

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.)

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

During the initial pre-hearing conference held in the above-captioned administrative proceeding on May 11, 2004, this Court reminded the parties of the availability of Commission Rule 3.51 and suggested that if any party believed that the pendency of collateral federal court litigation related to these proceedings warranted the invocation of a stay of these proceedings, that party should make an appropriate motion to this Court. Pursuant to Commission Rule 3.51, Complaint Counsel hereby move to stay the above-captioned administrative proceeding for approximately eight weeks (until July 9, 2004), at which time a hearing on the Commission's complaint for preliminary injunctive relief before the United States District Court for the District of Columbia will have concluded. Alternatively, Complaint Counsel request that discovery in this proceeding be stayed pending completion of the federal court preliminary injunction hearing. The outcome of the federal court litigation will have a significant bearing on the scope of this administrative proceeding, as well as on the amount and form of additional discovery that will be needed to adjudicate the merits of Complaint Counsel's claims. Thus, the parties and this Court

will be in a substantially better position to determine an appropriate pretrial schedule at the conclusion of the federal court hearing.

Commission Rule 3.51 provides that “The ALJ may stay the administrative proceeding until resolution of [a] collateral federal court proceeding.” 16 C.F.R. § 3.51. On April 1, 2004, six days before filing the administrative complaint in this action, the Commission filed a complaint in United States District Court for the District of Columbia, pursuant to section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), seeking a preliminary injunction to prevent the merger that is the subject of this administrative proceeding until final resolution of the merits in this proceeding. *Federal Trade Commission v. Arch Coal, Inc., et al.*, Civil Action No. 04-0534 (D.D.C., April 1, 2004).¹ The preliminary injunction action has been assigned to the Honorable John D. Bates, and Judge Bates has scheduled a preliminary injunction hearing, with live testimony, that will commence on June 21, 2004 and will continue for five days.

Complaint Counsel and respondents currently are heavily involved in, and fully committed to, the expedited discovery schedule that is in place in the federal court proceeding. Forty six depositions have been allowed in that proceeding (23 for each side), and those depositions are being conducted throughout the country at present. The federal court proceeding also involves extensive document discovery, which is ongoing. Complaint Counsel expect that all of the discovery that is being conducted for the federal court proceeding is pertinent to, and will be incorporated in, this administrative proceeding. The discovery currently being conducted

¹ Six states filed a related suit in the federal district court on the same day, seeking both preliminary and permanent injunctive relief against the transaction. *State of Missouri et al., v. Arch Coal, Inc., et al.*, Civil Action No. 04-0535 (D.D.C., April 1, 2004). The FTC and state cases have been consolidated pursuant to Fed. R. Civ. P. 42, for the limited purpose of the preliminary injunction proceeding.

for the federal court proceeding thus will prove highly relevant to this administrative proceeding, as will the record in the federal court proceeding. Furthermore, the discovery needs of the parties, for purposes of this proceeding, will be the needs that remain outstanding at the conclusion of the collateral federal court hearing. Those needs cannot be fully determined until the conclusion of the federal court hearing.

In addition, counsel for respondent Arch Coal, Inc., has represented to this Court that Arch is unlikely to proceed with its proposed acquisition should the federal district court rule against it by entering a preliminary injunction. Such a decision undoubtedly would affect the proceedings before this Court.

Complaint Counsel thus respectfully submit that it would be appropriate for the Court to stay the current proceeding pending the completion of the preliminary injunction hearing before the federal district court. At that time, both this Court and the parties will be in a better position to determine the scope of this proceeding as well as the necessary additional discovery required to adjudicate the merits of Complaint Counsel's claims.

Alternatively, Complaint Counsel request that this Court stay discovery in this proceeding until completion of the federal preliminary injunction hearing. Because the discovery currently ongoing in the federal court case is likely to be relevant to, and incorporated into, this administrative proceeding, a substantial portion of the necessary discovery for this proceeding will have been completed at the end of the Commission's federal court case. Complaint Counsel thus expect that all parties will be in a position to adhere to an expedited discovery schedule in this proceeding beginning at the conclusion of the federal preliminary injunction hearing, and

that the October 12, 2004 hearing date currently contemplated by this Court will continue to be feasible.

Wherefore, Complaint Counsel respectfully move this Court to stay the current administrative proceeding or, in the alternative, to stay discovery in this proceeding, for approximately eight weeks (until approximately July 9, 2004), at which time the aforementioned preliminary injunction proceeding in federal district court will be concluded.

Dated: May 12, 2004

Respectfully submitted,

A handwritten signature in cursive script that reads "Michael H. Knight by MHO". The signature is written in black ink and is positioned above a horizontal line.

Michael H. Knight
Melvin H. Orlans
Thadd A. Prisco
Complaint Counsel

Federal Trade Commission
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CERTIFICATE OF SERVICE

I hereby certify that I caused on this 12th day of May 2004 a copy of Complaint Counsel's 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

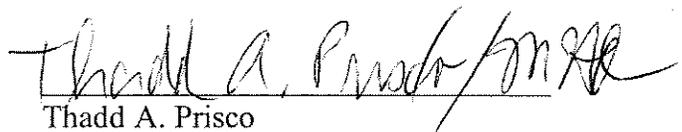
and by facsimile and by first-class mail to:

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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