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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Joseph J. Simons, Chairman
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Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of: **Peabody Energy Corporation,** **a public company;** **and** **Arch Coal, Inc.,** **a public company.**	**DOCKET NO. 9391**

PEABODY ENERGY CORPORATION'S ANSWER AND AFFIRMATIVE DEFENSES

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PEABODY'S ANSWER AND AFFIRMATIVE DEFENSES

Respondent Peabody Energy Corporation ("Peabody") hereby answers plaintiff Federal Trade Commission's ("FTC") Complaint, related to the proposed joint venture ("Joint Venture") between itself and Arch Coal, Inc. ("Arch") (collectively with Peabody, "Respondents"), and asserts affirmative and other defenses.

Any allegation in the Complaint that is not expressly admitted below is denied.[1]

PRELIMINARY STATEMENT

The FTC's challenge, brought over Commissioner Wilson's dissent, is mired in the past. It ignores dynamics that have rocked the wholesale energy markets over the last 10-15 years, slashing thermal coal sales. Thermal coal, including coal mined in the Southern Powder River Basin ("SPRB"), competes directly with other U.S. energy forms used to generate electricity. A megawatt of electricity produced from SPRB coal is indistinguishable from one produced using any other energy source. So how do U.S. electricity markets choose between diverse electricity generating sources? Whether a generation unit fueled by coal, natural gas, solar array or wind turbines is called upon to supply electricity is decided by a marketplace that selects and rewards the lowest cost producer. When a light switch is flipped on, the demand for electricity is filled by the lowest cost units first, regardless of the fuel used to generate that electricity. The electricity markets *force* head-to-head competition between fuels.

Coal, and SPRB coal in particular, is losing that competition at an unprecedented pace. The rise of hydraulic fracturing ("fracking") has made cheap natural gas the fuel of choice for electricity generation in the U.S. And the growth of wind- and solar-powered electricity has

[1] The Complaint contains section titles and organizational headings to which no response is required. To the extent that the headings may be construed to contain allegations of fact to which a response is required, Peabody denies all such allegations.

further displaced coal, including SPRB coal. Just a decade ago, thermal coal powered 50% of all electricity generated in the United States. Together, natural gas and renewables now account for over 56% of all electricity generation. Monthly coal-fueled generation dipped below 20% of total electricity generation for the first time in 2019, and plant retirements and low natural gas prices have further reduced this share in early 2020.

Specifically, coal production in the SPRB is down by more than 50% since 2008 and continues to fall as demand declines, leaving SPRB coal mines running well below capacity. U.S. electricity generation companies have stopped building coal-fueled generation plants entirely and have closed over 700 coal-fueled units since 2004. As the U.S. Energy Information Administration ("EIA") explained in December 2019 when it found a direct link between coal plant retirements and low natural gas prices:

> Sustained relatively low natural gas prices has allowed natural gas-fired generators to become more competitive with coal-fired units, leading to a general decline in using coal-fired capacity. A decline in use leads to a decline in revenues at a plant, which generally translates to lower operating margins, less ability to cover costs, and in many cases, retiring that capacity . . . . Because of more competitive natural gas prices, more advanced natural gas combined-cycle generators, and the increasing efficiency of the natural gas generator fleet, EIA expects more coal-fired generators to retire, especially within the next decade. According to AEO Reference case projections, almost 90 GW of coal-fired capacity will retire between 2019 and 2030.[2]

Energy companies recognize this dramatic shift. Their coal purchases have rapidly declined as efficient natural gas generating units permanently replace coal-fueled generators. They admit that "[n]atural gas prices are a primary driver of coal demand"[3] and "[i]f the price of natural gas is below $3-4, then natural gas economically displaces most powder river basin

[2] U.S. Energy Info. Admin., *U.S. Coal Plant Retirements Linked to Plants with Higher Operating Costs*, Dec. 3, 2019, https://www.eia.gov/todayinenergy/detail.php?id=42155.

[3] NRG Energy, Inc., 2018 Annual Report (Form 10-K), at 48 (Feb. 28, 2019), https://www.sec.gov/Archives/edgar/data/1013871/000101387119000007/nrg201810-k.htm

[coal]."[4] Natural gas prices are well below $3/mmBTU, and virtually every reputable third party projects that they will remain well below that mark for the foreseeable future. In fact, today, natural gas prices are *below $2/mmBTU*. As natural gas prices fall, generating electricity from coal becomes even more uneconomic. And renewable fuel sources like wind and solar are expected to continue to grow and displace coal throughout the U.S. The prospects for coal have deteriorated further in 2020.

The parties cannot alter these forces. Instead, to compete, coal producers must lower their costs. Peabody and Arch have wrung costs out of their businesses, but they still struggle to compete with increasingly low-priced natural gas. They—and three of the other five companies mining coal in the SPRB—were forced into bankruptcy in recent years as a result of these dynamics.

Peabody and Arch formed this Joint Venture to combine their mines in Colorado and the SPRB to lower their costs in an attempt to remain competitive in a declining market. Critically, the Joint Venture will dissolve a seven-mile border that separates their largest two mines, slashing costs across the supply chain. Highly skilled personnel, industry experts, and recent experience integrating two contiguous mines involving the very same mining complex substantiate the parties' conservative estimates of over $1 billion in net present value of merger-specific cost savings over the venture's first ten years. These synergies are particularly necessary for the Joint Venture to remain competitive in today's declining market. In sum, the Joint Venture will lower the parties' costs thereby lowering prices to customers enabling coal-fueled units to compete more effectively for dispatch against natural gas and renewables.

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[4] *Southern's Current Outlook, Presentation by Chad Hewitt, Fuel Manager*, at 25 (September 2015), https://training.ua.edu/almineral/_documents/ChadHewitt.pdf.

The FTC does not dispute these dynamics; in fact, stunningly, it ignores them. It asks this court to put blinders on and join the FTC in a "SPRB coal-only" world to block the Joint Venture. If the FTC prevails, it will prevent the Joint Venture from achieving those efficiencies and guarantee that SPRB coal will continue losing to natural gas and renewables. Delaying and ultimately prohibiting this Joint Venture will harm the parties and their employees, their customers, and consumers across the country that would benefit if their utilities were able to buy lower-priced coal, as the parties have already committed to do for their SPRB customers.

Against this backdrop, Peabody hereby answers the specific allegations in the Complaint. Any allegation in the Complaint that is not expressly admitted below is denied.

I. NATURE OF THE CASE

1. Peabody admits that the Joint Venture would combine the coal mining and sales operations of their coal mines located in the Southern Powder River Basin. Peabody denies the remainder of Paragraph 1.[5]

2. Peabody admits that the SPRB is a large coal-bearing geological formation located in northeastern Wyoming and that Peabody extracts the coal and sells it, primarily to power plants. Peabody also admits that its customers purchase SPRB coal (although increasingly less so) for various reasons. Peabody denies the remainder of Paragraph 2.

3. Peabody admits that public sources indicate that the Respondents produced more than 60% of all SPRB coal mined in 2018, but otherwise is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in the first and second sentence of Paragraph 3. Peabody denies the third sentence, states that the fourth sentence is an incomplete description of the Merger Guidelines, and denies the fifth sentence.

[5] References to paragraph numbers in the Complaint correlate to the numbered paragraphs in the Complaint.

4. Peabody denies Paragraph 4 of the Complaint.

5. Peabody admits that, to the extent new entry means greenfield entry of new producers of SPRB coal, such new entry is unlikely to occur in the near term under current market conditions. Peabody denies the remainder of Paragraph 5.

6. Peabody denies Paragraph 6 of the Complaint.

II. JURISDICTION

7. Peabody avers that Paragraph 7 states legal conclusions to which no response is required. To the extent a response is required, Peabody admits it is engaged in commerce.

8. Peabody avers that Paragraph 8 states legal conclusions to which no response is required. To the extent a response is required, Peabody admits the Joint Venture is a transaction.

III. RESPONDENTS

9. Peabody admits the first four sentences of Paragraph 9. Peabody admits the fifth sentence except that it sold 119.1 million tons of SPRB coal in 2018 and is without knowledge or information about the FTC's meaning of "reserves" to respond. Peabody admits the sixth sentence as a correct description of Peabody's production and revenues across the entire company's portfolio two years ago but avers that the figures are misleading as stated.

10. Peabody admits the first two sentences except that it is without knowledge or information sufficient about the meaning of "reserves." Peabody is without knowledge or information sufficient to form a belief as to the truth of the allegations in the third and fourth sentences.

IV. THE JOINT VENTURE

11. Peabody admits Paragraph 11 of the Complaint.

V. RELEVANT MARKETS

A. Relevant Product Market

12. Peabody avers that Paragraph 12 states legal conclusions to which no response is required. To the extent a response is required, Peabody denies Paragraph 12 of the Complaint.

13. Peabody is without knowledge or information sufficient to form a belief as to why all electric power producers choose to buy coal from the SPRB. Peabody admits that SPRB coal tends to be relatively close to the earth's surface, that SPRB mines tend to yield subbituminous coal with a heat content typically that ranged from 8400 to 8800 BTU per pound, and that SPRB coal tends to have relatively low sulfur content. Peabody either is without knowledge or information sufficient about the remainder of the Paragraph 13, or avers that the figures are misleading as stated.

14. Peabody denies Paragraph 14 of the Complaint.

15. Peabody is without knowledge or information sufficient to form a belief as to the FTC's meaning of the phrases "Industry and public recognition," "[p]ublic sources of information" or "market participants and industry analysts." To the extent a response is required, Peabody denies Paragraph 15 of the Complaint.

16. Peabody denies Paragraph 16 of the Complaint except that it admits that customers may issue RFPs as part of a process to purchase thermal coal.

17. Peabody admits that it knows the identity of the customers who issue RFPs to Peabody seeking to purchase SPRB coal, denies that it can "customize [its] bids based on a customer's circumstances," and is without knowledge or information sufficient to form a belief as to the remainder of the first sentence of Paragraph 17. Peabody admits the second sentence except that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that greater distances typically result in greater shipping costs. Peabody is without

knowledge or information sufficient to form a belief as to the truth of the last sentence of Paragraph 17.

18. Peabody denies the first sentence of Paragraph 18. Peabody is without knowledge or information sufficient to form a belief as to the truth of the second sentence of Paragraph 18.

19. Peabody admits that public sources indicate that the total demand for SPRB coal in the economy has been falling over time but expect that there will continue to be sales in the future, but otherwise is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 19.

20. Peabody admits the first sentence of Paragraph 20 and denies the remainder.

VI. RELEVANT GEOGRAPHIC MARKET

21. Peabody avers that Paragraph 21 of the Complaint states legal conclusions to which no response is required. To the extent that it makes any assertion of fact, it is denied, except that Peabody admits that SPRB coal is mined in the SPRB.

22. Peabody avers that the first sentence of Paragraph 22 of the Complaint states legal conclusions to which no response is required. To the extent that it makes any assertion of fact, it is denied. Peabody is without knowledge or information sufficient to form a belief as to the truth of the second sentence.

23. Peabody avers that the first sentence of Paragraph 23 of the Complaint states legal conclusions to which no response is required. To the extent that it makes any assertion of fact, it is denied. Peabody is without knowledge or information sufficient to form a belief as to the truth of the second sentence but admits that SPRB coal is sold in each of the sixteen identified states, among others. Paragraph 23 is otherwise denied.

VII. MARKET CONCENTRATION AND THE JOINT VENTURE'S PRESUMPTIVE ILLEGALITY

24. Peabody denies the first sentence of Paragraph 24. Peabody admits that public sources indicate that Respondents produced more than 60% of all SPRB coal mined in 2018 but otherwise is without knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence.

25. Peabody admits that besides Peabody and Arch there are five others producers of SPRB coal but otherwise is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence. Peabody admits the second sentence. Peabody is without knowledge or information sufficient to form a belief as to the meaning of the phrase "meaningfully compete" and otherwise is without knowledge or information sufficient to form a belief as to the truth of the allegations in the third sentence. Peabody admits the fourth sentence. Peabody is without knowledge or information sufficient to form a belief as to the truth of other producers' future scale or reserves, or the measure used to compare SPRB coal "reserves" but admits that public information would confirm the remainder of the fifth sentence.

26. Peabody admits that the Merger Guidelines measure concentration using HHIs but denies that those Guidelines are binding on the agency, let alone courts. Peabody admits that the second, third and fourth sentences accurately summarize how "HHI" is described in the non-binding Merger Guidelines. Peabody denies the remainder of Paragraph 26.

VIII. ANTICOMPETITIVE EFFECTS

27. Peabody denies Paragraph 27.

28. Peabody denies Paragraph 28.

29. Peabody denies Paragraph 29.

30. Peabody denies Paragraph 30.

31. Peabody denies Paragraph 31.

32. Peabody denies Paragraph 32.

IX. LACK OF COUNTERVAILING FACTORS.

A. Barriers to Entry and Expansion

33. Peabody denies Paragraph 33.

34. Peabody denies Paragraph 34.

35. Peabody denies Paragraph 35.

B. Efficiencies

36. Peabody denies Paragraph 36.

X. VIOLATION

Count I – Illegal Agreement

37. Peabody avers that no response is required to Paragraph 37.

38. Peabody avers that Paragraph 38 states legal conclusions to which no response is required. To the extent a response is required, Peabody denies Paragraph 38 of the Complaint.

Count II – Illegal Joint Venture

39. Peabody avers that no response is required to Paragraph 39.

40. Peabody avers that Paragraph 40 states legal conclusions to which no response is required. To the extent a response is required, Peabody denies Paragraph 40 of the Complaint.

PEABODY'S AFFIRMATIVE DEFENSES

Peabody asserts the following defenses, without assuming the burden of proof on such defenses that would otherwise rest with the Plaintiff:

1. The Complaint fails to state a claim on which relief can be granted.

2. Granting the relief sought is contrary to the public interest.

3. The Complaint fails to allege a plausible relevant product market.

4. The Complains fails to allege a plausible geographic market.

5. The Complaint fails to allege undue share in any plausibly defined relevant market.

6. The Complaint fails to allege any plausible harm to competition.

7. The Complaint fails to allege any plausible harm to consumers.

8. The Complaint fails to allege any plausible harm to consumer welfare.

9. Expansion by existing competitors, including non-coal sources of electricity, can be swift, likely, and sufficient such that it will ensure that there will be no harm to competition, consumers, or consumer welfare.

10. Customers have a variety of tools available to ensure that they receive competitive pricing and terms.

11. The Joint Venture will be procompetitive. It will result in substantial merger-specific efficiencies, including cost synergies, which will allow Peabody and Arch to compete more effectively than they can alone against competition from other electricity-generating fuels, particularly natural gas and renewables.

12. Peabody reserves the right to assert any other defenses, as they become known to it.

NOTICE OF CONTEMPLATED RELIEF

WHEREFORE, Peabody requests that the Administrative Law Judge enter a judgment in its favor as follows:

A. The Complaint be dismissed with prejudice;

B. None of the Complaint's contemplated relief issue to the FTC;

C. Any and all other relief as the Commission may deem just and proper.

Dated: March 11, 2020

Respectfully submitted,

/s/ Edward D. Hassi

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CERTIFICATE OF SERVICE

I certify that on March 11, 2020, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Acting Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W., Rm. H-113
Washington, D.C. 20580

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., N.W., Rm. H-110
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I also certify that I cause the foregoing documents to be served via email to:

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Counsel for Respondent Arch Coal, Inc.

Dated: March 11, 2020

By: */s/ Leah S. Martin*
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Counsel for Respondent Peabody Energy Corporation

CERTIFICATE FOR ELECTRONIC FILING

I hereby certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: March 11, 2020

By: */s/ Leah S. Martin*
Leah S. Martin

<u>Notice of Electronic Service</u>

I hereby certify that on March 11, 2020, I filed an electronic copy of the foregoing Peabody Energy Corporation's Answer and Affirmative Defenses , with:

D. Michael Chappell
Chief Administrative Law Judge
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I hereby certify that on March 11, 2020, I served via E-Service an electronic copy of the foregoing Peabody Energy Corporation's Answer and Affirmative Defenses , upon:

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