customers make their living analyzing and predicting the future pricing and availability of coal, and are motivated to watch the marketplace carefully because they will be the first to feel the effects of any loss of competition. For these reasons, customer testimony has been influential in the courts. *See PPG*, 798

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[8] Although the district court cited to the correct legal standards at various points in its decision (*see, e.g.*, Op. 31-33), it failed to apply them in view of its erroneous understanding that plaintiffs articulated a "novel" theory of output restriction.

F.2d at 1505; *Cardinal Health*, 12 F. Supp. 2d at 48; *United States v. IVACO*, 704 F. Supp. 1409, 1427-28 (W.D. Mich. 1989); *FTC v. Great Lakes Chemical Corp*., 528 F. Supp. 84, 95 (N.D. Ill. 1981). In the Commission's evaluation of hundreds of proposed mergers, customer testimony has been influential. Indeed, the receipt of strong customer complaints is the leading indicator of whether the Commission will challenge a merger.[9] A variety of enforcement officials and commentators have also emphasized the probativeness of customer testimony.[10]

The customer testimony here is particularly credible because it involves the kinds of issues that the customers – sophisticated power generating companies that are large and experienced coal buyers – had incentives to study carefully. Their interests are at stake, and one would expect that if the merger would have no effect on competition or have procompetitive benefits, they would not hesitate to support it. Because many of these customers were reluctant to run the risk of alienating an important supplier, their decisions ultimately to oppose this acquisition speak volumes about the depth of their concerns. Even without other evidence, their concerns about the effects of the merger and their inability to protect themselves demonstrate the potential for severe competitive injury and, at a minimum, reinforce the documentary evidence and other testimony. The court thus erred in

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[9] *See* FEDERAL TRADE COMMISSION, *HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996-2003* (Feb. 2, 2004) (Commission challenged mergers in 50 of 51 markets, in which there were strong customer complaints), available at http://www.ftc.gov/os/2004/02/040202horizmergereffects.pdf. Conversely, the Commission has declined to challenge other mergers in part as a result of testimony indicating a lack of customer concern. *See, e.g.*, *R.R. Donnelley & Sons*, 120 F.T.C. 36, 197 (1995); *Weyerhaeuser*, 106 F.T.C. 172, 285-86 (1985).

[10] *See* TRANSCRIPT FOR THE FTC/DOJ MERGER WORKSHOP (Feb. 19, 2004) (www.usdoj.gov/atr/public/workshops/docs/40219ftc.wpd), at pp. 215-22; *id*. at 220-21 (remarks of Hewitt Pate, Assistant Attorney General for Antitrust) ("customer complaints do matter inside the agencies"); *id.* at 221(remarks of former Assistant Attorney General James Rill) ("I don't think there can be any disagreement with the notion that serious, credible customer complaints are certainly revealing as to the possible likely anticompetitive or competitive dynamic of the transaction. I certainly don't disagree with that.")

ignoring this evidence. Indeed, the court's criticism that customers do not "have the expertise to state what <u>will</u> happen in the SPRB market," Op. 61 (emphasis in original), underscores the fact that the court imposed a much higher burden of proof on plaintiffs than is appropriate under Section 7 of the Clayton Act and Section 13(b) of the FTC Act.

One class of customer that stands to be particularly vulnerable to the effects of the merger consists of those who, for a variety of operational reasons, can use only 8800 coal. Although the district court acknowledged the existence of such customers (Op. 17 n.8), it never addressed the ability of producers to coordinate as to these customers. Even if the court were correct in ruling that the ability of *some* customers to switch precludes the finding of an 8800 market,[11] customers requiring 8800 coal would remain subject to the effects of coordination, because pricing in this market is determined by bids on individual contracts.

The court also wrongly suggested that plaintiffs' evidence is somehow deficient, merely because the bulk of the documentary evidence showing producers' discussions of a strategy to limit coal production dates from 2000-2001. Op. 48. In fact, plaintiffs presented more recent evidence as well. *See, e.g.*, Ex. J at 2 (April 2003 internal memorandum in which Arch's CEO states that Arch has "continue[d] to lead this charge" of cutting production to obtain "improved pricing" in the SPRB); Ex. K at 1 (July 2002 article noting that Arch has been "preaching and practicing discipline as fervently as a Baptist minister"). More importantly, there has been no structural change that would indicate the SPRB coal market is any less susceptible to coordinated interaction today. The

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[11] That determination is in fact erroneous, however. The only evidence cited by the court was that some customers can and do purchase both 8800 and 8400 coal – that is, they are functionally interchangeable. *See* Op. 15-16. But many people can and do purchase multiple products that can and do enable people to perform the same function. By failing to address the critical question – the extent to which purchasers will substitute one for the other in the event of a relative change in prices – the court's finding is plainly flawed. Indeed, one searches the district court's decision in vain for any recognition that this question is even pertinent. *See* Op. 17.

only change is that, after the production cut-backs and a price increase in 2001, the U.S. Department of Justice initiated an investigation to determine if there were agreements between competitors in the SPRB that would be actionable under the Sherman Act (a different issue involving a much higher burden of proof than whether Section 7 of the Clayton Act has been violated), and in that context sought, *inter alia*, information on "speeches centered on the need of companies to be more disciplined, with regard to production." PX0832 at 001, 004. It is hardly surprising, then, that Arch and other SPRB producers – feeling the gaze of government scrutiny – subsequently would be more careful in the statements they made and the documents they created or retained.

B. The District Court Erred in Holding that the Divestiture of Triton's Buckskin Mine Remedies the Competitive Problems Created by the Acquisition.

The district court denied a preliminary injunction in large part because it found that Arch's plan to sell Triton's Buckskin mine to a third party, Kiewit, resolves the competitive concerns resulting from this merger. This reliance is erroneous on several grounds. First, it erroneously credits the sale of Buckskin to Kiewit as a benefit of the transaction. The undisputed facts show that Kiewit was always interested in (and indeed bid separately for) the Buckskin mine, and that Arch was never interested in (and indeed never planned to keep) the Buckskin mine. Ex. X at 35, 38-39. Arch was interested only in acquiring the North Rochelle mine, and that is what is at stake in this transaction: whether Arch should be permitted to acquire the only 8800 mine not in the hands of the big three producers (Arch, Kennecott, and Peabody). By dressing up the transaction in form as a purchase of both mines and then a sale of Bucksin, Arch has claimed numerous "benefits" that are not merger-specific: its acquisition is not responsible for the introduction of Kiewit as a competitor, nor for Kiewit's expansion plans, nor for the claim that Kiewit will be a stronger owner of Buckskin.

Second, by crediting Arch with the introduction of Kiewit, the district court eviscerates the provisions of Section 13(b). Having structured its acquisition of North Rochelle as an acquisition of both mines, with the divestiture of Buckskin as a proposed "remedy" to competitive concerns, Arch should not have been allowed to avoid both FTC and judicial oversight. Under the provisions of the FTC Act and the Clayton Act, the Commission retains continued oversight over the conditions under which relief is administered, including the ability to oversee any proposed terms under which the proposed purchaser acquires the divested assets. Here, by contrast, the district court has *no* continuing jurisdiction over the proposed acquisition once the preliminary injunction is denied. If Arch and Kiewit were to decide mutually to change the terms under which Kiewit will acquire Buckskin, for example – or even if Kiewit were to decide, with Arch's consent, no longer to pursue the transaction – the district court has no oversight with respect to those matters.

The district court could have disregarded the Kiewit sale and analyzed this transaction for what it is in substance – the acquisition of North Rochelle by Arch – or it could have analyzed the transaction as it is in form, the acquisition of both mines by Arch, without any enforceable relief within the scope of the district court's jurisdiction. Instead, it did neither, with the result that Arch has been rewarded for its artificial structuring of the deal, obtaining North Rochelle in a clearly anticompetitive acquisition, and avoiding any enforceable oversight over its sale of Buckskin.

Finally, contrary to the district court's holding, the evidence establishes that the divestiture of Buckskin to Kiewit is insufficient to resolve the competitive concerns created by the transaction. Arch's acquisition of North Rochelle alone increases concentration significantly in markets that are already highly concentrated and conducive to coordination, and places most of the excess capacity in the SPRB in the hands of Arch, the strongest proponent of production discipline. Three producers (Arch, Kennecott and Peabody) will control 100% of 8800 Btu SPRB coal production and over 80% of 8400 SPRB coal production. For the reasons discussed above, that acquisition makes anticompetitive coordination among the major producers more profitable and easier, and thus more likely. As plaintiffs' economic expert testified, divesting Buckskin to Kiewit does little to solve the problem. Ex. V ¶¶ 122-132. Customer testimony confirms the inadequacy of the Buckskin divestiture. Plaintiffs' customer witnesses were aware of the proposed divestiture of Buckskin to Kiewit, and all remained concerned about the transaction. Ex. Y at ¶ 14; Ex. Z at ¶ 23; Ex. S at 117.

III. THE BALANCE OF EQUITABLE CONSIDERATIONS STRONGLY FAVORS AN INJUNCTION PENDING APPEAL.

As shown above, the pervasive errors in the district court's ruling by themselves amply justify the grant of an injunction pending an expedited appeal, to preserve this Court's ability to render effective relief. Moreover, an injunction should issue as long as the Commission has shown a "substantial case on the merits" of its appeal, in light of the overwhelming balance of hardships in this case. *See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir.1977).

For the Commission – and the public – a temporary injunction is essential if there is to be any chance of obtaining effective relief in the event of reversal. As Triton's own counsel was forced to admit at closing arguments, if an injunction is denied, "it would be difficult to undo this transaction." Ex. C at 133. This concession is consistent with this Court's recognition of the historic difficulty of rendering effective relief in merger cases once the parties are able to consummate the transaction. *See PPG*, 798 F.2d at 1508-09. Indeed, the inherent inefficacy of after-the-fact divestiture orders is the very reason Congress gave the Commission power to seek pre-consummation injunctive relief. *See Heinz*, 246 F.3d at 726.

These concerns are particularly salient in the present case, because Arch plans to alter fundamentally the acquired assets, making it impossible to restore competition. Arch asserts that it will sell the Buckskin mine to a third party, making it impossible to recover. Ex. AA at 14-15. Arch also plans reductions in key personnel – which, as defendants' own witnesses acknowledged, would be difficult to reverse. *See* Ex. BB at 757, 765, 767, 769, 770-71, 775-77; Ex. CC at 247-48; Ex. DD at 150. As the district court recognized, the cumulative impact of initiating these and other actions will make it impossible at a later date to "unscramble the eggs" in a manner that would permit Triton to regain its current strength and position in the market. *See* op. 87-88.

Even during the pendency of administrative proceedings, moreover, the anticompetitive consolidation in this market will irreparably harm consumers. Any price increase effected by the means discussed above will fall chiefly on electric utilities, which will pass those added costs on to individual consumers. No future proceedings can remedy such harms.

The district court erroneously dismissed these harms to the Commission and the public, based on its "skeptic[ism]" about the degree of competitive harm and without any discussion of the "unscrambling" problem. *See* Op. 87-88. Instead, the court focused on perceived harm to the private parties, and accepted at face value defendants' self-serving statements that they would "abandon" the transaction if it is preliminarily enjoined, rather than proceeding with administrative litigation. *Id*. Reliance on such *ipse dixit* by the merging parties sets a dangerous precedent, for it would always allow them to create reason to deny injunctive relief. Indeed, the parties' statements to that effect in the present case are based on no concrete showing of circumstances why, "[i]f the merger makes economic sense now, . . . it would not do so later." *See Heinz*, 246 F.3d at 726. Certainly defendants have shown no irreparable harm from the modest incremental delay occasioned by the grant of an injunction pending the completion of expedited proceedings in this Court – relief that would be short-lived, yet is essential to preserve this Court's ability to render effective relief.

CONCLUSION

For the reasons stated above, appellants request that the Court grant an injunction pending an expedited appeal of the district court's order denying a preliminary injunction.

Respectfully submitted,

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ON BEHALF OF PLAINTIFF STATES

Dated: August 17, 2004

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