





extract, and SPRB coal's characteristics (in particular, its sulfur content) allow electric power plants to burn significant quantities of it without violating environmental regulations.

Moreover, many power plants that burn SPRB coal can face substantial switching costs if they attempt to switch to other coals, which could include installation of additional pollution-control equipment.

3. In 2018, Defendants produced more than 60% of all SPRB coal mined.

Defendants collectively control more than 60% of SPRB coal reserves. The Joint Venture would significantly increase concentration in an already concentrated market, well beyond the

5. Due to high entry barriers, new entry into SPRB coal production is unlikely to occur in a timely manner, or on a scale sufficient to counteract the anticompetitive effects of the Joint Venture. The significant barriers to entry for SPRB coal producers include the need for

9. Preliminary injunctive relief is necessary to preserve the status quo and to protect competition during the Commission's ongoing administrative proceeding. Allowing Defendants to consummate the Joint Venture before the administrative proceeding has concluded is likely to cause immediate harm to consumers, and would undermine the Commission's ability to remedy the anticompetitive effects of the Joint Venture if it is found unlawful after a full trial on the merits and any subsequent appeals.

### **JURISDICTION AND VENUE**

10. This Court's jurisdiction arises under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and under 28 U.S.C. §§ 1331, 1337, and 1345. This is a civil action arising under the Acts of Congress protecting trade and commerce against restraints and monopolies, and is brought by an agency of the United States authorized by an Act of Congress to bring this action.

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

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 – the Commission by any of its attorneys designated by it for such purpose may bring suit in a district 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 . . .

12. Defendants are, and at all relevant times have been, engaged in activities in or affecting "commerce" as 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.

13. Defendants Peabody and Arch both are headquartered in St. Louis, Missouri. In addition, personal jurisdiction exists where service is effected pursuant to a federal statute. Fed. R. Civ. P. 4(k)(1)(C). The FTC Act, 15 U.S.C. § 53(b), authorizes nationwide service of process. Defendants are therefore subject to personal jurisdiction in the Eastern District of Missouri. Venue is proper in the Eastern District of Missouri under 28 U.S.C. § 1391(b) and (c), as well as under 15 U.S.C. § 53(b).

#### **THE PARTIES AND THE PROPOSED JOINT VENTURE**

14. Plaintiff, 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, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45.

15. Defendant Peabody Energy Corporation is headquartered in St. Louis, Missouri. Peabody is the largest coal producer in the United States and the largest producer in the SPRB by production and reserves. Peabody operates three mines in the SPRB: North Antelope Rochelle, Caballo, and Rawhide. The North Antelope Rochelle mine is the largest coal mine in the world, according to Peabody. In 2018, Peabody sold 119.2 million tons of coal extracted from its three SPRB mines. Worldwide, in 2018 Peabody sold 186.7 million tons of coal, and recognized revenues exceeding \$5.5 billion.

16. Defendant Arch Coal, Inc., also headquartered in St. Louis, Missouri, is the second largest coal producer in the United States, and the second largest in the SPRB by production and reserves. Arch operates two mines in the SPRB: Black Thunder and Coal Creek.

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industry analysts regularly discuss supply and demand conditions for SPRB coal separately from supply and demand for other types of coal.

22. SPRB coal prices are typically determined through direct interactions between SPRB coal producers and customers, involving a request-for-proposal (“RFP”) process in which customers solicit bids from multiple suppliers of SPRB coal. Customers typically issue an RFP specifying the quantity of coal that they desire to contract for and the time period in which the coal will be delivered (often one year or two years). Based on responses to the RFP, a customer will negotiate a supply contract with one or more suppliers. While customers can also purchase SPRB coal by placing a bid on the Over-The-Counter (“OTC”) spot market, due to their reliance on regular supplies of large amounts of coal for their coal-fired power plants, most customers prefer to contract with suppliers for most of their SPRB coal purchases rather than rely exclusively or primarily on OTC purchases. SPRB coal customers value the security of supply provided by a contract, and OTC prices are typically higher than individually negotiated contract prices.

23. Due to the widespread use of RFPs, SPRB coal producers typically know the identity of customers seeking to purchase SPRB coal, and are able to customize their bids based on a customer’s circumstances, including the location of the customer’s power plants, which impact both the plants’ regulatory requirements and the shipping costs the customer will incur. SPRB coal purchasers generally negotiate shipping costs directly with railroads, without the involvement of SPRB coal producers, and greater distances typically result in greater shipping costs. Shipping costs are significant compared to the free-on-board price of SPRB coal; in many cases, shipping costs account for 50% or more of a customer’s delivered cost.



**B. Relevant Geographic Market**

27. A relevant geographic market in which to analyze the competitive effects of this transaction is the Southern Powder River Basin. The suppliers of SPRB coal are located within the Southern Powder River Basin, and this is the region in which purchasers of SPRB coal can seek alternative suppliers of SPRB coal.

28. Further, the United States is a relevant geographic market in which to analyze the competitive effects of this transaction. SPRB coal is not sold in any significant quantities outside the United States, and even if it were, due to high transportation costs, SPRB coal customers could not defeat a price increase by purchasing SPRB coal outside of the United States and re-importing it.

29. Alternatively, relevant geographic markets could be defined based on the locations at which SPRB coal is consumed. All or nearly all SPRB coal consumed in 2018 was burned at fewer than 150 power plants; the majority was consumed by power plants located in the central United States and upper Midwest, within the states of Arkansas, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Oklahoma, South Dakota, Texas, Wisconsin, and Wyoming. The Joint Venture would substantially lessen competition for the sale of SPRB coal within a relevant geographic market consisting of one or more of the locations at which SPRB coal is consumed.

**THE JOINT VENTURE IS PRESUMPTIVELY ILLEGAL**

30. The Joint Venture would create a single entity with a dominant share of SPRB coal reserves, and a dominant share of sales to SPRB customers. Post-Joint Venture, the combined entity would control more than 60% of SPRB coal reserves and approximately 60% or more of SPRB coal production.

31. The minority of SPRB reserves and production not controlled by Peabody and Arch are split among five producers. Two producers are vertically integrated companies that utilize their SPRB production to supply their own captive power plants: the Dry Fork mine is operated by the Western Fuels Association, a cooperative organization of power plant owners, and the Wyodak mine is owned by the Black Hills Corporation, which operates an SPRB coal-fired power plant located at the mine mouth. These mines do not meaningfully compete to supply power plants other than the captive power plants the mines currently serve. The other three producers are Navajo Transitional Energy Company, LLC, Eagle Specialty Materials, LLC, and Peter Kiewit Sons' Inc. If the Joint Venture were consummated, none of these would approach the scale of the Joint Venture: in 2018, Arch and Peabody collectively produced approximately five times the SPRB coal production of the next largest producer, and collectively controlled more than five times the SPRB coal reserves of the next largest rival.

32. The Merger Guidelines and federal courts measure concentration using HHIs. The HHI for a relevant market is calculated by totaling the squares of the market shares of each producer that sells the relevant product within the relevant geographic market. The post-Joint Venture HHI and the change in HHI (post-Joint Venture compared to pre-Joint Venture) are used to determine whether a transaction raises significant competitive concerns. A transaction is presumed likely to create or enhance market power – and is presumptively illegal – when the post-transaction HHI exceeds 2,500 and the transaction increases the HHI by more than 200 points. Both of these conditions would be satisfied by the Joint Venture in any of the three geographic markets identified above: the Southern Powder River Basin, the United States, or a relevant geographic market consisting of one or more of the locations at which SPRB coal is consumed. In each of these relevant geographic markets, whether market shares are measured by

SPRB coal reserves or SPRB coal production, the Joint Venture would result in HHIs over 4,500 and produce an HHI increase of at least 2,000 – far exceeding the thresholds that create a presumption of illegality. Therefore, the Joint Venture is presumptively unlawful.

**THE JOINT VENTURE WILL PRODUCE ANTICOMPETITIVE EFFECTS**

33. The Joint Venture would eliminate current competition between Peabody and Arch that benefits SPRB coal customers.

34. As the two biggest SPRB coal competitors, with large deposits of high-quality coal that can be mined at relatively low costs, Defendants often bid directly against each other in response to RFPs and other competitive opportunities to supply SPRB coal, resulting in lower prices and other benefits for customers. The Joint Venture would eliminate this competition immediately.

35. The Joint Venture would face few rivals with significant low-cost and high-quality reserves, and would have the increased incentive and ability to reduce its output and/or increase its prices compared to the prices and output that Peabody and Arch would provide to customers but-for the Joint Venture.

36. The other, much smaller SPRB coal producers will not make up for the competition lost as a result of the Joint Venture. Among other reasons, a significant portion of the Defendants' competitors' coal reserves are more costly to extract than the coal currently mined by Peabody and Arch. As a result, even if Defendants' rivals had an incentive to increase output or otherwise compete more aggressively in response to the Joint Venture's post-transaction conduct, they would not be able to do so on a scale sufficient to alleviate the anticompetitive effects on SPRB coal customers. In addition, one or more of Defendants' rivals



### **LACK OF COUNTERVAILING FACTORS**

39. Defendants cannot demonstrate that new entry or expansion by existing firms would be timely, likely, or sufficient to offset the anticompetitive effects of the Joint Venture.

40. Expansion by the existing firms sufficient to defeat anticompetitive effects in the SPRB coal market is unlikely because, among other reasons, a significant portion of Defendants' rivals' coal reserves are more costly to extract than the coal currently mined by Peabody and Arch.

41. New entry into the SPRB coal market is unlikely due to substantial barriers to entry. Firms historically enter the SPRB coal market by leasing rights to extract SPRB coal from federally owned land. Obtaining these rights typically entails a lengthy regulatory process including environmental assessments, the submission of detailed plans, and other regulatory hurdles. Moreover, new SPRB coal producers must make significant up-front financial investments in equipment and infrastructure before they are able to mine coal cost-effectively, and must be able to fund significant reclamation liabilities once the lease expires. Thus, new entry is unlikely to occur in a timely fashion on a scale sufficient to prevent a price increase by current SPRB coal producers.

42. Defendants cannot demonstrate cognizable, transaction-specific efficiencies that would be sufficient to rebut the strong presumption and evidence of the Joint Venture's likely significant anticompetitive effects.

### **LIKELIHOOD OF SUCCESS ON THE MERITS, BALANCE OF EQUITIES, AND NEED FOR RELIEF**

43. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the Commission, whenever it has reason to believe that a proposed transaction is unlawful, to seek preliminary injunctive relief to prevent consummation of the transaction until the Commission has had an

opportunity to adjudicate the transaction's legality in an administrative proceeding. In deciding whether to grant relief, the Court must balance the likelihood of the Commission's ultimate success on the merits against the public equities. The principal public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws. Private equities affecting only Defendants' interest cannot defeat a preliminary injunction.

44. Here, the Commission is likely to succeed in proving that the Joint Venture is likely to lead to anticompetitive effects in the relevant market for the sale of SPRB coal, as it may substantially lessen competition in the sale of SPRB coal in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, or Section 5 of the FTC Act, 15 U.S.C. § 45.

45. Preliminary relief is warranted and necessary. Should the Commission rule, after the full administrative proceeding, that the Joint Venture is unlawful, reestablishing the status quo of vigorous competition between Peabody and Arch would be difficult, if not impossible, if the Joint Venture has already occurred. Moreover, in the absence of relief from this Court, irreversible harm to competition would likely occur in the interim, even if suitable divestiture remedies were obtained later.

46. Accordingly, the equitable relief requested here is in the public interest. The Commission respectfully requests that the Court:

1. Enter the temporary restraining order and preliminarily enjoin Defendants from taking any further steps to consummate the Joint Venture, or any other acquisition of stock, assets, or other interests of one another, either directly or indirectly;



2. Retain jurisdiction and maintain the status quo until the administrative proceeding that the Commission has initiated is concluded; and
3. Award such other and further relief as the Court may determine is appropriate, just, and proper.

Dated: February 26, 2020

Respectfully Submitted,

Dr. [Name]  
[Address]  
[City, State, ZIP]

*[Signature]*  
[Name]  
[Address]  
[City, State, ZIP]



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 26th day of February, 2020, I served the following:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]