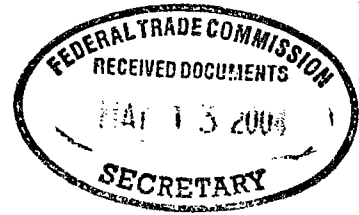


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of)
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ARCH COAL, INC.,)
)
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NEW VULCAN COAL HOLDINGS, LLC, and)
)
)

TRITON COAL COMPANY, LLC)
)
)

Respondents.)
_____)

Docket No. 9316

SCHEDULING ORDER

- May 25, 2004 - Complaint Counsel provides preliminary witness list (not including experts) with description of proposed testimony.
- June 1, 2004 - Respondents' Counsel provides preliminary witness lists (not including experts) with description of proposed testimony.
- June 8, 2004 - Complaint Counsel provides expert witness lists, with description of the general subject matter of the proposed testimony.
- June 15, 2004 - Respondents' Counsel provides expert witness lists, with description of the general subject matter of the proposed testimony.
- June 22, 2004 - Complaint Counsel provides revised witness lists, including preliminary rebuttal fact witnesses, with description of proposed testimony.
- June 29, 2004 - Respondents' Counsel provides revised witness lists, including preliminary rebuttal fact witnesses, with description of proposed testimony.

- July 6, 2004 - Deadline for issuing document requests, requests for admission, interrogatories and subpoenas, except for discovery for purposes of authenticity and admissibility of exhibits.
- July 27, 2004 - Complaint Counsel provides expert witness reports.
- August 3, 2004 - Close of discovery, other than depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
- August 10, 2004 - Respondents' Counsel provides expert witness reports.
- August 24, 2004 - Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s), if any. Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit sur-rebuttal expert reports on behalf of Respondents).
- August 27, 2004 - Deadline for filing motions for summary decision.
- September 7, 2004 - Deadline for depositions of experts (including rebuttal experts).
- September 10, 2004 - Deadline for filing responses, including any opposing affidavits, statement of facts, and brief, to motions for summary decision.
- September 13, 2004 - Exchange: (1) final proposed witness lists with a brief summary of the testimony of each witness; (2) final exhibit lists, including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative or summary exhibits).

Serve courtesy copies on ALJ of: (1) final proposed witness lists with a brief summary of the testimony of each witness; and (2) final exhibit lists.
- September 13, 2004 - Parties that intend to offer into evidence at the hearing confidential materials of an opposing party or non-party must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).
- September 17, 2004 - Deadline for filing motions *in limine* and motions to strike.

- September 20, 2004 - Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
 - September 27, 2004 - Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.
 - September 29, 2004 - Parties file pretrial briefs, to include proposed findings of fact and conclusions of law. To the extent possible, findings of fact shall be supported by document citations and/or deposition citations. Conclusions of law shall be supported by legal authority.
 - October 1, 2004 - Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists. Exchange objections to the designated testimony to be presented by deposition and counter designations.
 - October 4, 2004 - Exchange proposed stipulations of law, facts, and authenticity.
 - October 7, 2004 - Final prehearing conference to be held at 10:00 a.m in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C.
- The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity and any designated deposition testimony. Stipulations of law, facts, and authenticity shall be prepared as a Joint Exhibit and offered at the final prehearing conference.
- Counsel may present any objections to the final proposed witness lists and exhibits, including the designated testimony to be presented by deposition. All trial exhibits must be offered at the final prehearing conference. The offered exhibits will be admitted or excluded at this conference to the extent practicable.
- October 12, 2004 - Commencement of Hearing, to begin at 10:00 a.m. in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C.

ADDITIONAL PROVISIONS

1. Pursuant to Rule 3.21(c)(2), extensions or modifications to these deadlines will be made only upon a showing of good cause.

2. Service of all papers that are required to be filed with the Commission shall be made on opposing counsel by hand, facsimile, or electronic mail (formatted in pdf file, WordPerfect, or Word), with two courtesy copies to the Administrative Law Judge by hand by 5:00 p.m. on the designated date. Upon request, the parties agree to provide each other promptly papers formatted in WordPerfect or Word. Unless requested by the Administrative Law Judge, the parties shall not serve courtesy copies on the Administrative Law Judge of any papers (including discovery requests and responses) that are not required to be filed with the Office of the Secretary. *See Commission Rules 3.31(b), 3.35, 3.37.*

Deliveries shall be as follows:

For Complaint Counsel:

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601 New Jersey Ave., NW
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For Respondent Arch Coal, Inc.

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For Respondents New Vulcan Coal Holdings, LLC and Triton Coal Company, LLC

Richard Parker
O'MELVENY & MYERS LLP
1625 Eye Street, NW
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fax: (202) 383-5414

3. All pleadings that cite to unpublished opinions or opinions not available on LEXIS or WESTLAW shall include such copies as exhibits.

4. All motions must attach a draft order containing the proposed relief. All such attachments must be titled "Proposed Order" instead of simply "Order." In no event shall a party file a pleading that is titled "Order."

5. Memoranda in support of, or in opposition to, any non-dispositive motion, shall not exceed 10 pages.

6. Compliance with the scheduled end of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off, that all responses and objections will be due on or before that date, unless otherwise noted. Any motion to compel responses to discovery requests shall be filed within 5 days of impasse if the parties are negotiating in good faith and are not able to resolve their dispute.

7. The parties are limited to 25 document requests, 25 interrogatories, and 50 requests for admission, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits. Additional discovery may be permitted only for good cause upon application to and approval by the Administrative Law Judge.

8. Responses and objections to document requests and interrogatories shall be due within 30 days of service, unless the parties agree otherwise. Responses and objections to requests for admission shall be due within 10 days of service, unless the parties agree otherwise. Each response and/or objection to each discovery request shall be preceded by the specific discovery request to which the answer pertains.

9. The deposition of any person may be recorded by videotape, provided that the deposing party notifies the deponent and all parties of its intention to record the deposition by videotape at least five days in advance of the deposition.

10. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. For subpoenas *ad testificandum*, the party seeking the deposition shall consult with the other parties before the deposition date is scheduled.

Non-parties shall provide copies or make available for inspection and copying of documents requested by subpoena to the party issuing the subpoena. The party that has requested documents from non-parties shall provide copies of the documents received from non-parties to the opposing party within five business days of receiving the documents. No deposition of a non-party shall be scheduled between the time a non-party provides documents in response to a subpoena *duces tecum*

to a party, and 3 days after the party provides those documents to the other party, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, or a third party produces those documents at the time of the deposition unless agreed to by all parties involved.

11. The revised and final witness lists shall represent counsels' good faith designation of all potential witnesses who counsel reasonably expect may be called in their case-in-chief or for rebuttal. Parties shall notify the opposing party promptly of changes in witness lists to facilitate completion of discovery within the dates of the scheduling order. The final proposed witness list may not include additional witnesses not listed in the preliminary or revised preliminary witness lists previously exchanged unless by order of the Administrative Law Judge upon a showing of good cause, or by agreement of the parties.

12. The final exhibit lists shall represent counsels' good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final lists only by order of the Administrative Law Judge upon a showing of good cause, or by agreement of the parties.

13. At the time an expert is first listed as a witness by a party, the listing party will provide to the other party:

- (a) materials fully describing or identifying the background and qualifications of the expert, all publications authored by the expert within the preceding ten years, and all prior cases in which the expert has testified or has been deposed within the preceding four years; and
- (b) transcripts of such testimony in the possession, custody or control of the listing party or the expert.

At the time an expert report is produced, the listing party will provide to the other party all documents and other written materials relied upon by the expert in formulating an opinion in this case. Draft reports and notes of experts need not be produced.

Each expert report shall include a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the expert in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the expert; and the compensation to be paid for the study and testimony.

14. Applications for the issuance of subpoenas commanding a person to attend and give testimony at the adjudicative hearing must comply with 16 C.F.R. § 3.34, must demonstrate that the subject is located in the United States, and must be served on opposing counsel. Oppositions to applications for issuance of subpoenas shall be due within three business days.

15. The parties shall provide one another 48 hours ahead of time, not including weekends and holidays, a list of all witnesses to be called on each day of hearing, subject to possible delays or other unforeseen circumstances.

16. Witnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. F. R. Evid. 602.

17. Witnesses not properly designated as expert witnesses shall not be allowed to provide opinions beyond what is allowed in F. R. Evid. 702. F. R. Evid. 701.

18. Expert witnesses may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data. The expert may in any event be required to disclose the underlying facts or data on cross-examination. F.R.E. 705.

19. Properly admitted deposition testimony and properly admitted investigational hearing transcripts are part of the record and may not be read in open court. Videotape deposition excerpts that have been admitted in evidence may be presented in open court only upon prior approval by the Administrative Law Judge.

20. The parties shall provide one another with copies of any demonstrative exhibits 48 hours before they are used with a witness.

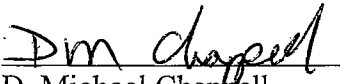
21. Motions for *in camera* treatment for evidence to be introduced at trial must meet the strict standards set forth in 16 C.F.R. § 3.45 and explained in *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re North Texas Specialty Physicians*, Docket 9312 (April 23, 2004) (available at www.ftc.gov/formalactions/adj.proceedings).

22. Complaint Counsel's exhibits shall bear the designation CX and Respondents' exhibits shall bear the designation RX or some other appropriate designation. Both sides shall number the first page of each exhibit with a single series of consecutive numbers. When an exhibit consists of more than one piece of paper, each page of the exhibit must bear a consecutive control number or some other consecutive page number. Additionally, parties must account for all their respective exhibit numbers. Any number not actually used at the hearing shall be designated "intentionally not used."

23. At the final pre-hearing conference, counsel will be required to introduce all exhibits

they intend to introduce at trial. Counsel will also be required to give *the originals* of exhibits to the court reporter, which the court reporter will keep.

ORDERED:


D. Michael Chappell
Administrative Law Judge

- Date: May 13, 2004