

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI**

FEDERAL TRADE COMMISSION

Plaintiff,

v.

PEABODY ENERGY CORPORATION, et al.

Defendants.

Case No. 4:20-cv-00317

NOTICE OF SUBPOENA

PLEASE TAKE NOTICE that, in accordance with Rule 45 of the Federal Rules of Civil Procedure, Southwest Power Pool, Inc. is being subpoenaed to produce the documents and things in its possession, custody or control that are identified in the attached subpoena on or before March 31, 2020.

Dated: March 20, 2020
New York, New York

DEBEVOISE & PLIMPTON LLP

By: /s/ Tristan M. Ellis
Tristan M. Ellis
919 Third Avenue
New York, New York 10022
Tel: (212) 909-6000
Email: tmellis@debevoise.com

Attorneys for Peabody Energy Corporation

CERTIFICATE OF SERVICE

I, Tristan M. Ellis employed by Debevoise & Plimpton LLP, attorneys for Peabody Energy Corporation, certify:

I am over eighteen (18) years of age. On the 20th day of March 2020, I served copies of the within Notice of Subpoena by electronic mail to counsel for the other parties to this action at the following addresses:

Daniel Matheson
Amy Dobrzynski
Michael Franchak
Joshua Goodman
Brittany Hill
James McCollough
Federal Trade Commission
Bureau of Competition
400 Seventh Street, S.W.
Washington, D.C. 200024
Tel: (202) 326-2075
Email: dmatheson@ftc.gov
Email: adobrzynski@ftc.gov
Email: mfranchak@ftc.gov
Email: jgoodman@ftc.gov
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Federal Trade Commission*

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Email: william.lavery@bakerbotts.com
Email: steven.pet@bakerbotts.com
Email: pouria.sadat@bakerbotts.com

Counsel for Defendant Arch Coal, Inc.

Pursuant to 28 U.S.C. § 1746, I certify under the penalty of perjury that the foregoing is true and correct.

Executed on March 20, 2020.

/s/ Tristan M. Ellis
Tristan M. Ellis

UNITED STATES DISTRICT COURT

for the

Eastern District of Missouri

FEDERAL TRADE COMMISSION

Plaintiff

v.

PEABODY ENERGY CORPORATION, et al.

Defendant

Civil Action No. 4:20-cv-00317-SEP

**SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION**

To: Southwest Power Pool, Inc. – ATTN: Paul Suskie, Esq.
201 Worthen Drive, Little Rock, AR 72223

(Name of person to whom this subpoena is directed)

Production: **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material:

See attached Attachment A and Definitions and Instructions

| | |
|--|---|
| Place: Southwest Power Pool, Inc., 201 Worthen Drive, Little Rock, AR 72223 [or as otherwise agreed] | Date and Time: 03/31/2020 12:00 pm [or as otherwise agreed in writing] |
|--|---|

Inspection of Premises: **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

| | |
|--------|----------------|
| Place: | Date and Time: |
|--------|----------------|

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 03/20/2020

CLERK OF COURT

OR



Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* PEABODY ENERGY CORPORATION, who issues or requests this subpoena, are:

Ted Hassi, Debevoise & Plimpton LLP, 801 Pennsylvania Avenue N.W., Washington, D.C. 20004, thassi@debevoise.com, (202) 383-8135

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 4:20-cv-00317-SEP

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____ .

I served the subpoena by delivering a copy to the named person as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____
_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____ .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

- (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

**ATTACHMENT A TO SUBPOENA TO PRODUCE
DOCUMENTS ISSUED TO SOUTHWEST POWER POOL**

SPECIFICATIONS

1. Submit all documents related to the proposed transaction, including but not limited to documents discussing the Organization's views or opinions of the proposed transaction and/or the Organization's proposed responses to the consummation of the proposed transaction as well as any communications (and documents related thereto) between the Organization and any other person, including but not limited to the FTC, related to the proposed transaction.
2. Submit documents since January 1, 2015, sufficient to show, for each generation resource offered in the day-ahead market, the generation resource's name, ISO zone or geographic region location and node, owner/scheduling representative, offer curves (including start-up, no load and energy components as applicable), day-ahead market hourly production awards, and hourly prices.
3. Submit documents since January 1, 2015, sufficient to show, for each generation resource offered in the real-time market, the generation resource's offer curves (including start-up, no-load and energy components as applicable), real-time market hourly production awards, and hourly prices.
4. Submit all correspondence with the Organization relating to any approach by an owner/operator to retire any coal-fired generating unit or plant or shift any coal-fired generating unit or plant to seasonal operations (e.g., summer only) since January 1, 2015.
5. Submit daily maintenance schedules for all resources dispatched by the Organization and a listing of all generation resources that were on seasonal economic outages (as opposed to maintenance outages).
6. Submit all correspondence with Organization members related to future generation resource additions, conversions, and/or retirements.
7. Submit documents sufficient to identify, daily from January 1, 2015, each coal-fired power plant that submitted at least one bid during that day, the bid(s) that were made, and whether they were (a) self-scheduled or self-committed status and (b) market-scheduled or market-committed status.
8. Submit documents sufficient to show, for each generation resource, any payments made to compensate a member for costs it incurred for operating as directed by the Organization ("Uplift Payments").
9. Submit documents sufficient to show, since January 1, 2015, and for each coal-fired generating unit, the amount of time that it was dispatched by the Organization in order to alleviate a transmission constraint.

10. Provide all data and documents used to generate the Organization's annual assessments of future resource adequacy, including the 2017, 2018, and 2019 SPP Resource Adequacy Reports.

DEFINITIONS

1. The term "the Organization" means Southwest Power Pool, Inc., and its parents, predecessors, division, subsidiaries, divisions, subsidiaries, affiliates, partnerships, joint ventures, and all directors, officers, employees, agents, and representatives.
2. "Arch" means Arch Coal, Inc. and its parents, predecessors, division, subsidiaries, divisions, subsidiaries, affiliates, partnerships, joint ventures, and all directors, officers, employees, agents, and representatives.
3. "Peabody" means Peabody Energy Corporation and its parents, predecessors, division, subsidiaries, divisions, subsidiaries, affiliates, partnerships, joint ventures, and all directors, officers, employees, agents, and representatives.
4. The term "FTC" means the Federal Trade Commission, its agents, and all other persons acting or purporting to act on its behalf.
5. The term "proposed transaction" means the joint venture agreement between Peabody and Arch to contribute assets comprising Peabody's North Antelope Rochelle, Caballo, Rawhide, and Twentymile mines, and Arch's Black Thunder, Coal Creek, and West Elk mines.
6. The term "document" (or "documents") is defined as broadly as that term is construed under Rule 34 of the Federal Rules of Civil Procedure, and is meant to include, but is not limited to, *all tangible and intangible modes of communicating*, conveying or providing any information such as writings, correspondence, communications, notes, letters, memoranda,

drawings, graphs, charts, photographs, discs, computer recordings, electronic mail, spreadsheets, *data, databases, and any other data compilations* from which information can be obtained.

7. The terms “relating to” and “related to” mean in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, addressing, or stating the designated subject matter, regardless of the length of the treatment or detail of analysis of the subject matter. A document “relating to” an agreement or contract includes the agreement or contract itself.

8. The term “person” includes the Organization and means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.

9. The terms “all” and “each” mean “each and every.”

10. The terms “and” and “or” have both conjunctive and disjunctive meanings.

11. The term “any” means “at least one that applies, and if more than one applies, each that applies.”

INSTRUCTIONS

Unless the context indicates otherwise, the following instructions shall apply to these requests:

1. Provide all responsive documents in your possession, custody, or control or in the possession custody or control of your representatives and agents.

2. Unless otherwise specified, each Request calls for documents from each of the years from January 1, 2017 to the present.

3. For each request, produce entire documents, including all attachments, enclosures, cover letters, memoranda and appendices. Copies that differ in any respect from an original (because, by way of example only, handwritten or printed notations have been added) shall be treated as separate documents and produced separately. Each draft of a document is a separate document. A request for a document shall be deemed to include a request for any and all transmittal sheets, cover letters, exhibits, enclosures or attachments to the document, in addition to the document itself. For those documents written in a language other than English, please translate the document into English, and produce the foreign language document, with the English translation attached thereto.

4. Provide all electronically stored information (“ESI”) in standard, single-page Group IV TIFF format with searchable text and metadata in a Relativity or similar load file. Also, provide any spreadsheet or presentation files, including Microsoft Access, Excel, and PowerPoint files, as well as audio, audiovisual, and video files, in their native formats. Provide all hard copy documents as image files with searchable OCR text and unitize the hard copy documents to the extent possible (i.e., multi-page documents shall be produced as a single document and not as several single-page documents). Hard copy documents shall be produced as they are kept, reflecting attachment relationships between documents and information about the file folders within which the document is found. Produce the metadata for any responsive ESI with the responsive data, including the following fields: custodian, author(s), recipient(s), copy recipient(s), blind copy recipient(s), subject, file sent date/time, file creation date/time, file modification date/time, file last accessed data/time, beginning bates, ending bates, parent beginning bates, attachment(s) beginning bates, hash value, application type, file type, file name,

file size, file path, and folder path. Documents produced in native format shall be accompanied by a native link field.

5. Where a claim of privilege or other protection from discovery is asserted, and any document is withheld (in whole or in part) on the basis of such assertion, you shall provide a log (“Privilege Log”) in Microsoft Excel format that identifies where available:

- a. the nature of the privilege or protection from discovery (including but not limited to attorney-client, work product, and deliberative process) that is being claimed with respect to each document;
- b. the type of each document;
- c. the date of each document;
- d. the author of each document;
- e. the addresses and recipients of each document (including those recipients cc-ed or bcc-ed);
- f. a description of each document containing sufficient information to identify the general subject matter of the document and to enable Defendants to assess the applicability of the privilege or protection claimed; and
- g. the identity of and any production Bates number assigned to any attachment(s), enclosure(s), cover letter(s), or cover email(s) of each document, including the information outlined in subsections (a) through (g) above for each such attachment, enclosure, cover letter, or cover email.

Attachments, enclosures, cover letters, and cover emails shall be entered separately on the Privilege Log. The Privilege Log shall include the full name, title, and employer of each

author, addressee, and recipient, denoting each attorney with the letters “ESQ.” Submit all non-privileged portions of any responsive document (including non-privileged or redactable attachments, enclosures, cover letters, and cover emails) for which a claim of privilege is asserted, noting where redactions to the document have been made.

6. If you assert that part of the request is objectionable, respond to the remaining parts of the request to which you do not object. For those portions of any document request to which you object, please state the reasons for such objection and describe the documents or categories of documents that are not being produced.

7. These document requests shall not be deemed to call for identical copies of documents. “Identical” means precisely the same in all respects; for example, a document with handwritten notes or editing marks shall not be deemed identical to one without such notes or marks.

8. The documents responsive to these requests are to be produced as they were kept in the ordinary course of business and are to be labeled in such a way as to show which files and offices they came from.

9. These requests are continuing in nature, and you must supplement your responses pursuant to Federal Rule of Civil Procedure 26(e). Defendants specifically reserve the right to seek supplementary responses and the additional supplementary production of documents before trial.