UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
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**

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by the virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents Peabody Energy Corporation ("Peabody") and Arch Coal, Inc. ("Arch") have executed an joint venture agreement (the "Joint Venture") in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I. NATURE OF THE CASE

1. If consummated, the Joint Venture would combine the coal mining operations and the sales operations of Respondents' coal mines located in the Southern Powder River Basin ("SPRB"). Respondents are currently—by a wide margin—the two largest producers of SPRB coal. They compete with one another to supply SPRB coal, providing substantial benefits to purchasers in the form of lower prices and other benefits. The Joint Venture would eliminate that competition and those benefits.

2. The SPRB is a large coal-bearing geological formation located in northeastern Wyoming. Respondents extract the coal and sell it primarily to power plants, which burn the coal to generate electricity. SPRB coal is attractive to electric power producers because the

SPRB's coal deposits are relatively close to the earth's surface and therefore relatively inexpensive to 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, Respondents produced more than 60% of all SPRB coal mined. Respondents collectively control more than 60% of SPRB coal reserves. The Joint Venture would significantly increase concentration in an already concentrated market, well beyond the thresholds set forth in the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines"). Under the Merger Guidelines, a merger or other business combination, such as a joint venture, is presumptively unlawful when it would result in a post-transaction market-concentration level above 2,500 points, as measured by the Herfindahl-Hirschman Index ("HHI"), and an increase in market concentration of more than 200 points. The Joint Venture exceeds those thresholds and is thus presumptively unlawful.

4. The Joint Venture would substantially lessen competition for the production and sale of SPRB coal by eliminating current head-to-head competition between Peabody and Arch, replacing that competition with a single producer with a greater incentive and ability to reduce output or increase prices, which would likely result in significant harm to SPRB coal customers. Other SPRB coal producers are significantly smaller than Respondents and will not make up for this lost competition. The SPRB coal market contains few competitors; aside from Respondents, only three other producers of SPRB coal are realistic options for power plants that demand SPRB coal, and none is likely to increase output or otherwise compete more aggressively to sufficiently eliminate the harm from a post-Joint Venture price increase or output reduction.

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 substantial capital investment and the likelihood that it would take several years to begin coal production due to regulatory requirements. Expansion or repositioning by current producers is also unlikely to be sufficient to offset the Joint Venture's anticompetitive effects. Among other reasons, a significant portion of Respondents' rivals' coal reserves are more costly to extract than the coal currently mined by Peabody and Arch.

6. Respondents cannot show cognizable, transaction-specific efficiencies that would offset the likely and substantial competitive harm resulting from the Joint Venture.

II. JURISDICTION

7. Respondents are, and at all relevant times have been, engaged in commerce or in activities 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.

8. The Joint Venture constitutes a transaction subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

III. RESPONDENTS

9. Respondent 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.

10. Respondent 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. In 2018, Arch sold 79 million tons of coal extracted from these two mines. In total, Arch sold 96 million tons of coal in 2018, and recognized revenues of approximately $2.5 billion.

IV. THE JOINT VENTURE

11. Under the terms of the June 18, 2019 Joint Venture Agreement, each firm will contribute assets comprising their respective SPRB and Colorado coal mining operations. Specifically, Peabody will contribute four mines—three from the SPRB (North Antelope Rochelle, Caballo, and Rawhide) and one in Colorado (Twentymile)—and Arch will contribute three mines—two in the SPRB (Black Thunder and Coal Creek) and one in Colorado (West Elk). In exchange for their respective contributions, Peabody and Arch will receive 66.5% and 33.5% of the noncorporate interests of the Joint Venture, respectively.

V. RELEVANT MARKETS

A. Relevant Product Market

12. A relevant product market in which to assess the effects of the Joint Venture is the sale of SPRB coal.

13. SPRB coal is distinguishable from coal mined elsewhere in the United States (*e.g.*, the Illinois Basin, the Uinta Basin located in Utah and Colorado, and coal mined in the Appalachian region) by a number of key factors that are important to electric power producers, including, but not limited to:

- Low cost of production: SPRB coal is relatively close to the earth's surface, and thus is extracted from surface mines, which generally face lower costs than underground mines. SPRB coal beds are relatively thick, which also reduces the cost of extraction, compared to thinner beds. The difference in cost is reflected in the sales price of the coal. Measured in dollars per million British Thermal Units

($/mmBTU), SPRB coal is the lowest priced coal in the United States, measured at the mine mouth. For example, the United States Energy Information Administration ("EIA") releases weekly information regarding the spot price of different coals, broken down by coal region. According to the EIA, for the week ending January 10, 2020, on a $/mmBTU basis, the spot price of Appalachian coals was more than three times the price of Powder River Basin coal, and such price differences have been persistent over time.

- Heat content: SPRB mines yield subbituminous coal with a heat content that typically ranges from 8400 to 8800 BTU per pound, while other varieties of coal have different heat contents (for example, lignite coal typically produces less than 8300 BTU per pound, while bituminous and anthracite coal produce substantially more heat per pound, at least 11,500 BTUs). Electric power generators typically seek to purchase coal with an appropriate BTU specification in order to run their units cost-effectively.

- Low sulfur content: The sulfur content of the coal burned in coal-fired power plants is important to power generators because local, state and federal regulations limit emissions of certain pollutants, including sulfur dioxide. SPRB coal typically has relatively low sulfur content, and thus when burned produces less sulfur dioxide than higher-sulfur coals.

- Low sodium content: SPRB coal is also relatively low in sodium compared to other coals mined in the United States. Ash is another waste product of coal combustion, and a relatively low sodium content in ash is considered desirable by power producers.

14. Coal mined in other basins does not meaningfully constrain the price of SPRB coal in the large portions of the United States where SPRB coal can be shipped economically. Power plant generation units that burn SPRB coal rarely switch to coal from a different basin. Not only is SPRB coal the lowest-cost coal produced in the United States, environmental restrictions may prevent SPRB-burning power plants from burning coal with higher proportions of certain pollutants (such as sulfur). In some cases, plant owners may be entirely foreclosed from burning another type of coal because the plant only has regulatory approval to burn SPRB coal. 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.

15. Industry and public recognition confirms that SPRB coal differs from non-SPRB coals. Public sources of information, including analysis of commodity prices, routinely differentiate between SPRB coal and other types of coal. Likewise, market participants and industry analysts regularly discuss supply and demand conditions for SPRB coal separately from supply and demand for other types of coal.

16. 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.

17. 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.

18. Power generation units designed to burn SPRB coal cannot readily replace SPRB coal with natural gas, wind, sun, or nuclear fuels. Owners of such units cannot practicably construct new facilities that use alternative fuels in response to small-but-significant increase in the price of SPRB coal, because it is expensive and time-consuming to construct new facilities powered by natural gas, renewables, or nuclear fuels.

19. While the total demand for SPRB coal in the economy has been falling over time, industry regulators such as EIA, and SPRB coal producers (including Peabody and Arch), expect that SPRB coal plants will continue to purchase and burn many millions of tons of SPRB coal for many years to come.

20. Some power plants that rely on SPRB coal are owned by utilities that can also supply electricity to end-customers by (i) generating it from power plants designed to use fuels other than SPRB coal, and/or (ii) purchasing power "wholesale" from other power generators. If SPRB coal prices were to increase by a small-but-significant amount, such utilities are unlikely to reduce their purchases of SPRB coal by enough to render the price increase unprofitable, for several reasons. Among other reasons:

- coal-fired power plants are expensive to construct (modern plants can cost more than one billion dollars), and once a power plant operator has made such a significant investment, it has strong incentives to operate its plant, even if the price of coal increases by a small-but-significant amount;

- electricity producers often rely on coal-fired power units to run continuously to reliably supply power despite variable conditions (such as weather, natural gas pipeline constraints, and electricity grid congestion) that can render alternative power sources unreliable or unavailable; and

- a small-but-significant increase in SPRB coal producers' prices would have only a minor impact on a power generator's cost of producing electricity, due to the high transportation costs of SPRB coal and other factors.

B. Relevant Geographic Market

21. 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.

22. 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.

23. 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.

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

24. 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.

25. 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.

26. 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.

VII. ANTICOMPETITIVE EFFECTS

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

28. As the two biggest SPRB coal competitors, with large deposits of high-quality coal that can be mined at relatively low costs, Respondents 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.

29. 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.

30. 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 Respondents' competitors' coal reserves are more costly to extract than the coal currently mined by Peabody and Arch. As a result, even if Respondents' 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 Respondents' rivals may be dissuaded from acting on an incentive to increase output or compete more aggressively due to an anticipated reaction by the Joint Venture.

31. Moreover, Respondents' rivals may each find it individually rational to refrain from increasing output or otherwise competing more aggressively in response to a post-Joint Venture price increase or output reduction. By reducing the number of producers in the market and significantly increasing concentration, the transaction will increase rivals' ability to predict the overall response to a price increase or other competitive initiative, thereby affecting rivals' competitive incentives and potentially emboldening price increases. Each SPRB coal producer's ability to predict rivals' responses is heightened by significant transparency regarding output, pricing, and the competitive initiatives of rival firms. In addition to mine production, mine cost, and mine capacity information, SPRB coal producers have awareness of pricing. SPRB coal producers learn about competitors' pricing during the RFP process, and each producer can (and generally does) track the OTC spot market price of SPRB coal.[1]

32. Competition from fuels other than SPRB coal will also not replace the competition lost between Peabody and Arch. Suppliers of natural gas, uranium, and renewable energy do not bid against SPRB coal suppliers in RFPs or other competitive opportunities to supply SPRB coal-fired power generation units at all. SPRB producers face relatively inelastic demand for SPRB coal because, among other reasons, SPRB coal-fired power plants have high fixed costs, their generating units are unable to use alternative fuels, and many customers are utilities subject to retail rate regulation that are able to pass through their fuel costs to their end-customers (residential, commercial, and industrial consumers of electricity).

VIII. LACK OF COUNTERVAILING FACTORS

A. Barriers to Entry and Expansion

33. Respondents 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.

34. 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 Respondents' rivals' coal reserves are more costly to extract than the coal currently mined by Peabody and Arch.

35. 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.

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[1] While some SPRB mines yield coal with different heat rates, the price of SPRB coals of differing heat rates can be compared by calculating the price per-million-BTUs (rather than the price-per-ton).

B. Efficiencies

36. Respondents 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.

IX. VIOLATION

Count I – Illegal Agreement

37. The allegations of Paragraphs 1 through 36 above are incorporated by reference as though fully set forth herein.

38. The Joint Venture Agreement constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

Count II—Illegal Joint Venture

39. The allegations of Paragraphs 1 through 36 above are incorporated by reference as though fully set forth herein.

40. The Joint Venture, if consummated, may substantially lessen competition in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the eleventh day of August, 2020, at 10:00 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted. If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Joint Venture challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as

amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Joint Venture is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant markets, with the ability to offer such products and services as Peabody and Arch were offering and planning to offer prior to the Joint Venture.

2. A prohibition against any transaction between Peabody and Arch that combines their businesses in the relevant markets, except as may be approved by the Commission.

3. A requirement that, for a period of time, Peabody and Arch provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant markets with any other company operating in the relevant markets.

4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore Arch as a viable, independent competitor in the relevant market.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this twenty-fifth day of February 2020.

By the Commission, Commissioner Wilson dissenting.

April J. Tabor
Acting Secretary

SEAL: