IN THE UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of ARCH COAL, INC., a corporation, NEW VULCAN COAL HOLDINGS, LLC, a limited liability company, and TRITON COAL COMPANY, LLC, a limited liability company.	)	Docket No. 9316

MOTION TO THE COMMISSION FOR WITHDRAWAL OF MATTER FROM ADJUDICATION

Respondent Arch Coal, Inc., on behalf of itself and Co-Respondents Triton Coal Company, LLC, and New Vulcan Coal Holdings, LLC (hereafter collectively referred to as "Respondents"),[1] hereby moves, pursuant to FTC Rule 3.26(c), 16 C.F.R. 3.26(c), for a withdrawal of the above captioned matter from adjudication to facilitate the Commission's consideration whether it is in the public interest to continue pursuing this matter following a denial by the federal district court of a preliminary injunction, a denial by the federal appeals court of an injunction pending appeal, and consummation of the proposed transactions on August 20, 2004. The core purpose of FTC Rule 3.26(c) would be well served by withdrawal of the matter from adjudication so that the Commission's consideration of whether to pursue the matter may be conducted without the normal adjudicative constraints, including the "*ex parte*

[1] On August 20, 2004, Arch Coal acquired Triton from New Vulcan Coal Holdings, and immediately thereafter sold Triton's Buckskin mine to Peter Kiewit & Sons', Inc. As of that date, both Triton and New Vulcan Holdings had disposed of all their assets, transferred the remaining liabilities to a separate entity, Vulcan Holding, Ltd., and ceased doing business.

rule," applicable to Part 3 proceedings. For the reasons set forth below, Respondents respectfully submit that withdrawal is entirely appropriate under the circumstances and should be granted.

BACKGROUND STATEMENT

Complaint counsel commenced the instant administrative proceeding on April 6, 2004, five days after filing an almost identical complaint in the federal district court under Section 13(b) of the Federal Trade Commission Act. The Complaint challenges Arch's proposed acquisition of Triton's North Rochelle and Buckskin mines under Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Following an Answer from Respondents, Administrative Law Judge Chappell entered a scheduling order, pursuant to which all discovery is to be concluded by September 7, 2004 (today), and an evidentiary hearing is scheduled to commence on October 12, 2004.

The Section 13(b) district court proceeding sought to preliminarily enjoin Arch's acquisition of Triton, and thereby also prevent Arch's proposed subsequent sale of Triton's Buckskin mine to Kiewit. Following 10 days of hearings, involving nearly two dozen witnesses, and the introduction of many hundreds of trial exhibits, followed by extensive post-trial briefing and closing arguments, the district court denied the FTC's request for preliminary injunctive relief on August 16, 2004, finding that the FTC had not shown a likelihood of success of prevailing on its Clayton Act, Section 7, administrative challenge to the transactions. *See FTC v. Arch Coal, Inc.*, Civ. No. 04-0534 (JDB) (Mem. Op. Aug. 16, 2004) (hereafter "Op."). An injunction pending appeal was thereafter sought by the FTC and denied by the United States Court of Appeals for the District of Columbia on August 20, 2004.[2] The Arch-Triton-Kiewit transactions were thereupon immediately consummated, with the transfer of Triton to Arch, and Arch's transfer immediately thereafter of its newly acquired Buckskin mine to Kiewit.

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[2] A copy of the Court of Appeals' Order is attached hereto as Exhibit A.

Counsel for the FTC and for Respondents have agreed that the district court record will be included in its entirety as part of the record before the Administrative Law Judge in the instant administrative proceeding.

ARGUMENT

I. THE INSTANT REQUEST FOR WITHDRAWAL IS TIMELY AND SHOULD BE ENTERTAINED BY THE COMMISSION

Pursuant to FTC Rule 3.26(b), withdrawal motions are generally to be submitted by Respondents following the denial of Section 13(b) relief by a federal court of appeals. The Commission may, however, entertain such a motion earlier under Rule 3.26(c), and, even over the objection of Complaint Counsel on timeliness grounds, grant withdrawal as an appropriate exercise of its discretionary authority. *See* 16 C.F.R. 3.26(c).

The instant circumstances compel such an exercise of discretion. Under the expedited briefing schedule set by the appellate court, argument on the FTC's appeal from the district court's ruling is not scheduled until January 18, 2005. The pending administrative hearing, scheduled to commerce on October 12, 2004, will thus surely be concluded well before the federal appeal is decided, and before counsel are scheduled to present oral argument in the Circuit Court. Accordingly, waiting for the appeal process to run its course will effectively deny the Commission the full benefit of considering possible withdrawal, without Complaint Counsel and Respondents alike having an opportunity to offer their respective views to the Commission on the public interest questions presented due to (i) the constraints posed by the "*ex parte* rule," 16 CFR 4.7 (which applies to communications with both complaint counsel and respondents), (ii) the requirement that communications by the parties be on the record of the administrative proceeding, and (iii) other adjudicative constraints that would undermine the Commission's ability to consider, on a fully informed basis, whether to continue the matter.

Moreover, the purpose of generally deferring a Rule 3.26(b) withdrawal motion until after the court of appeals has acted is to insure that the FTC's opportunity to obtain Section 13(b) relief has been fully exhausted. Here, despite the fact that the appeal is still pending, there is no

longer any opportunity for the FTC to obtain Section 13(b) relief to prevent a closing of the transactions. The FTC's motion for an injunction pending appeal was denied by the court of appeals, and the transactions have since been completed. These events have rendered the FTC's appeal moot, *see Public Media Center v. FCC*, 587 F.2d 1322, 1326 (D.C. Cir. 1978) (courts will dismiss appeals as moot when events during pendency of appeal make the relief sought unavailable), and, there thus appears to be no good reason for the Commission to defer consideration of Respondents' withdrawal request pending final resolution of the appeal. To the contrary, entertaining the present motion, and entertaining it now, is most appropriate.

II. WITHDRAWAL IS IN THE PUBLIC INTEREST AND WILL PROVIDE THE COMMISSION TIME TO CONSIDER FULLY WHETHER AND HOW MOST APPROPRIATELY TO PROCEED

The district court had a full opportunity to consider the FTC's Clayton Act, Section 7 challenge to the Arch-Triton-Kiewit transactions. In concluding that a satisfactory factual showing had not been made to demonstrate, as a threshold matter, a likelihood that the FTC would or could succeed on the merits of its administrative claim, the federal district court was unpersuaded that the challenged transactions posed any realistic threat of tacit coordination among producers in the Southern Powder River Basin ("SPRB"). *See* Op. at 69.

The FTC's burden before Administrative Law Judge Chappell is, of course, considerably higher than it was in the Section 13(b) action. *See R.R. Donnelly & Sons Co.*, 120 F.T.C. 36 (1995), 1995 FTC LEXIS 450, at *155 (dismissing administrative complaint "for failure to prove that the acquisition is likely to reduce competition in a relevant market"); *compare with* Op. at 5 (noting that, in a Section 13(b) action, the FTC can obtain an injunction based on a Clayton Section 7 claim merely by "'rais[ing] questions going to the merits so serious, substantial, difficult and doubtful'" so as to make them fair ground for administrative review) (citation omitted). It thus appears highly unlikely that the administrative proceeding -- following so closely on the heels of the extensive preliminary injunction proceedings, and without benefit of

much (if anything) in the way of additional discovery[3] – will produce a factual record any more likely to show that the Arch-Triton-Kiewit transactions will likely substantially lessen competition in the SPRB. Indeed, if history is any guide, such a turnaround in the Part 3 administrative litigation should not be expected. *See R.R. Donnelly & Sons Co.*, 120 F.T.C. 36 (1995) (Commission dismissed the administrative complaint for which preliminary relief had been denied by the federal court); *Owens-Illinois, Inc.*, 115 F.T.C. 179 (1992) (same).

Withdrawal of the matter from adjudication is particularly appropriate where, as here, the federal court proceeding was extensive in nature and neither truncated nor rushed. The district court allowed each side ample opportunity to fully develop and present its evidence and arguments. In view of that fully developed record, considerations of administrative efficiency and fairness to the parties weigh strongly in favor of withdrawal of the matter from adjudication so that the Commission has an opportunity to consider whether to proceed after candid discussions with both Complaint counsel and Respondents.

A withdrawal of the matter from adjudication would not, of course, foreclose Commission action at a later date should such a course appear appropriate. Since the transactions have now been consummated, there is no longer the need for prompt administrative review either to clear the way for a long-awaited closing, on the one hand, or to prevent an imminent closing from occurring, on the other hand. With the benefit of more time, the Commission and consumers can, and undoubtedly will, be able to monitor the competitive effects of the transactions closely, with Arch fully mindful of the Commission's authority to

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[3] The FTC and Respondents again deposed one another's expert witnesses, but, since the experts were no different and very little new information was developed in the several weeks following the conclusion of the court hearings, the experts' new testimony does not significantly add to the evidentiary record. Indeed, most of the post-district court hearing expert testimony relates to the efficiencies of integrating the Arch and Triton mines, which integration has already occurred. Respondents have also noticed the deposition of one additional potential fact witness, Mr. Roberts of RAG. The FTC has taken no additional third party discovery nor sought deposition testimony from any additional fact witnesses. But for the deposition of Mr. Roberts, fact discovery in the administrative proceeding is now closed.

reinstate the Part 3 administrative proceeding and challenge the acquisitions based on hard facts, not just economic theory.

Thus, the public interest will not be ill-served by taking the requested action at this time. Indeed, in the event there were a reinstated Part 3 proceeding, the likelihood is that, with the passage of time, a more meaningful record would then be available for the fashioning of appropriate relief than might ever be suggested by the immediate record recently considered by the district court and presently before the Administrative Law Judge. Conversely, if time proves that the acquisitions are procompetitive and have inured to the benefit of consumers, the public interest is equally well served by withdrawal.

Finally, withdrawal now would neither send an adverse signal, nor set an undesirable FTC precedent. The district court's 92-page decision was clearly fact-intensive. As the court of appeals underscored, there was nothing novel about the FTC's legal theory. *See* Exh. A. It was the facts of record in this instance that showed (i) the transactions increased concentration levels in the SPRB only modestly (Op. at 29-30); (ii) they substituted a financially vibrant new entrant for a financially weakened producer, leaving the same number of competitors selling SPRB coal (*id.* at 83); (iii) the market has been and is today characterized by intense competition (*id.* at 36); and (iv) based on the incomplete, untimely, and often unreliable market information available (*id.* at 69, 85), coordination in the future appears unlikely because there was no identifiable mechanism to serve as the focal point for such interaction, the ease of deviation undercuts whatever coordination might theoretically be suggested, and the deviator could readily avoid effective punishment (*id.* at 59-60, 85).

These factual findings are, of course, peculiar to the factual record presented, and do not foreclose, either in their particulars or collectively, FTC inquiry into such matter in the future, whether examining an acquisition in the same or a different market or industry. For the present, however, the record evidence fully supports the decision of the federal district court, and it promises in the immediate future to be materially no different before Administrative Law Judge Chappell in the administrative hearing scheduled to commence October 12, 2004. Accordingly,

Commission withdrawal of the matter from adjudication, to permit a full and open reassessment of the relevant public interest considerations, is certainly warranted in light of recent developments, and, we respectfully submit, should in the circumstances be ordered.

CONCLUSION

For the reasons stated, Respondents' motion for withdrawal of the matter from adjudication should be granted forthwith.

Dated: September 7, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that copies of the foregoing Motion to the Commission for Withdrawal of Matter from Adjudication were served on the following persons on this 7th day of September, 2004.

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EXHIBIT A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5291 **September Term, 2003**

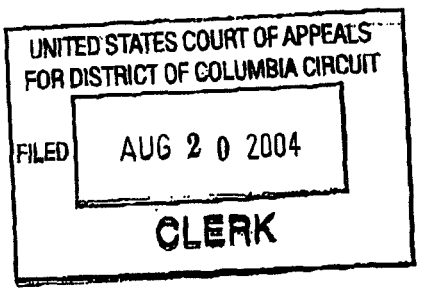
04cv00534
04cv00535

Filed On:

Federal Trade Commission,
Appellant

v.

Arch Coal, Inc., et al.,
Appellees



Consolidated with 04-7120

BEFORE: Sentelle, Rogers, and Garland, Circuit Judges

ORDER

Upon consideration of the emergency motion for an injunction pending appeal, the opposition thereto, and the reply, it is

ORDERED that the motion be denied. Although the court agrees with the FTC that there is nothing novel about the theory it has advanced in this case, the court concludes that it has not met the standard for an injunction pending appeal. See FTC v. H.J. Heinz Co., No. 00-5362 (D.C. Cir. Nov. 8, 2000); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

Per Curiam

RBG/cjd

MBG/cjd