

UNITED STATES DISTRICT COURT

for the

Eastern District of Missouri

FEDERAL TRADE COMMISSION

Plaintiff

v.

PEABODY ENERGY CORPORATION, ARCH COAL, INC.

Defendant

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

(If the action is pending in another district, state where:)

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

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

Table with 2 columns: Place (Federal Trade Commission, 400 7th Street SW, Washington, DC 20024) and Date and Time (04/03/2020 9:00 am)

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.

Table with 2 columns: Place and Date and Time (empty)

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

Date: 03/24/2020

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk OR /s/ Amy Dobrzynski Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) Federal Trade Commission, who issues or requests this subpoena, are: Amy Dobrzynski, 400 7th Street SW, Washington, DC 20024, 202-326-3080, adobrzynski@ftc.gov

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.)

This subpoena for *(name of individual and title, if any)* _____
was received by me 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 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:

Print

Save As...

Add Attachment

Reset

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(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 issuing court 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 issuing court 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 issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party’s officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(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 issuing court may, on motion, quash or modify the subpoena if it requires:

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

(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; or

(iii) a person who is neither a party nor a party’s officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(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.

(d) 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 to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty’s failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

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

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

PEABODY ENERGY CORPORATION

and

ARCH COAL, INC.,

Defendants.

Civil Action No. 4:20-cv-00317

**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 with Peabody or Arch, 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, conversion, 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 document 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 or documents used to generate the Organization’s annual assessments of future resource adequacy, including the 2017, 2018, and 2019 SPP Resource Adequacy Reports.

DEFINITIONS

- A. The term “the Organization” means Southwest Power Pool, Inc., and its parents, predecessors, divisions, subsidiaries, affiliates, partnerships, joint ventures, and all directors, officers, employees, agents, and representatives.
- B. “Arch” means Arch Coal, Inc. and its parents, predecessors, divisions, subsidiaries, affiliates, partnerships, joint ventures, and all directors, officers, employees, agents, and representatives.
- C. “Peabody” means Peabody Energy Corporation and its parents, predecessors, divisions, subsidiaries, affiliates, partnerships, joint ventures, and all directors, officers, employees, agents, and representatives.
- D. The term “FTC” means the Federal Trade Commission, its agents, and all other persons acting or purporting to act on its behalf.
- E. 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 miles, and Arch’s Black Thunder, Coal Creek, and West Elk mines.

- F. 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 records, electronic mail, spreadsheets, *data, databases, and any other data compilations* from which information can be obtained.
- G. 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.
- H. The term “person” includes the Organization and means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.
- I. The terms “all” and “each” mean “each and every.”
- J. The terms “and” and “or” have both conjunctive and disjunctive meanings.
- K. The term “any” means “at least one that applies, and if more than one applies, each that applies.”
- L. The terms “all” and “each” mean “each and every.”
- M. The terms “and” and “or” have both conjunctive and disjunctive meanings.
- N. The term “any” means “at least one that applies, and if more than one applies, each that applies.”

INSTRUCTIONS

For purposes of this Subpoena, the following instructions apply:

- I. Unless otherwise specified, each request calls for documents received or created from January 1, 2017 to the present.
- II. Unless modified by agreement with the FTC, these document requests require a complete search of all the files of the Company. The Company shall produce all responsive documents, wherever located, that are in the actual or constructive possession, custody, or control of the Company and its representatives, attorneys, and other agents, including, but not limited to, consultants, accountants, lawyers, or any other person retained by, consulted by, or working on behalf or under the direction of the Company.
- III. This Subpoena shall be deemed continuing in nature and shall be supplemented in the event that additional documents responsive to this request are created, prepared, or received between the time of the Company's initial response and the date established by the Court for hearing the FTC's Motion for Preliminary Injunction in the above-captioned proceeding.
- IV. The Company does not need to provide documents that the Company previously provided to the Commission.
- V. All documents responsive to these document requests, regardless of format or form and regardless of whether submitted in hard copy or electronic format:
 - a) Shall be produced in complete form, un-redacted unless privileged, and in the order in which they appear in the Company's files.
 - b) Shall be marked on each page with corporate identification and consecutive document control numbers;
 - c) If written in a language other than English, shall be translated into English, with the English translation attached to the foreign language document;
 - d) Shall be produced in color where necessary to interpret the document (if the coloring of any document communicates any substantive information, or if black-and-white photocopying or conversion to TIFF format of any document (e.g., a chart or graph), makes any substantive information contained in the document unintelligible, the Company must submit the original document, a like-colored photocopy, or a JPEG format image;
 - e) Shall be accompanied by an affidavit of an officer of the Company stating that the copies are true, correct, and complete copies of the original documents; and
 - f) Shall be accompanied by an index that identifies: (i) the name of each person from whom responsive documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that person's

documents, and if submitted in paper form, the box number containing such documents. The FTC will provide a sample index upon request.

VI. Do not produce any Sensitive Personally Identifiable Information (“Sensitive PII”) or Sensitive Health Information (“SHI”) prior to discussing the information with a Commission representative. If any document responsive to a particular Specification contains unresponsive Sensitive PII or SHI, redact the unresponsive Sensitive PII or SHI prior to producing the document.

a) The term “Sensitive Personally Identifiable Information” means an individual’s Social Security Number alone; or an individual’s name, address or phone number in combination with one or more of the following:

- date of birth,
- driver’s license number or other state identification number, or a foreign country equivalent,
- passport number,
- financial account number, and
- credit or debit card number.

b) The term “Sensitive Health Information” includes medical records and other individually identifiable health information, whether on paper, in electronic form or communicated orally. Sensitive Health Information relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

VII. Forms of Production: The Company shall submit all documents as instructed below absent written consent from the FTC.

a) Documents stored in electronic or hard copy formats in the ordinary course of business shall be submitted in the following electronic format provided that such copies are true, correct, and complete copies of the original documents:

- i. Submit Microsoft Excel, Access, and PowerPoint files in native format with extracted text and applicable metadata and information as described in subparts (a)(ii), (a)(iii) and (a)(iv).
- ii. Submit emails in image format with extracted text and the following metadata and information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.

Metadata/Document Information	Description
Ending Bates number	The last bates number of the document.
Custodian	The name of the original custodian of the file.
To	Recipient(s) of the email.
From	The person who authored the email.
CC	Person(s) copied on the email.
BCC	Person(s) blind copied on the email.
Subject	Subject line of the email.
Date Sent	Date the email was sent.
Time Sent	Time the email was sent.
Date Received	Date the email was received.
Time Received	Time the email was received.
Attachments	The Document ID of attachment(s).
Mail Folder Path	Location of email in personal folders, subfolders, deleted items or sent items.
Message ID	Microsoft Outlook Message ID or similar value in other message systems.

- iii. Submit email attachments in image format other than those identified in subpart (a)(i) with extracted text and the following metadata and information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the original custodian of the file.
Parent Email	The Document ID of the parent email.

Metadata/Document Information	Description
Modified Date	The date the file was last changed and saved.
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.
Hash	The Secure Hash Algorithm (SHA) value for the original native file.

- iv. Submit all other electronic documents other than those described in subpart (a)(i) in image format accompanied by extracted text and the following metadata and information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the original custodian of the file.
Modified Date	The date the file was last changed and saved.
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.
Originating Path	File path of the file as it resided in its original environment.

Metadata/Document Information	Description
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.
Hash	The Secure Hash Algorithm (SHA) value for the original native file.

- v. Submit documents stored in hard copy in image format accompanied by OCR with the following information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the original custodian of the file.

- vi. Submit redacted documents in PDF format accompanied by OCR with the metadata and information required by relevant document type described in subparts (a)(i) through (a)(v) above. For example, if the redacted file was originally an attachment to an email, provide the metadata and information specified in subpart (a)(iii) above.
- b) Submit data compilations in electronic format, specifically Microsoft Excel spreadsheets or delimited text formats, with all underlying data un-redacted and all underlying formulas and algorithms intact.
- c) If the Company intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in its computer systems or electronic storage media, or if the Company's computer systems contain or utilize such software, the Company must contact the Commission staff to determine, with the assistance of the appropriate Commission representative, whether and in what manner the Company may use such software or services when producing materials in response to these document requests.
- d) Produce electronic file and image submissions as follows:
- i. For productions over 10 gigabytes, use IDE, EIDE, and SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure;

- ii. For productions under 10 gigabytes, CD-R CD-ROM optical disks formatted to ISO 9660 specifications, DVD-ROM optical disks for Windows-compatible personal computers, and USB 2.0 Flash Drives are acceptable storage formats;
- iii. All documents produced in electronic format shall be scanned for and free of viruses prior to submission. The Commission will return any infected media for replacement, which may affect the timing of the Company's compliance with these Document Requests; and
- iv. Encryption of productions using NIST FIPS-Compliant cryptographic hardware or software modules, with passwords sent under separate cover, is strongly encouraged.
- v. Each production shall be submitted with a transmittal letter that includes the Civil Action Number (15-cv-2115-EGS); production volume name; encryption method/software used; passwords for any password protected files; list of custodians and document identification number range for each; total number of documents; and a list of load- file fields in the order in which they are organized in the load file.

VIII. If any documents are withheld or redacted from production based on a claim of privilege, provide a statement of the claim of privilege and all facts relied upon in support thereof, in the form of a log that includes each document's authors, addresses, date, a description of each document, and all recipients of the original and any copies. Attachments to a document should be identified as such and entered separately on the log. For each author, addressee, and recipient; state the person's full name, title, and employer or firm; and denote all attorneys with an asterisk. The description of the subject matter shall describe the nature of each document in a manner that, though not revealing information itself privileged, provides sufficiently detailed information to enable the FTC or a court to assess the applicability of the privilege claimed under FRCP 45(d)(2). For each document withheld under a claim that it constitutes or contains attorney work product, also state whether the Company asserts that the document was prepared in anticipation of litigation or for trial and, if so, identify the anticipated litigation or trial upon which the assertion is based. Submit all non-privileged portions of any responsive document (including non-privileged or redactable attachments) for which a claim of privilege is asserted (except where the only non-privileged information has already been produced in response to this instruction), noting where redactions in the document have been made. Documents authored by outside lawyers representing the Company that were not directly or indirectly furnished to the Company or any third-party, such as internal firm memoranda, may be omitted from the log.

IX. If documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business or the implementation of the Company's document retention policy, but the Company has reason to believe such documents have been in existence, state the circumstances under which they were lost or destroyed, describe the

documents to the fullest extent possible, state the request(s) to which they are responsive, and identify persons having knowledge of the content of such documents.

- X. If you object to any part of a request, set forth the basis for your objection and respond to all parts of the request to which you do not object. Any ground not stated in an objection within the time provided by Federal Rule of Civil Procedure 45(c), or any extension thereof, shall be waived. All objections must be made with particularity and must set forth all the information upon which you intend to rely in response to any motion to compel.
- XI. All objections must state with particularity whether and in what manner the objection is being relied upon as a basis for limiting the scope of any search for documents or withholding any responsive documents. If you are withholding responsive information pursuant to any general objection, you should so expressly indicate. If, in responding to any request, you claim any ambiguity in interpreting either the request or a definition or instruction applicably thereto, set forth as part of your response the language deemed to be ambiguous and the interpretation used in responding to the request, and produce all documents that are responsive to the request as you interpret it.
- XII. Whenever necessary to bring within the scope of a request a response that might otherwise be construed to be outside its scope, the following construction should be applied:
 - a) Construing the terms “and” and “or” in the disjunctive or conjunctive, as necessary, to make the request more inclusive;
 - b) Construing the singular form of any word to include the plural and plural form to include the singular;
 - c) Construing the past tense of the verb to include the present tense and present tense to include the past tense;
 - d) Construing the masculine form to include the feminine form and vice versa; and
 - e) Construing the term “date” to mean the exact day, month, and year if ascertainable; if not, the closest approximation that can be made by means of relationship to other events, locations, or matters.
- XIII. Unless otherwise stated, construe each request independently and without reference to any other purpose of limitation.
- XIV. Any questions you have relating to the scope or meaning of anything in this Subpoena should be directed to Philip Kehl at 202-326-2559 or pkehl@ftc.gov. The response to this Subpoena shall be addressed to the attention of Don King, Federal Trade Commission, 600 Pennsylvania Avenue, NW Washington, D.C. 20580, and delivered between 8:30 a.m. and 5:00 p.m. on any business day.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 24, 2020, I served the foregoing on the following entity via electronic mail:

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

/s/ Philip Kehl _____
Philip Kehl
Attorney for Plaintiff Federal Trade Commission