IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| FEDERAL TRADE COMMISSION<br>600 Pennsylvania Avenue, N.W.<br>Washington, D.C. 20580,<br><br>Plaintiff,<br><br>v.<br><br>ARCH COAL, INC.<br>1 CityPlace Drive, Suite 300<br>St. Louis, Missouri 63141<br><br>and<br><br>NEW VULCAN COAL HOLDINGS, LLC<br>141 Market Place Drive, Suite 100<br>Fairview Heights, IL 62208<br><br>and<br><br>TRITON COAL COMPANY, LLC<br>113 South Gillette Ave, Suite 203<br>Gillette, WY 82716<br><br>Defendants. | ) | Civ. No. |

COMPLAINT FOR PRELIMINARY INJUNCTION PURSUANT TO FTC ACT § 13(b)

Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), by its designated attorneys, petitions the Court, pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), for a preliminary injunction enjoining defendant Arch Coal, Inc. ("Arch"), including its domestic and foreign agents, divisions, parents, subsidiaries, affiliates, partnerships, or joint ventures, from acquiring through a merger or otherwise any stock, assets, or other interest, either directly or indirectly, of or from defendants New Vulcan Coal Holdings,

LLC ("New Vulcan") or Triton Coal Company, LLC ("Triton"), or their domestic and foreign agents, divisions, parents, subsidiaries, affiliates, partnerships, or joint ventures; thereby maintaining the status quo during the pendency of an administrative proceeding, challenging defendant Arch's proposed acquisition of Triton from New Vulcan, that will be promptly commenced by the Commission pursuant to Section 5 of the FTC Act, 15 U.S.C. § 45, and Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18 and 21; and alleges:

Jurisdiction and Venue

1. Jurisdiction is based on Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and 28 U.S.C. §§ 1337 and 1345. Venue is proper under Section 13(b) of the FTC Act, 28 U.S.C. § 1391(b) and (c), and Section 12 of the Clayton Act, 15 U.S.C. § 22.

The Parties

2. The Commission is an administrative agency of the United States Government, established, organized, and existing pursuant to the FTC Act, 15 U.S.C. § 41, *et seq.*, with its principal offices at 600 Pennsylvania Avenue, N.W., Washington D.C. 20580. The Commission is vested with authority and responsibility for enforcing, *inter alia*, Section 7 of the Clayton Act and Section 5 of the FTC Act.

3. Defendant Arch Coal, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at One CityPlace Drive, Suite 300, St. Louis, Missouri 63141.

4. Defendant New Vulcan Coal Holdings, LLC is a limited liability company, wholly owned by Vulcan Partners, an investment partnership. Defendant New Vulcan is organized and existing under the laws of the State of Delaware, with its principal place of business at 141

Market Place Drive, Suite 100, Fairview Heights, Illinois 62208. Defendant New Vulcan owns all of the outstanding limited liability interests of Triton Coal Company, LLC.

5. Defendant Triton Coal Company, LLC is a limited liability company, wholly owned by New Vulcan and organized and existing under the laws of the State of Delaware, with its principal place of business at 113 South Gillette Ave, Suite 203, Gillette, Wyoming 82716.

6. Defendants are each engaged in commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

Section 13(b) of the FTC Act

7. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), provides in pertinent part:

> (b) Whenever the Commission has reason to believe –
>
> (1) that any person, partnership or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public –
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> the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond . . . .

The Proposed Acquisition and the Commission's Response

8. Pursuant to a Merger and Purchase Agreement dated May 29, 2003, Arch proposes to acquire all the assets of Triton, including principally Triton's Tier 1 North Rochelle

mine, from New Vulcan for approximately $364 million in cash (the "Acquisition").

9. Arch also has entered into an executory contract to transfer another mine that it is acquiring from Triton, Triton's Tier 3 Buckskin mine assets (valued at approximately $80 million, or approximately 22% of the value of the Acquisition), to Peter Kiewit Sons', Inc. ("Kiewit"). This executory contract does not materially change the Acquisition or its likely effect on competition. In any event, defendants have not amended their filings with the FTC under the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a ("HSR Act"). Absent a preliminary injunction, therefore, defendants would be free to consummate the acquisition they reported under the HSR Act (*i.e.*, the acquisition of all of the assets and business of Triton, including Triton's North Rochelle and Buckskin mines), and thereafter to mutually agree to terminate or change the terms of their agreement with Kiewit regarding the transfer of Triton's Buckskin mine to Kiewit.

10. On March 30, 2004, the Commission authorized the commencement of an action under Section 13(b) of the FTC Act to seek a preliminary injunction barring the Acquisition during the pendency of administrative proceedings to be initiated by the Commission pursuant to Section 5(b) of the FTC Act, 15 U.S.C. §45(b). The legality of the Acquisition under Section 7 of the Clayton Act and Section 5 of the FTC Act, and the appropriate remedy, in the event liability is found, will be determined by the Commission through such administrative proceeding and will be subject to judicial review.

11. Defendants Arch and Triton have assured the Commission that they will not consummate the Acquisition until at least two business days after the Court has ruled on Plaintiff's request for a preliminary injunction.

12. In authorizing the commencement of this action, the Commission has determined that such an injunction is in the public interest and that it has reason to believe that the Acquisition would violate Section 7 of the Clayton Act and Section 5 of the FTC Act because the Acquisition may substantially lessen competition and/or tend to create a monopoly in coal mined from the Southern Powder River Basin ("SPRB") and in 8800 Btu SPRB coal.

Coal from the SPRB

13. Coal is a leading energy source in the United States. Coal-fired generating plants account for about 92% of all coal consumption and about 50% of all electric power produced in the United States. Of the approximately 1.1 billion tons of coal produced annually in the United States, about one-third is produced in the SPRB, which is located in Wyoming. SPRB coal is burned by electric generators in at least 26 states, including generators extending from Oregon to Arizona in the west, to Lake Michigan, Georgia, and Alabama in the east. Electric generators account for virtually all consumption of SPRB coal. In 2003, mines in the SPRB produced about 363 million tons of coal with an approximate value in excess of two billion dollars.

14. The SPRB is a source of low sulfur coal that has an energy content of between approximately 8300 and 8800 British Thermal Units ("Btus") per pound. SPRB coal is lower in sulfur than most coals mined in the United States and is one of the few coals that comply with the current sulfur emission limits imposed on coal-fired generators by the 1990 Clean Air Act. SPRB coal is also low in ash and sodium content. These properties, combined with exceptionally low mining costs, give SPRB coal a strong economic advantage in supplying many electric generators compared to coal produced in other regions of the United States.

The Three Tiers in the SPRB

15. SPRB coal suppliers and customers have established two distinct price points for SPRB coal based on the heat content of the coal – 8800 Btu and 8400 Btu. Coal contracts specify sulfur content and the Btu range of the coal and provide price adjustment for actual sulfur content and Btu content of the coal transferred from the mine.

16. The most highly valued SPRB coal is 8800 Btu coal, which is produced in the southern portion of the SPRB, known as "Tier 1" or as the "Wright Area." This 8800 Btu coal commands a substantial price premium over 8400 Btu coal, which comes from mines in Tiers 2 and 3, the adjacent areas to the north in the SPRB. The price premium for 8800 Btu SPRB coal reflects its lower sulfur content, higher energy content, and easy access to competing rail transport service.

17. The mines that produce 8400 Btu coal are divided between Tiers 2 and 3. Tier 2 mines are located just south of Gillette, Wyoming. These mines typically produce coal that not only has a lower heat content but also generally a higher sulfur content than coal from Tier 1. Tier 3 mines include those mines located immediately north and east of Gillette, Wyoming. These mines also produce coal with approximately 8400 Btu/lb., but with higher sulfur content than the Tier 2 mines to the south.

18. Coal mines in Tier 1 and Tier 2 of the SPRB have a transportation advantage because they have access to the joint line of the Burlington Northern Santa Fe ("BNSF") and Union Pacific ("UP") railroads. Consequently, shippers of coal from mines in Tier 1 and Tier 2 of the SPRB are able to contract with either BNSF or UP to transport the coal to the customer's generating plant. Tier 3 mines have access only to the BNSF railroad. Tier 3 producers are

competitively disadvantaged relative to producers in Tiers 1 and 2 of the SPRB, because they produce a lower Btu coal with a higher sulfur content than mines in other regions of the SPRB, and have access to only the BNSF railroad.

19. The four leading producers in the SPRB – Arch, Peabody, Kennecott, and Triton – all operate mines in the Tier 1 Region. Arch's Black Thunder mine and Triton's North Rochelle mine are located in the Tier 1 region and produce 8800 Btu coal. Each of these producers also conducts one or more coal mining operations in Tiers 2 and 3 of the SPRB. Arch's Coal Creek mine, which Arch has kept idle since 2000, is located in the Tier 2 region. Triton's Buckskin mine is located in the Tier 3 region. Another SPRB producer, R.A.G., is a significant producer of 8400 Btu SPRB coal, but produces coal only in Tiers 2 and 3.

Use of SPRB Coal

20. Coal-fired generating plants are optimized to use coal from a certain source, or a specific mixture of coals. Switching to, or away from, SPRB coal often entails significant costs. Most generating plants burning SPRB coal that were brought on line in the last twenty years are designed specifically to burn SPRB coal and cannot economically burn other coal. Prior to the development of the SPRB coal mines, coal-fired generating plants were designed to burn the highest Btu coal, generally bituminous coal with a heat content up to 12,000 Btu/lb., from the closest mines to the plants without regard to sulfur content. Following passage of the Clean Air Act of 1990, many of these older plants converted their facilities to burn SPRB coal in order to comply with stricter sulfur emissions limitations. Converting a coal-fired electric generating facility from high-Btu bituminous coal to SPRB coal is costly, in the tens of

millions of dollars, and takes a significant amount of time. Plant modifications to burn SPRB coal include upgrading the coal conveying and handling systems to deliver the higher volume of SPRB coal needed by the electric generating units at the plant, and modifying the plants' boiler and heat absorption and cleaning systems. Many older plants that currently burn SPRB coal would require installation of scrubbers to reduce emission of sulfur compounds before they could switch to non-SPRB (e.g., Appalachian) coal in any significant volume. Installing a scrubber is an expensive procedure, which can cost hundreds of millions of dollars and take several years.

21. Montana coals from the Northern Powder River Basin ("NPRB") are not competitive with Wyoming coals from the SPRB. NPRB coals have high sodium content, which can lead to operational problems at the generating plant. The high sodium content associated with NPRB coals tends to create excessive slagging in the boilers that adversely affects the boilers' efficiency. In addition, Montana imposes a significantly higher severance tax on its coal than does Wyoming. The higher tax puts Montana NPRB coal at a competitive disadvantage to SPRB coal, which is produced in Wyoming. Transportation from the NPRB mines is also limited to one rail line. NPRB coal production is small relative to that in the SPRB, and shipments of NPRB coal have declined in recent years.

22. Even if coal from outside the SPRB possessed physical characteristics that would allow its use in lieu of SPRB coal, coals from other regions are too costly on a delivered cost basis to be an economic substitute for SPRB coal for most generators that use SPRB coal. Colorado and Uinta Basin coals, for many generators that burn SPRB coal, are much more

expensive, on a delivered cost per Btu, sulfur-adjusted basis, than SPRB coals. Appalachian coal is significantly more expensive on a delivered cost per Btu basis than SPRB coal, and moreover most Appalachian coal has high sulfur content.

23. SPRB coal is sold exclusively at the mine-mouth in the SPRB. Customers ship the coal on one of the two rail lines serving the SPRB and negotiate a freight rate with the railroad. Coal from the SPRB travels to at least 26 states extending from Oregon to Arizona in the west, to Lake Michigan, Georgia and Alabama in the east.

24. 8800 Btu SPRB coal produced in Tier 1 of the SPRB is functionally and economically distinct from the 8400 Btu SPRB coal produced in Tier 2 and Tier 3 of the SPRB. More 8400 Btu coal must be transported and burned in order to generate the same heat output as would be generated from a given quantity of 8800 Btu coal. Because more 8400 Btu coal is required to generate the same heat value as a given amount of 8800 Btu coal, in general the greater the distance from the SPRB to a customer's generating facility, the more uneconomical it is for a customer with a given type of generator that is burning 8800 Btu SPRB coal to switch to 8400 Btu SPRB coal in response to an increase in the mine price of 8800 Btu SPRB coal.

25. Performance problems associated with burning 8400 Btu SPRB coal make use of this coal uneconomic for some 8800 Btu SPRB coal customers. When low-Btu coal is used to fuel a boiler designed to burn higher Btu coal, more coal must be moved through the boiler to generate the same quantity of heat. It is often not possible, however, to move a sufficient volume of coal through the boiler unit to achieve the boiler's full rated steam output level,

causing the rated maximum electric generating capacity of the generating facility to be reduced, a consequence referred to in the electricity industry as a "derate." For some 8800 Btu coal customers, use of 8400 Btu coal causes a derate. Growth in demand for electricity has increased, and is likely to continue to increase, the demand for 8800 Btu SPRB coal relative to the demand for 8400 Btu SPRB coal.

Arch and Triton Each Control Significant Excess Capacity for Production of SPRB Coal

26. Arch idled its 8400 Btu SPRB coal mining operations at Coal Creek in or about July 2000 because of what Arch regarded as unfavorable conditions existing in the market environment.

27. Arch has much of the infrastructure in place to support coal production of 18 million tons per year at its Coal Creek mine. Through its idle Coal Creek mine, Arch controls the principal excess capacity for production of 8400 Btu SPRB coal.

28. Through its North Rochelle mine, Triton controls the principal excess capacity for production of 8800 Btu SPRB coal.

The SPRB Coal Market Is Susceptible to Coordination

29. The SPRB coal market (and any narrower market therein) possesses several structural features that make coordination more likely, including a small number of competitors, high barriers to entry, homogeneity of the relevant product, relatively inelastic demand, availability of substantial market and competitor information, and close geographic proximity of competitors.

30. Defendants and others, including Kiewit, recognized that consolidation in the

SPRB has led and will lead to producer restraint and higher SPRB prices.

31. Detailed information regarding SPRB coal market and competitor output, sales, prices, capacity, forecasts, and plans is readily available to mine owners through the trade press and through other public and private sources of information.

32. Behavior by the major SPRB producers facilitates coordination. The major SPRB producers regularly signal their intent with respect to coal production, and competitors keenly follow these signals and ascertain whether production announcements are actually implemented. This signaling includes open communications by coal companies and coal company executives at investor conferences and trade association meetings and through press releases and statements in the trade press.

33. Arch has been a leading proponent of limiting SPRB coal production. With the acquisition of Triton, Arch will have greater incentive and ability to limit supply of SPRB coal from the mines it already owns and those it would acquire. Arch has publicly encouraged SPRB competitors to restrict output to stabilize or increase prices for SPRB coal. Arch's output restriction and signals concerning output and prices facilitate coordination by reducing uncertainty among Arch's SPRB competitors. For example:

(a) On May 18, 2000, Arch announced its plans to reduce production at Coal Creek in a press release in which Arch President and CEO Steven Leer states, "We are committed to earning an adequate return for our shareholders, and we will not resume higher levels of production at Coal Creek until such a return is possible." Speaking at the Western Coal Council's Spring Forum on May 23, 2000, before an

audience that included Arch's competitors, Mr. Leer noted that overproduction had eroded coal prices. Mr. Leer urged coal suppliers to "Produce Less Coal" in response to the problem of oversupply. Advocating cutbacks in coal production, Mr. Leer said that coal companies will benefit from matching supply and demand and that Arch, Kennecott, and Peabody are all currently moving to reduce production. He stressed to his audience that "Arch has been conscientious" in reducing capacity, including idling Coal Creek (removing 10 million tons per year of output and idling 18 million tons per year of capacity) and limiting expansion at Black Thunder to about 60 million tons per year (the original plan had called for about 80 million tons per year).

(b) A year later, at an April 17, 2001, Western Coal Transportation Association meeting, Mr. Leer delivered the keynote address to the group, which included his competitors and customers. In that speech, Mr. Leer explained that the reason for the price increase in the SPRB was the "supply/demand balance," due, in part, to the fact that in the "Southern PRB, fewer producers, so greater potential for discipline." Even though coal prices had more than doubled from the previous year, Mr. Leer defended his and his competitors' decisions to constrain supply – "We've had offers to open up Coal Creek Mine for one year at extremely attractive pricing. And the answer is no. I think other producers are in the same boat." Arch's message got through to Triton, and indeed was discussed within a few days internally among Triton's management.

(c) On March 18, 2002, PRNewswire-FirstCall reported that Arch

announced production cuts during a period of increasing prices and even though such cuts would adversely impact Arch's earnings. Quoting Mr. Leer, the report stated:

> "While we are seeing the initial signs of an economic recovery, and forward pricing for 2003 has begun to increase, we believe that the best course for Arch is to act aggressively to bring production in line with demand."
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> "We are committed to being a market-driven producer," Leer said. We believe it would be a mistake to sell coal into an oversupplied market, at prices that will not provide an adequate return."
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> "We have not taken these steps lightly," he added. "The reductions will have an adverse impact on earnings, particularly in the first and second quarters, given the relatively fixed nature of our cost structure in the near term."

According to Mr. Leer, being "market driven" means exercising production discipline, *i.e.*, when demand is less than supply at Arch's desired price, Arch reduces its output rather than its price. Mr. Leer's statements were not merely posturing for public consumption. Privately Mr. Leer urged that Arch should continue to restrict output even in light of rising prices, because output increases would cause the price rebound to stall.

(d) Four months after Arch announced its decision to restrict production, the July 18, 2002, edition of Coal & Energy reported that Arch had, in fact, reduced its coal shipments. The article further reported Arch's most recent pricing for SPRB coal. The report quotes Mr. Leer as saying:

> "Although we are continuing to restrict production, we are seeing signs that the market is progressing towards a healthier balance between supply and demand. . . . In the West, we have committed in recent weeks approximately 3 million tons of

> Powder River Basin coal for delivery in 2003 or 2004, at an average price of approximately $7 per ton. . . . We are very comfortable with our position and feel no sense of urgency to sign contracts at current pricing levels. . . . We continue to believe that the current market has far more upside potential than downside."

(e) Throughout 2002 and into 2003, Mr. Leer continued to tout the benefits of restricting production. On April 21, 2003, one month before Arch announced it was acquiring Triton, Mr. Leer stated in a release announcing Arch's First Quarter 2003 results that "we continue to believe that our strategic decision to leave uncommitted tons in the ground, rather than sell them at a price that does not provide an adequate return, is sound." At the same time, Mr. Leer reaffirmed privately that Arch has been doing the right thing by restricting production and cautioned that Arch's ability to continue to lead the charge would depend on gaining market support. However, Mr. Leer warned that if prices did not improve soon, Arch would ramp up the mines to full production. Such a ramp up would send Arch's competitors a strong signal that Arch was prepared to punish other producers if they failed to support Arch's output curtailment initiative.

34. Arch's SPRB competitors also understand the importance of limiting production to tighten the supply/demand balance in the market and have signaled their own production intentions. For example:

(a) Privately, an executive of a major SPRB producer observed, in May 2000, that while the company could not enter into express or implied understandings with its competitors as to market matters influencing or affecting price, it can set a

rational, independent example for the PRB industry. The company examined the message it would send to the PRB industry by curtailing expansion and expressed hope that competitors would consider these factors in their own market behavior, in light of preclusion, under antitrust law, of express or implied understandings or communications on these topics.

(b) Irl Engelhardt, Chairman and CEO of Peabody Coal, made the following statement in his April 25, 2000, speech to the Western Coal Transportation Association:

> The growing demand for Powder River Basin coals should point to robust market conditions. The opposite is true; conditions are soft at present. Why? Our "firm" believes that too many producers relied upon those optimistic market projections discussed earlier, and some made investments that resulted in oversupply situations.

Mr. Engelhardt then described the steps Peabody had taken to reduce "oversupply," including:

- In early 1999, Peabody suspended the 10-million-ton-per-year Rawhide Mine, "one of the most productive mines in the United States;"

- Also in 1999, Peabody delayed a 30-million-ton-per-year capacity expansion at North Antelope/Rochelle "until margins will generate the proper returns;" and

- In April 2000, Peabody idled a truck/shovel fleet at Caballo, reducing output by 8 million tons per year, "until market conditions improve."

(c) In an internal evaluation of its own SPRB coal supply strategy, another major SPRB producer noted with interest Mr. Engelhardt's speech, including his

statements regarding the damage oversupply has wreaked and Peabody's output reductions until market conditions improve.

(d) On May 8, 2000, a few days after the Engelhardt speech, Kennecott issued a press release announcing its intent to "temporarily curtail production" at its mines. A week later, on May 15, 2000, Coal Outlook reported that "these reductions would come from the Cordero Rojo complex, 5.5 million tons; Jacobs Ranch, 2 million tons; and Colowyo, 500,000 tons." The article quotes Kennecott's president Gary Goldberg, as stating that Kennecott elected to curtail output "'rather than accept prices that do not provide a return on its investment.'"

(e) Communications among the major SPRB producers are not limited to speeches, but include direct conversations concerning expansion plans and mine operations. Competitors also discuss with one another supply contracts with individual customers. In considering how to respond to a customer's expressed interest in purchasing coal, a major SPRB producer drew on its discussions with Arch personnel regarding the customer's future purchase commitments with Arch. Discussions between competitors also involve SPRB price projections and the SPRB supply and demand balance.

(f) Triton, well aware of the cutbacks by the three largest of the five SPRB producers, ordered the development of plans for the public announcement, at a May 15, 2000, speech to a Coaltrans conference, of its own plan to reduce production at North Rochelle until pricing improved. But Triton ultimately decided to expand

output at the North Rochelle mine rather than cut back its production. Triton continued to operate the North Rochelle mine at close to full practical capacity until after entering into the acquisition agreement with Arch, entering into a joint defense agreement with Arch, and engaging in due diligence discussions with Arch. More recently, Triton also has indicated that it has plans to reduce production at the North Rochelle mine.

Prior to the Proposed Acquisition, Triton's North Rochelle Mine Has Been the Principal Source of Output Expansion in the SPRB During the Past Five Years

35. Shipments of SPRB coal increased by 70 million tons over the five-year period 1998 through 2003. While other SPRB producers exercised production discipline, Triton rapidly expanded production at its North Rochelle mine, the newest mine in the SPRB. Triton's North Rochelle mine has been the largest source of increased supply of SPRB coal over the five-year period 1998 through 2003. The increase in coal shipments from the North Rochelle mine accounted for 34.1% of the total increase in coal shipments from the SPRB over the five-year period 1998 through 2003. The expansion at North Rochelle has been the largest expansion of supply of SPRB coal over the five-year period 1998 through 2003.

36. Output expansion has been profitable for Triton. Triton's EBITDA was over fifty million dollars in 2002, and Triton has continued to have a strong operating income and EBITDA. The vast majority of Triton's operating income and EBITDA, in 2002 and 2003, came from Triton's North Rochelle mine.

37. Arch Coal management recognized that an acquisition of Triton will provide an "insurance policy" for Arch in the SPRB, by eliminating an "undisciplined" producer and

enabling Arch more effectively to control production to match demand.

Likelihood of Success on the Merits and Need for Relief

38. Arch's acquisition of Triton, both as originally agreed among defendants and as further agreed between Arch and Kiewit (a competing bidder for Triton and for Triton's Tier 3 Buckskin assets) is an acquisition of "all or any part of the stock" and "all or any part of the assets" of Triton, within the meaning of Clayton Act § 7, 15 U.S.C. § 18.

39. The Commission is ultimately likely to succeed in demonstrating, in administrative proceedings to adjudicate the legality of the proposed Acquisition, that the Acquisition would violate Section 7 of the Clayton Act and Section 5 of the FTC Act. In particular, the Commission is ultimately likely to succeed in demonstrating, *inter alia*, that:

(a) The relevant product markets in which the competitive effects of the proposed Acquisition may be assessed include SPRB coal (and any narrower markets therein).

(b) The relevant geographic market within which to assess the competitive effects of the proposed Acquisition is the SPRB (and any narrower markets therein). The SPRB is the only area with mines to which customers can turn for supply of SPRB coal, and Tier 1 of the SPRB is the only area with mines to which customers can turn for supply of 8800 Btu SPRB coal. The Acquisition will adversely affect electricity customers throughout the United States.

(c) The Acquisition may result in some or all of the following effects:

(i) The Acquisition would combine two of the four leading

producers of SPRB coal, substantially increasing concentration in the SPRB market, would result in a highly concentrated SPRB market, would eliminate the existing substantial competition between Arch and Triton, and would substantially reduce competition in the SPRB market.

(ii) The Acquisition would combine the two firms that hold the principal sources of excess capacity in the SPRB and would bring under Arch's control the principal source of excess capacity for production of 8800 Btu SPRB coal.

(iii) The Acquisition would combine two among only four producers in Tier 1 of the SPRB, substantially increasing concentration in 8800 Btu SPRB coal, would result in high concentration among 8800 coal producers, would eliminate the existing substantial competition between Arch and Triton, and would substantially reduce competition in 8800 Btu SPRB coal.

(iv) The Acquisition increases the likelihood of coordination in the market for SPRB coal (and narrower markets therein), a market that is already susceptible to coordination. Following the Acquisition, Arch could more easily coordinate profitably with either or both of the other two remaining major producers to restrict output, limit capacity expansion, or raise price as demand for SPRB coal continues to grow. The Acquisition would make coordination among SPRB producers, and among producers of 8800 Btu SPRB coal, easier, more likely, more successful, and more durable.

(d) Entry and expansion by fringe competitors in the relevant markets would not be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of the Acquisition.

40. The transfer by Arch of Triton's Tier 3 Buckskin mine to Kiewit does not remedy the potential anticompetitive effects of the Acquisition in the SPRB or in 8800 coal. Buckskin and R.A.G. would be unable to constrain a coordinated price increase in the SPRB.

41. The reestablishment of Triton as an independent, viable competitor in the relevant markets if the Acquisition were consummated would be difficult, and there is a substantial likelihood that it would be difficult or impossible to restore Triton's business as it originally existed. If the agreement between Arch and Kiewit were consummated, the assets of Triton would be divided between Arch and Kiewit, and the reestablishment of Triton as a viable and major competitor in the SPRB would be impaired. Further, it is likely that substantial interim harm to competition, and harm to one or both of the acquired mines, would occur even if suitable divestiture remedies could be devised. For example:

(a) Arch could preempt economic expansion of the North Rochelle mine by preventing the North Rochelle mine from acquiring the West Roundup Lease, for which Triton applied to the Bureau of Land Management on July 28, 2000, and which would add approximately 185 million tons of coal reserves, and approximately 1,868 acres, to the North Rochelle mine.

(b) Arch could preempt economic expansion of the Buckskin mine by

preventing the Buckskin mine from acquiring the West Hay Creek Lease, for which Triton applied to the Bureau of Land Management on August 31, 2000, and which would add approximately 130 million tons of coal reserves, and approximately 840 acres, to the Buckskin mine.

(c) Arch could shift production of 8800 Btu SPRB coal from Arch's Black Thunder mine to the North Rochelle mine, causing coal reserves at the North Rochelle mine to be depleted.

(d) Arch could continue to hold out of production Arch's Coal Creek mine and produce 8400 Btu SPRB coal only at the Buckskin mine, causing coal reserves at the Buckskin mine to be depleted.

(e) Arch plans to consolidate operations at the North Rochelle mine with Arch's adjoining Black Thunder mine, resulting in a disruption of independent and economic operation of the North Rochelle mine and impairing the restoration of independent and economic operation of the North Rochelle mine following divestiture.

42. For the reasons stated above, the granting of the injunctive relief sought is in the public interest.

WHEREFORE, the Commission requests that the Court:

1. Preliminarily enjoin defendant Arch, and all its affiliates, from taking any further steps to consummate, directly or indirectly, the acquisition of Triton, or any other acquisition of stock, assets, or other interest, either directly or indirectly, of Triton from New Vulcan;

2. Maintain the status quo pending the issuance of an administrative complaint by the Commission challenging the Acquisition, and until such complaint is dismissed by the Commission or set aside by a court on review, or until the order of the Commission made thereon has become final; and

3. Award such other and further relief as the Court may determine to be proper and just, including costs.

DATED: April 1, 2004


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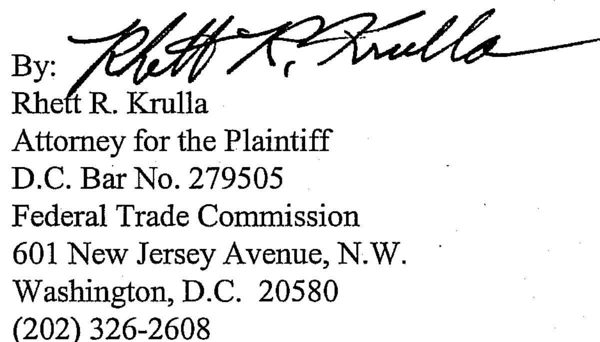

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