

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
ARCH COAL, INC., *et al.*,)
) Docket No. 9316
Respondents.)

**COMPLAINT COUNSEL'S REPLY IN SUPPORT OF MOTION TO STAY THIS
PROCEEDING, OR IN THE ALTERNATIVE, TO STAY DISCOVERY**

Despite this Court's clear suggestions regarding the appropriateness of a stay in this proceeding, Respondents filed a last minute Opposition to Complaint Counsel's Motion to Stay ("Opposition") on May 24, 2004. In their Opposition, Respondents mischaracterize the prehearing conference, and directly contradict the position that they took in the District Court on the appropriateness of a stay in this proceeding. Contrary to Respondents' inaccurate assertions, at no time during the prehearing conference did Complaint Counsel ever indicate that we did not intend to invoke Commission Rule 3.51 to stay this proceeding temporarily. In fact, this Court repeatedly reminded the parties of the availability of Commission Rule 3.51 during the prehearing conference. *See, e.g.*, Transcript of Initial Prehearing Conference, May 11, 2004, at 6 ("somebody needs to file a motion to stay what we're doing. . . ."), 5, 9, and 10. The next day, Complaint Counsel filed the present Motion to Stay. As it was required to do under Commission Rules, this Court issued its Scheduling Order on the following day, May 13th.

It is indisputable that the outcome of the collateral federal court litigation in the United States District Court will have a substantial bearing on the entire scope of this administrative proceeding, including whether this proceeding will occur at all. It also will have a significant bearing on the amount and form of additional discovery that will be needed to adjudicate the merits of Complaint Counsel's claims. This Court, as well as the parties themselves, thus will be

in a substantially better position to determine the remaining discovery needs for this proceeding at the conclusion of the federal court hearing.

Absent a temporary stay, the parties would be forced to conduct two different tracks of discovery for two different proceedings simultaneously. To do so would not only exceed Complaint Counsel's limited resources, it also would enable Respondents to use, indeed abuse, this administrative proceeding to circumvent clear limitations on discovery that have been imposed by the United States District Court in the pending preliminary injunction proceeding. In that collateral federal proceeding, the Respondents noticed nearly five times the maximum of ten depositions allowed under Fed. R. Civ. P. 30(a)(2)(A). The District Court ruled that Respondents' request was excessive, and that "far fewer than 45 depositions will adequately meet defendants' legitimate discovery needs." *FTC v. Arch Coal, Inc.*, Civil Action No. 04-0534 (D.D.C.), May 7, 2004 Order at 2. The District Court thus limited each side to 23 depositions, which currently are being conducted throughout the country.

It is clear that the primary, if not only, purpose of Respondents' Opposition is to attempt to circumvent the clear limitations on discovery imposed by the District Court. Indeed, Respondents made clear in the "meet and confer" conference prior to this Court's prehearing conference that, absent a stay, they intended to use the discovery process in this administrative proceeding to conduct (and use in the federal court proceeding) the discovery that the District Court had denied them. Respondents should not be permitted to use this proceeding as an "end run" around the clear limitations on discovery imposed by the District Court.

It is ironic, to say the least, that Respondents oppose Complaint Counsel's Motion to Stay this administrative proceeding temporarily, for they admit that they have no intention of going

forward in this proceeding if the United States District Court grants the Commission preliminary injunctive relief in the collateral federal proceeding. As counsel for Respondent Arch Coal clearly admitted to this Court at the initial prehearing conference, "in the event that the [District] Court should issue a preliminary injunction, there is not going to be any administrative proceeding. . . ." Transcript of Initial Prehearing Conference, May 11, 2004, at 9.

Finally, this Court should be aware that Respondents' Opposition flatly contradicts the position that they took in the United States District Court just last month. At the initial scheduling conference in federal court, counsel for Arch Coal vigorously argued to Judge Bates that Respondents did not want both the collateral federal court action and this administrative action to proceed simultaneously. As counsel for Respondents clearly stated:

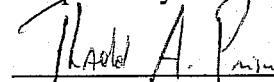
We're not going to try this twice at the same time, that's for sure. . . .
So that administrative proceeding is sometime after we're done here, whatever the dimensions or parameters are of this.

FTC v. Arch Coal, supra, Initial Scheduling Conf. (April 14, 2004), Tr. 35 (emphasis added).

In sum, the present Motion to Stay should be granted. After a temporary stay, all parties will be in a position to adhere to an expedited discovery schedule in this proceeding, and the October 12, 2004 hearing date contemplated by this Court should still be feasible.

Dated: May 25, 2004

Respectfully submitted,



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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
ARCH COAL, INC.,)
)
NEW VULCAN COAL HOLDINGS, LLC, and) Docket No. 9316
)
TRITON COAL COMPANY, LLC)
)
Respondents.)

ORDER STAYING ADMINISTRATIVE PROCEEDING

This matter arose on the motion of complainant to stay this proceeding. Having considered the positions of all parties, IT IS HEREBY ORDERED that the above captioned proceeding is STAYED in its entirety until July 9, 2004.

SO ORDERED this ____ day of _____, 2004.

D. Michael Chappell
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused on this 25th day of May 2004 a copy of Complaint Counsel's Reply In Support of Motion to Stay This Proceeding or, in the Alternative, to Stay Discovery, to be delivered by hand to:

The Honorable D. Michael Chappell
Federal Trade Commission
H-104
600 Pennsylvania Ave. N.W.
Washington D.C. 20580

Administrative Law Judge

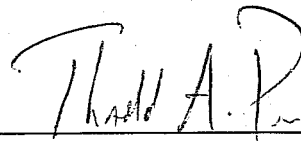
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