

Introduced by: Mayor Zulkosky  
Date: March 24, 2009  
Action: Passed  
Vote: 6-0

## *CITY OF BETHEL*

### **Resolution # 09-16**

**REQUESTING THE STATE OF ALASKA HOUSE JUDICIARY COMMITTEE TO INQUIRE INTO THE EFFECTIVENESS OF THE CONSENT DECREE BETWEEN THE STATE OF ALASKA AND CROWLEY MARINE SERVICES, INC. CROWLEY MARITIME CORPORATION; NORTHLAND FUEL, LLC; YUKON FUEL COMPANY; NORTHLAND VESSEL LEASING COMPANY LLC; AND YUTANA BARGE LINES, LLC., IN ACHIEVING ITS INTENDED GOAL OF PREVENTING A MONOPOLISTIC MARKET AND TO ALLOW FOR FAIR COMPETITION**

**WHEREAS**, communities within Western Alaska like much of the country are facing exorbitant fuel charges, unfortunately the prices paid by communities within Western Alaska are established by a small number of distributors operating within this region;

**WHEREAS**, to insure a competitive market rate would be maintained and to prevent Crowley Marine Services from establishing market power over the regions fuel sources, a consent decree was produced and ordered;

**WHEREAS**, without an annual or bi-annual operational review and compliance verification of the consent decree, the communities affected by the transaction of fuel cannot be comfortable in knowing they are being charged fairly for the product;

**WHEREAS**, reviewing the market rate for storage and use, in conjunction with the consent decree will confirm the business practices between Crowley Marine Services and their only local competitor Delta Western, are in the fair interest of the communities they service;

**WHEREAS**, because of the market control Crowley Marine Services has on this region and its competitors it is in the best interest of every surrounding community to have a review of continued fulfillment of the consent decree;

**NOW, THEREFORE, BE IT RESOLVED** that the Bethel City Council hereby requests the State of Alaska House Judiciary Committee to inquire into the effectiveness of the Consent Decree between the State of Alaska and Crowley Marine Services, Inc.; Crowley Maritime Corporation; Northland Fuel, LLC.; Yukon Fuel Company; Northland Vessel Leasing Company LLC.; and

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Yutana Barge Lines, LLC., in achieving its intended goal of preventing a monopolistic market and to allow for fair competition.

**ENACTED THIS 24<sup>th</sup> DAY OF MARCH 2009 BY A VOTE OF 6 IN FAVOR AND 0 OPPOSED.**

\_\_\_\_\_  
Tiffany Zulkosky, Mayor

ATTEST:

*Lori Strickler*  
Lori Strickler, City Clerk

**REPORT OF THE ATTORNEY GENERAL REGARDING  
THE ACQUISITION OF YUKON FUEL COMPANY  
BY CROWLEY MARINE SERVICES.**

**I. Introduction.**

In the fall of 2003, the Alaska Attorney General's Office became aware that Crowley Marine Services ("Crowley") made an offer to purchase all of the assets of Yukon Fuel Company ("Yukon"). Both Crowley and Yukon compete with each other for the sale, storage, and distribution of petroleum products in parts of Western Alaska. Concerns were raised by several individuals, communities, and businesses about the potential harm this transaction might have on the price of delivered petroleum products in the region. The Attorney General considered these concerns and began an informal review of the proposed transaction and its potential effects on competition for the sale and delivery of fuel in Western Alaska.

In response to this proposed transaction, the Alaska Village Electric Cooperative, Inc., ("AVEC") and members of the Western Alaska Fuel Group ("WAFG")<sup>1</sup> filed a complaint on November 19, 2003 in the Alaska Superior Court in Nome. The primary allegation in the complaint is that the transaction will eliminate the existing competition between Crowley and Yukon for the delivery of fuel, leaving Crowley with monopoly power over fuel prices in Western Alaska.

After filing the complaint, the parties to the lawsuit continued their request that the Attorney General initiate a formal investigation of the transaction to determine

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<sup>1</sup> Those six members are: (1) Inn Electric Cooperative, Inc.; (2) Kotzebue Electric Association, Inc.; (3) Naknek Electric Association, Inc.; (4) City of Nome d/b/a Nome Joint Utility System; (5) Nushagak Electric & Telephone Cooperative, Inc.; and (6) Unalakleet Valley Electric Cooperative, Inc.

whether it would violate Alaska's antitrust laws. In February 2004, the Attorney General held a meeting in Anchorage with the parties to discuss these concerns in more detail, and to determine whether the parties could take any action on their own to resolve the pending lawsuit. Following the meeting, the Attorney General decided further review by the state was warranted, and initiated a formal investigation to determine if the transaction would violate Alaska's antitrust laws.

## **II. Summary.**

There are currently very few competing firms engaged in the sale of delivered petroleum products ("fuel") in Western Alaska. Some of the equipment and assets necessary for delivering fuel in this area is specialized. With the exception of small amounts of fuel delivered by air, all fuel is delivered by barge. Purchases by utility companies account for the majority of fuel sales. About 75% of all fuel in this region is purchased through the bidding process. Both AVEC and WAFG select the supplier of their fuel as a result of bidding. Once selected, the successful bidder usually enters a long term (two or three year) contract for supplying fuel.

In order for a competitor to bid on these contracts, it must have access to the necessary equipment and storage facilities to deliver fuel economically and profitably to the prospective customers. There are two primary components involved in the delivery of fuel by barge to a significant number of customers: (1) the barge, and (2) storage facilities. There are also two primary kinds of barges required to serve this market; (1) deep water (or "line haul") barges that can hold several million gallons of fuel, and (2)

smaller barges capable of navigating shallow coastal and up-river locations, called "shallow draft" barges.

Most fuel delivered to Western Alaska locations originates from refiners in Anchorage. Bulk fuel is purchased by the barge company, loaded into line haul barges, then brought to Western Alaska for delivery to the customer. Some customers have storage tanks that can be accessed directly by a line haul barge. Other customers can only be reached by shallow draft barges. To make shallow draft deliveries, fuel must be transferred to a shallow draft barge directly from a line haul barge (called lightering), and it is then delivered directly to the customer, or stored in a storage tank for future delivery.

To maximize the efficiencies of delivering fuel, it is necessary for a competitor to own, or have access to, line haul barges, shallow draft barges, and storage facilities in key locations. Without all these elements, it is difficult to compete in this market. Currently, only Crowley and Yukon operate these kinds of assets in the immediate region. Thus, the proposed transaction creates a significant threat that Crowley would be the owner of all the assets necessary for delivering fuel in this market, and could exercise "market power" to increase prices.

Additionally, Crowley and Yukon each own a fuel storage facility in Bethel. Crowley recently constructed a new 5 million gallon facility in Bethel which became operational in December, 2003. Yukon owns a 10 million gallon facility that has served Bethel and the surrounding area for over 20 years. Allowing Crowley to own both facilities would eliminate this newly created competition for fuel sales in and around Bethel.

The state approached Crowley and Yukon with these issues, and expressed serious reservations about approving the transaction unless Crowley was willing to sell sufficient assets to another competitor to address the state's antitrust concerns. The state expressed to Crowley its goal of maintaining a competitive marketplace for the delivery of fuel that was consistent with Alaska's antitrust laws. After months of review and investigation, the state and Crowley agreed on the terms of a Consent Decree the state believes complies with Alaska law. The main features of the decree are:

1. The buyer of the assets is Delta Western, one of the largest and most experienced barge companies on the West Coast.
2. Crowley will sell Delta Western two sets of tugs and barges that are capable of navigating the shallow coastal and up-river waters in Western Alaska. Coupled with Delta Western's other tugs and barges, this will allow Delta Western to compete effectively in this market.
3. Crowley will divest four million gallons of fuel storage capacity to Delta Western in Bethel. Because Crowley also plans to remove one million gallons of storage capacity from the Yukon facility in Bethel, this amount approximates the current level of competition in Bethel. The term of the divestiture extends to a potential of 30 years, with an initial term of 10 years plus four 5-year options.
4. Crowley must offer Delta Western an option to purchase or lease certain property Crowley owns in Bethel. The location of this property will allow Delta Western the opportunity to construct new fuel storage facilities in the future if competitive forces require expansion.

5. Crowley must offer Delta Western 29% of any additional storage capacity Crowley adds to its existing facilities in Bethel. This will allow Delta Western to grow along with Crowley.

6. Crowley must allow Delta Western and others access to fuel storage facilities in Nome, Kotzebue, and St. Michael. Access to storage at these locations will allow Delta Western to compete more effectively in and around these areas without the need to construct its own storage facilities.

By agreeing to these conditions, the state believes any legitimate concern about a reduction in competition for delivered petroleum products is resolved. The resulting competitive environment will prevent Crowley from charging monopoly prices, or exercising market power.

### **III. Alaska's Antitrust Laws.**

Alaska's antitrust statutes, AS 45.50.562 - .596, are patterned after federal antitrust laws. These laws are aimed at stopping conduct that prevents or inhibits competition in the free marketplace. In the United States, unlike other countries, our policy of encouraging competition among free enterprise is based on the notion that consumers will benefit from lower prices, higher quality, and greater choice than under a system where capital ventures are controlled by the government. This national policy of competition has made the United States economy one of the strongest in the world.

A primary goal of the antitrust laws is to ensure that consumer choice is not unreasonably restricted since consumer choice is a powerful incentive for sellers to keep prices low and quality high. To ensure consumer choice, the antitrust laws set two basic

requirements; (1) companies cannot agree to limit competition in ways that hurt consumers, and (2) a single company cannot monopolize an industry through unfair practices. These principles are set forth in general terms in both state and federal antitrust laws, and courts are left to decide on a case-by-case basis whether any particular conduct is unlawful.

Application of the antitrust laws, however, can be very complicated. It is not always obvious whether conduct is unlawful under these complex standards. For example, monopolies that form as a result of superior marketing efforts or a superior product may be completely lawful. A company that offers a new product in a market where no other comparable products have been sold before will have a monopoly until a competitor decides to enter the market and compete. The antitrust laws do not prevent someone from gaining market power if it is acquired through legitimate business practices.

Another basic principle of antitrust law is to prevent the illegal accumulation of market power in a single entity.<sup>2</sup> If one entity was able to obtain market power, it could control prices. The ability to control prices through illegal conduct is something state and federal governments try very hard to prevent. The role of the Alaska Attorney General in enforcing the state's antitrust laws is to review proposed transactions, like the Crowley/Yukon transaction, to make sure the resulting entity is not left with this kind of market power.

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<sup>2</sup> If a business has "market power" it has the ability to restrict competition or control prices. Thus, antitrust law does not distinguish between "how much" market power one business has. Any amount of market power is illegal.



#### **A. Defining Markets.**

The start of any antitrust investigation begins with determining what market is potentially affected by the alleged conduct. In this case, the state had to determine what markets would be affected by the sale of Yukon to Crowley. This is called the "relevant market." In general terms, the relevant market consists of two components: (1) a "product market" which consists of all the competing products sold by the merging companies plus any products that can be used as a reasonable substitute; and (2) a "geographic market" which consists of all the areas from which these products can be economically and profitably supplied.

In this case, the product market was determined to be "barge delivered petroleum products." The product market is not simply "petroleum products" because none of the competitors in this area actually own a source of fuel. Both Yukon and Crowley, for example, purchase all their fuel from a third party. The product is also not "barge services" because barge services by themselves are rarely purchased by customers. Fuel is typically purchased on a "delivered" basis.

There are no other reasonable substitutes for barge delivered petroleum products in this area. There are no roads that service Western Alaska, thus land transportation of petroleum is not possible. Some limited amounts of fuel are delivered by air. These deliveries are isolated, and not economical in large volumes. Other sources of energy, such as coal, hydro, and wind power, are also not economic alternatives to petroleum. None of the communities currently using petroleum products could quickly

and economically switch to one of these alternative energy sources. Accordingly, the Attorney General defined the product market as “delivered petroleum products.”

The geographic market was more difficult to define. To determine the relevant geographic market, antitrust law requires that you include all places a customer could go to get the relevant product at competitive prices. Courts have frequently, and consistently, defined geographic markets for barge transportation as generally broad, and have found them to include all waterways where there is no physical barrier to barge movement.

The area affected most by the proposed transaction is Western Alaska. Fuel can be economically delivered to Western Alaska by barge, however, from locations outside of Western Alaska. For example, a barge company from as far away as Southern California could bid on contracts to supply AVEC, the WFAG, and other customers. If successful, the bidder could arrange to purchase fuel in Anchorage, lease (or buy) line haul and shallow draft barges, then arrange necessary storage space to deliver the fuel to customers. Economic and profitable deliveries, however, depend on a variety of factors, including the volume of fuel sold, and the cost to position equipment in Western Alaska to make deliveries. Complicating this analysis is the unique geography of Western Alaska. The experience and knowledge required to operate here is unique and challenging.

Antitrust economists hired by Crowley determined that profitable fuel deliveries could be made by using a single set of tugs and barges from Southern California if the seller could obtain at least 2.1 million gallons of delivered fuel sales.

This estimate considered the cost of bringing a shallow draft tug and barge from San Diego to Alaska.

The analysis done by an expert economist hired by the state suggests the minimum volume necessary for deliveries to be made from California is probably higher than the volumes calculated by Crowley's economist. But under either analysis, it was clear that at some volume, fuel could be profitably delivered to Alaska from locations as far away as California, including locations in Oregon and Washington State. There is about 90 million gallons of bulk fuel sales annually in Western Alaska. Considering these volumes, the state concluded the geographic market for supplying barge delivered petroleum products includes all of Western Alaska and the West Coast of the United States.

**B. Competitors in the Market.**

The next step in analyzing the potential competitive effects of the proposed transaction required the state to identify competitors currently participating in the relevant market, and the amount of "market power" held by each. Knowing the number of competitors and each competitor's share of the market is critical to understanding how the elimination of one competitor may impact competition among the remaining competitors.

For barge delivered petroleum, the Western Alaska market has been recently dominated by three competitors. When a market has few competitors, it is considered "highly concentrated." Crowley and Yukon have been the major competitors in recent years making bids on contracts to supply fuel in shallow-draft markets. Delta

Western and Crowley are the two dominant competitors bidding for contracts to supply fuel by line haul barge. Of all the barge companies actively operating in Western Alaska, Crowley is the only competitor with a mix of assets that allows it to serve both the shallow draft and line haul markets. Delta Western does not own any shallow draft barges in the Western Alaska region, and Yukon does not own any line-haul barges.

To get fuel to its smaller barges, Yukon contracts with other companies for the delivery of fuel by line haul barge. Recently, Yukon has contracted with Sirius Maritime, Inc., a Seattle-based barge company, to deliver fuel by line haul barge to specific locations in Western Alaska where it is then loaded onto Yukon's storage facilities or barges. Sirius does not have any other customers in Western Alaska.

There are no other "active" competitors supplying bulk fuel by barge to Western Alaska. Thus, this transaction would eliminate one of the three barge companies operating in Western Alaska, and eliminate the only other current competitor for shallow draft barge deliveries. This reduction in competition raises serious concerns, but is not entirely determinative of the actual competitive impact caused by this transaction. Because the fuel market is a "bidding market" all potential bidders must be considered as potential competitors, regardless of whether they have actually made any historic sales of fuel in the market.

### **C. Market Power.**

Once the competitors in a market are identified, the "market power" of each competitor must be assessed. Market power is defined as the ability to raise prices or exclude competition. The most common basis for predicting a firm's ability to raise

prices in the future is to calculate its historic percentage of sales in the relevant market. There are exceptions to this approach, however, when future sales are not dependent on past percentages, but are determined by independent events. In a bidding market, like the Western Alaska fuel market, past performance is not a good indicator of market power. Future sales depend on future bids, not past sales. Market power also cannot be inferred from high percentages of past sales in markets that are characterized by low entry barriers, as discussed more fully below. A firm with 100% of sales cannot profitably overcharge if doing so would simply attract new competition lured by the higher-than-competitive prices.

Because all competitors in a bidding market have an equal chance of winning future bids, each is assigned the same amount of market share. Even if a company makes no sales in one year, it still has an equal share of the market along with companies that made significant sales. The antitrust law requires consideration of these other “potential” or “uncommitted” competitors. These are competitors who are not currently participating in the market, but would likely enter the market in a timely manner if prices rose above competitive levels. This “threat” of competition is a strong deterrent to active competitors, and acts to keep prices from reaching monopoly levels. Thus, all potential bidders are assigned an equal share of the market.

#### **D. Entry Barriers.**

Federal regulators have often approved mergers and acquisitions that have left only one competitor in the market when evidence showed a strong likelihood that other competitors could easily enter the market. A merger or acquisition is not likely to

create or enhance market power if entry into the market is so easy that market participants could not profitably maintain a price increase above pre-merger levels. Entry into a market is considered “likely” if it would be profitable at pre-merger prices, and those prices could be secured by the new entrant. In addition, to be “sufficient” under antitrust guidelines, the assets required for entry must be available so that entrants can respond fully to new sales opportunities.

To determine which potential competitors are likely to enter the market in response to a price increase, the barriers to entering the market must be identified. Entry barriers are defined to include potential obstacles that a new competitor would have to overcome that the current competitors did not have to deal with. Examples of entry barriers include new governmental regulations that impose new requirements (i.e. permits) that current competitors did not have to comply with. Another barrier could be the ownership of a necessary resource by an incumbent firm (such as land or a manufacturing plant) that a new competitor cannot obtain. If access to these necessary components are constrained, or controlled by the existing competitors, new competition is not likely to happen.

Applying these principles to the Crowley/Yukon transaction, the state identified the following as potential entry barriers. There is some reasonable debate about whether any of these items, standing alone, would prevent a potential competitor from entering the market. But taken together, these items present significant obstacles to anyone looking to compete in this market.

1. Shallow draft barges. The state's research showed that shallow draft barges are not readily available. Although there are some used shallow draft barges on the market, most are not suitable for use in Alaska waters without significant retrofitting. One of the largest barge brokerage firms in the world, Markon International, Inc., lists several shallow draft barges for sale on its web page. A competitor could acquire one of these barges and invest in the necessary modifications, but the cost to do so would approach over 50% of the cost of a new barge. New shallow draft barges can be built for as little as \$1 million, and Crowley is currently completing construction of a state-of-the art barge for approximately \$3 million. The building process takes less than one year to complete.

Regardless of the cost, any investment in a shallow draft barge would not be profitable unless the buyer could obtain sufficient fuel sales to warrant the investment. Shallow draft barges are designed for a specific purpose, and cannot be used for a broad range of tasks. There are a few river systems in the U.S. where these assets can be deployed, including, for example, the Columbia River and the Mississippi River systems. However, the Attorney General remains concerned that these shallow-draft vessels are not as freely available as, for instance, line-haul barges, and the market for shallow draft barges is limited.

The current competitors, furthermore, had to obtain shallow draft barges to participate in this market, so the state's reliance on this obstacle is not fully supported by the antitrust law. Nonetheless, these barges are necessary assets to

competition that only Crowley and Yukon have ready access to.<sup>3</sup> These considerations generate some concern about the willingness of a new competitor to enter this market.

2. Storage facilities. If the proposed transaction were allowed to proceed with no conditions, Crowley would own nearly all of the fuel storage facilities in Western Alaska, including all of the fuel storage facilities inland from the coast used for up-river deliveries. Of significant importance are the two facilities in Bethel. These facilities require heightened attention because there is current competition in the Bethel market for fuel that is directly tied to ownership of these facilities. There is an extremely limited opportunity for new competitors to build a storage facility in Bethel because there is a scarcity of suitable land, and the market simply does not justify adding additional storage capacity for the reasonably foreseeable future.

Storage facilities outside Bethel present less of a concern, but are still important. There appears to be fewer limitations on the ability to construct new facilities in necessary locations along the West Coast of Alaska. Historically, the common practice in the area has been for owners of these facilities to allow access to storage capacity by other competitors at a reasonable rate. Still, if one competitor owned all the necessary storage facilities, it could exercise control over its competitors in a harmful way. This presents some concerns for new competitors looking to compete in this market. It bears note, however, that the storage facilities in these other areas have not historically faced immediate competition, and that Crowley's acquisition will not consolidate competing resources.

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<sup>3</sup> The state's research showed there was a readily available supply of tugs and line-haul barges.



3. Knowledgeable barge pilots. State and federal regulations require licensed pilots to have knowledge of the waters to be navigated. The coastal and river waterways in Western Alaska offer some of the most challenging navigation anywhere in the world. The only way to gain the experience required to operate shallow draft equipment in some of these remote waterways is to log hours of time with an experienced pilot. New competitors looking to operate shallow draft barges would need to locate and hire knowledgeable mariners with the requisite experience navigating the shallow waters of Western Alaska.

The current competitors had to face this obstacle as well, so any argument about finding qualified pilots as a “barrier to entry” in antitrust terms is subject to reasonable debate. This is particularly so in view of the ability of any new entrant to hire away pilots from Crowley or other incumbent barge companies operating around the State. Nonetheless, coupled with the other barriers to competition, this presents another potential deterrence to new market entrants.

Courts addressing entry barrier issues consistently agree that barge markets are typically open to new entry. While the State is unwilling to rely on this market mechanism entirely to resolve its concerns in this case, it is equally true that any monopoly “gouging” by Crowley would probably cause other barge companies to enter or consider entering the Western Alaska fuel market.

#### **IV. Analyzing the Crowley/Yukon Acquisition.**

Considering the above, the state’s analysis of the Crowley/Yukon Acquisition involved a preliminary assessment of market power based on a proper

definition of the relevant market, followed by an analysis of mitigating factors, such as the ease of entry into the market. Applying these principles to Crowley and Yukon, the attorney general concluded that the transaction, if allowed, would violate Alaska's antitrust laws that prohibit mergers or acquisitions if the effect of the merger will "substantially lessen competition." The Attorney General reached this conclusion based on the following three assessments:

1. Crowley could obtain monopoly power over nearly all fuel sales in Bethel. At the very least, there would be a significant lessening of competition in Bethel if Crowley were to own both of the existing fuel storage facilities in Bethel. The total volume market demand for fuel, coupled with the limited availability of land prevents a new competitor from entering this market easily and timely.
2. Crowley would obtain ownership of all other fuel storage facilities required for deliveries to some locations, particularly areas served by shallow draft barges. Obtaining control over these necessary assets for a significant portion of the market presents a dangerous probability that Crowley could exercise market power over fuel prices.
3. Crowley would obtain ownership of all the shallow draft barges currently used and available in Western Alaska for deliveries to shallow coastal and up-river locations. This would eliminate existing competition in areas where Crowley and Yukon currently compete for shallow draft deliveries. Although new competitors could purchase barges for use in these areas, there are significant obstacles to doing so.

The fact that Crowley would be in control of nearly all the assets currently used for barged delivered fuel, and would be the overwhelmingly dominant player, cannot be ignored. This alone presents serious concerns to the Attorney General.

#### **V. The Remedy.**

After concluding the transaction would violate Alaska's antitrust laws, the state was faced with only two options: (1) block the transaction, or (2) enter a consent decree that requires the parties to take affirmative steps to eliminate the potential for competitive harm. There are risks associated with each option. If the state filed a lawsuit to stop the transaction, Crowley and Yukon could litigate against the state to get the transaction approved. Crowley and Yukon argued vigorously that the transaction did not violate any state or federal antitrust laws, and the parties are confident they could get the transaction approved, without conditions, by a court.

The risk with a consent decree is that its terms may not adequately prevent the exercise of market power. Even though the Attorney General carefully reviewed the transaction, no one can predict the future. Events may occur that were not contemplated, or market conditions may change in ways not anticipated by a consent decree. Even so, the attorney general always retains the authority to take steps in the future if the intent and goal of a consent decree is not followed.

It is also important to recognize there are benefits that flow to the economy as a whole from mergers and acquisitions, and there are potential benefits to the economy of the state that can result from this merger. Here, Crowley will consolidate resources into a single firm that will be of a scope and scale sufficient to improve fuel delivery

service and reliability, and also at a potentially lower cost due to the resulting efficiencies. Crowley's strong economic commitment to Alaska's maritime markets also ensure that a responsible owner will operate these resources, which is important for environmental and economic reasons. While the Attorney General is deeply committed to preventing anticompetitive conduct in the state's markets, the state is equally committed to promoting the benefits of economic activity.

Given the nature of this transaction and all the information reviewed by the state and its expert, the Attorney General decided to enter a consent decree that required Crowley to take certain steps to alleviate the concerns identified by its investigation. Those include:

1. Divesting significant amounts of storage capacity to a competitor under terms that position the competitor as tantamount to the owner of the capacity of that facility.
2. Selling at least two sets of shallow draft tugs and barges to a buyer willing and able to compete in the shallow draft market.
3. Making space available in key storage facilities on a non-discriminatory basis to any competitor who wants it.
4. Making land available in Bethel to a competitor for the purpose of constructing a new fuel storage facility.
5. Requiring the divestiture to a competitor of 29% of any additional storage capacity added by Crowley to the Bethel facility.

6. Finding a buyer for these assets with the economic ability and required experience to compete effectively in this market.

A consent decree was crafted with these goals in mind. After several weeks of negotiation, Crowley agreed to the terms of the decree. Providing all the terms are complied with, the attorney general believes the transaction will satisfy Alaska's antitrust law, and will encourage continued competition in the market for barge delivered petroleum.

#### **VI. Further Proceedings and Opportunity to Comment.**

The consent decree has been filed in the Superior Court in Nome, the same court in which the pending lawsuit is located. The consent decree must be reviewed and approved by the court before it is effective.

In addition to review by the court, Crowley and Yukon must file a notice with the Department of Justice and the Federal Trade Commission that describes the transaction. These federal agencies will have an opportunity to review the transaction for antitrust violations, and may decide to initiate their own investigation.

Finally, any interested person can file an "exception" to the consent decree with the court in Nome. An exception must be filed with the court within 60 days of filing the consent decree. These exceptions can be mailed to the Nome Superior Court, Box 1110, Nome, Alaska, 99762. The court will consider these comments and objections when deciding to approve or disapprove the consent decree.

## **VII. Conclusion.**

The Attorney General believes the proposed transaction, as modified by the conditions set forth in the consent decree, is lawful under applicable Alaska (and federal) law, the federal antitrust merger guidelines, and the judicial decisions that interpret these laws and guidelines. Under the proposed consent decree, the Attorney General believes the transaction will benefit consumers in Western Alaska by maintaining strong competition, and securing reliable sources of barge delivered fuel by reputable competitors.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
SECOND JUDICIAL DISTRICT AT NOME

STATE OF ALASKA, )  
)  
Plaintiff, )  
)  
v. )  
)  
CROWLEY MARINE SERVICES, INC.; )  
CROWLEY MARITIME CORPORATION; )  
NORTHLAND FUEL, LLC; YUKON FUEL )  
COMPANY; NORTHLAND VESSEL )  
LEASING COMPANY LLC, and YUTANA )  
BARGE LINES, LLC, )  
)  
Defendants. ) Case No.: 2NO-04- \_\_\_\_\_ CIV  
)  
\_\_\_\_\_ )

**CONSENT DECREE**

**Preamble**

Plaintiff State of Alaska filed its Complaint herein and defendants, CROWLEY MARINE SERVICES, INC. and CROWLEY MARITIME CORPORATION (collectively, "Crowley"), NORTHLAND FUEL, LLC ("Northland Fuel"); YUKON FUEL COMPANY ("YFC"), YUTANA BARGE LINES, LLC ("Yutana"), and NORTHLAND VESSEL LEASING COMPANY LLC ("NVLC")<sup>1</sup>; were duly served with the Summons and Complaint. Defendants, by and through their undersigned attorneys, have consented to the entry of this Consent Decree without trial or adjudication of any issue of fact or law herein. This Consent Decree does not constitute

<sup>1</sup> YFC, Yutana, and NVLC are referred to collectively as the "Sellers."

any evidence against or admission by any party with respect to any issue of law or fact herein or in the Complaint.

### **RECITALS**

WHEREAS, YFC is a wholly owned subsidiary of Northland Fuel, and owns and operates a business delivering and selling petroleum products to end users and other customers in Western Alaska, employing various barges, tug boats, storage facilities and other assets to this end;

WHEREAS, NVLC is a wholly owned subsidiary of Northland Fuel, and holds title to most of the barges and boats used in YFC's business, which NVLC bareboat charters to Yutana, and which Yutana then time charters to YFC;

WHEREAS, Crowley owns and operates a business similar to YFC's, employing similar assets, delivering and selling petroleum products into some of the same locales in competition with YFC, and bidding for some of the same contracts;

WHEREAS, concurrently with the filing of this Consent Decree, the Defendants have executed agreements (together, the "Crowley/Sellers Purchase Agreement"), a copy of each of which has been provided to the Attorney General, pursuant to which the Sellers have agreed to sell, and Crowley has agreed to purchase, all or substantially all of the assets of Sellers (the "Acquisition"),<sup>2</sup> subject to certain conditions set forth therein, including that the Court enter an order approving this Consent Decree;

WHEREAS, the Acquisition will combine under Crowley's sole ownership all of YFC's assets used for delivery of petroleum products in Western Alaska, and the

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<sup>2</sup> Pursuant to the Crowley/Sellers Purchase Agreement, Crowley has also agreed to acquire from Northland Fuel all of the outstanding capital stock of Service Oil & Gas, Inc. ("SOG"). SOG operates a land-based fuel distribution business, primarily in South Central Alaska.



Attorney General believes that these assets when combined with Crowley's assets will constitute a significant portion of all assets currently located and available in Western Alaska that are necessary to compete in the relevant markets for delivered petroleum products;

WHEREAS, the Defendants claim the Acquisition will eliminate certain inefficiencies that Crowley and Sellers, operating separately, currently experience, including, among other things, (1) combining their diverse fleets to enable more efficient distribution of products during the relatively limited warm-weather periods during which such deliveries must be made in a timely fashion, (2) eliminating redundancies in their operations, and (3) combining the purchasing function and aggregating the quantities to be purchased from refineries;

WHEREAS, the State of Alaska ("State"), through its Attorney General, alleges in its complaint that the Acquisition is unlawful under Alaska and federal antitrust law (the allegations in the State's complaint are re-alleged and incorporated herein);

WHEREAS, the State has brought this action against Defendants on behalf of the people of Alaska, and in the State's capacity in *parens patriae*;

WHEREAS, prompt divestiture of certain assets is an essential element of the agreement among the parties to resolve this matter, and concurrently with the filing of this Consent Decree, Crowley and Delta Western, Inc. ("Delta Western") have executed agreements (collectively the "Crowley/Delta Western Agreement"), a copy of which has been provided to the Sellers and the undersigned Assistant Attorney General, pursuant to which Crowley has agreed to divest to Delta Western, and Delta Western has agreed to purchase from Crowley, assets described herein, subject to the Court's approval of this Consent Decree;

WHEREAS, Crowley and YFC own and operate the only tank farms in or immediately near the City of Bethel;

WHEREAS, Crowley's tank farm facility in the City of Bethel (the "Crowley Tank Farm") was recently put into operation in October of 2003, and has approximately five million gallons of capacity; and YFC's tank farm facility in the City of Bethel (the "YFC Tank Farm" and together with the Crowley Tank Farm the "Bethel Tank Farms") has approximately ten million gallons of capacity, of which approximately one million gallons is likely to be eliminated due to age irrespective of the proposed Acquisition;

WHEREAS, new or expanded competition in the relevant markets for marine-delivered fuel products to Western Alaska could be impeded by the limited availability of tank farm storage capacity in and near the City of Bethel;

WHEREAS, pursuant to the Crowley/Delta Western Agreement, Crowley has agreed to divest storage capacity from the Bethel Tank Farms in accordance with the terms of this Consent Decree in order to facilitate Delta Western's expanded sales in the region, subject to the Court's approval;

WHEREAS, Delta Western is one of the largest tug and barge companies on the West Coast of the United States and one of the most experienced tug and barge operators in the United States, including experience with operating in Western Alaska;

WHEREAS, the State has determined that Delta Western is adequately qualified to purchase and operate the assets described in this Consent Decree, and to provide strong competition in the delivery of petroleum products in the relevant market;

WHEREAS, neither the execution or entry of this Consent Decree nor the terms hereof are intended to alter, modify, supplement, or rescind in any way the respective rights or obligations of the Defendants related to the Acquisition;

WHEREAS, Defendants do not admit, and continue to deny, that such transaction is unlawful;

WHEREAS, the Court has made no determination of any violation of law;

WHEREAS, the State and Defendants wish to avoid litigation and to resolve the controversy on mutually acceptable terms;

WHEREAS, the Defendants have agreed to be bound by the provisions of this Consent Decree;

WHEREAS, the Attorney General believes the terms of this Consent Decree are fair and reasonable and in the public's interest.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

**I.**

**JURISDICTION**

This Court has jurisdiction over the subject matter of this action pursuant to AS 45.50.582 and over each of the parties hereto. Venue is proper in this Judicial District pursuant to Alaska Civil Rule 3. The Complaint states a claim upon which relief may be granted against the Defendants under Alaska antitrust law. The Attorney General of the State of Alaska, Gregg D. Renkes, has authority to bring this action pursuant to AS 45.50.580.

**II.**

**DEFINITIONS**

As used in this Consent Decree:

A. "Defendants" means the defendants listed in the State's complaint filed in this matter.

B. "Delta Western" means Delta Western, Inc.

C. “Crowley” means Crowley Marine Services, Inc. and Crowley Maritime Corporation, together.

D. “YFC” means Yukon Fuel Company.

E. “Yutana” means Yutana Barge Lines, LLC.

F. “Northland Fuel” means Northland Fuel LLC.

G. “NVLC” means Northland Vessel Leasing Company, LLC.

H. “Attorney General” means the Alaska Attorney General.

I. “Western Alaska” means the coastal regions of Alaska from Bristol Bay north to Point Hope, and inland regions west of Alaska’s road system.

J. “Relevant Market” means the market for marine-delivered petroleum products in the relevant geographic area, which includes the State of Alaska or parts thereof.

### **III.**

#### **APPLICABILITY**

A. The provisions of this Consent Decree apply to Defendants, their successors and assigns, and all other persons in active concert or participation with any of them who shall have received actual notice of this Consent Decree by personal service or otherwise.

B. Nothing herein shall be deemed to have been created for the benefit of any third party and nothing herein shall be construed to provide any rights to third parties, specifically including, without limitation, plaintiffs Alaska Village Electric Cooperative, Inc.; Inn Electric Cooperative, Inc.; Kotzebue Electric Cooperative, Inc.; Naknek Electric Cooperative, Inc.; City of Nome d/b/a Nome Joint Utility System; Nushagak Electric and Telephone Cooperative, Inc.; and Unalakleet Valley Electric Cooperative,

Inc.; together who have filed a lawsuit titled *Alaska Village Electric Co-op, et al. v. Crowley Marine Services, Inc. et al.*, Case No. 2NO-03-174 Civ., an action pending in Alaska Superior Court, in the Second Judicial District, at Nome.

#### IV.

#### DIVESTITURE OF ASSETS

A. Crowley is hereby ordered and directed, following the consummation of the Acquisition, to divest, absolutely and in good faith, two sets of tugs and barges designed and currently able to transport petroleum products in Western Alaska. These assets shall be in good condition, immediately available for use in Western Alaska, and have all applicable Coast Guard approvals and/or certificates necessary for the intended use of serving shallow-draft areas for deliveries of petroleum products in Western Alaska. The barges shall be of sufficient capacity to enable Delta Western to compete effectively for the delivery of fuel to these areas considering the availability of storage facilities, contract volumes necessary for profitable operations, and other factors. These assets shall be divested according to the following schedule:

1. Crowley shall close the aforesaid divestiture transaction and completely divest the assets within 60 days after approval of this Consent Decree.

2. If, notwithstanding the exercise of its good faith best efforts, Crowley is unable to close the transactions and divest the assets described herein within 60 days after approval of this Consent Decree, Crowley may apply to the Attorney General for additional time to close such transactions and divest the assets, as the Attorney General deems appropriate. The decision to grant any such additional extension of time rests within the sound discretion of the Attorney General and his decision upon such request shall be final.

B. The purpose of divesting these assets is to ensure their continued use in Western Alaska for delivered petroleum products and to remedy the lessening of competition that might otherwise result from the proposed Acquisition as alleged in the State's Complaint. This section shall be interpreted and construed to accomplish this intent to the fullest extent possible.

**V.**

**DIVESTITURE OF STORAGE CAPACITY IN BETHEL**

A. Crowley is hereby ordered and directed, following the consummation of the Acquisition, to divest four million gallons of fuel storage capacity in Bethel, on fair and reasonable terms, to Delta Western under the following conditions:

1. There shall be no restriction on the amount of fuel Delta Western may run through (or "throughput") the Bethel Tank Farms so long as Delta Western does not exceed four million gallons of capacity at any given time, unless agreed to by the parties;

2. Subject to the provisions hereof, Crowley shall allow Delta Western to store any combination of fuel types and in any amount requested by Delta Western, including but not limited to all grades of gasoline and diesel fuel, heating oil, aviation gas and Jet A; the storage requested by Delta Western shall be reasonably compatible with the overall storage capacity and tank assignments made from time to time by Crowley for annual throughput requirements, and Crowley shall be required to make its tank assignments in good faith taking due account of capacity commitments requested by Delta Western on a timely basis.

3. Subject to any contractual or other arrangements with the City of Bethel, Delta Western and Crowley shall have equitable, nondiscriminatory loading

rights to the Bethel fuel dock so that each will have access to the dock when needed. Neither Delta Western nor Crowley shall interfere with the other's equitable access to the Bethel fuel dock.

4. Crowley shall allow Delta Western full access to the Bethel Tank Farms, including equitable access to all loading racks. Neither Delta Western nor Crowley shall interfere with the other's equitable access to ensure Delta Western has access to its fuel supply as if it were an owner of the Bethel Tank Farms.

5. Upon reasonable advance notice to Crowley, Delta Western may provide unused storage capacity to Crowley on terms and conditions mutually agreed upon by the parties. Nothing in this paragraph shall prevent Delta Western from selling, leasing, or assigning any part of its storage capacity to other third parties.

B. In addition to the initial storage capacity of four million gallons, Crowley shall give Delta Western the option of acquiring additional storage capacity at the Bethel Tank Farms under the following conditions:

1. If Crowley expands its storage capacity in Bethel beyond 14 million gallons, it shall give Delta Western the option of acquiring up to 29% of the additional capacity on substantially the same terms as the initial four million gallon divestiture.

2. Notwithstanding paragraph (B)(1), Crowley is not required to provide Delta Western with additional capacity if Delta Western has constructed its own storage facility in Bethel or has otherwise acquired rights to use any other such storage capacity in Bethel.

C. The storage capacity divestiture (including any such divestiture under paragraph B above) in Bethel shall be for an initial term of 10 years with four five year

renewal options. The terms of the divestiture may include provisions that allow Crowley to adjust the amount charged to Delta Western upon each renewal to reflect additional operational costs incurred by Crowley during this time that are not already included in the original lease amount.

D. The storage capacity divestiture in Bethel shall terminate if Delta Western builds a competing facility in Bethel with at least 4 million gallons of storage capacity, or such other lesser amount of capacity as may be determined by the Attorney General to resolve competitive concerns.

E. It is the intent of this section to allow Crowley to charge an amount for storage capacity that equals its actual cost of providing the storage (including actual cost of construction and operation) plus a reasonable return. It is not the intent of this section to allow a storage charge that is excessive or unreasonable considering the goal of this Consent Decree to foster competition for the delivery of petroleum products.

## **VI.**

### **DIVESTITURE OF STORAGE CAPACITY AT OTHER FACILITIES**

A. Crowley is ordered and directed to make available, on a non-discriminatory basis, seasonal throughput storage capacity at its facilities in Nome, Kotzebue, and St. Michael under the following conditions. For purposes hereof, "seasonal throughput" means barge-in/barge-out temporary storage during open-water shipping season, and shall not include, among other things, storage for rack sale or delivery:

1. Upon reasonable notice, Crowley must allow other competitors to store fuel at these facilities, and may not refuse storage unless there is no space in the facility. Crowley will use its best efforts, consistent with good business practices, to



consolidate its products to maximize the space available for storage by others. Crowley shall not shift its products or use these facilities in any manner that intentionally or unreasonably limits the amount of storage capacity available to others.

2. Crowley shall make its Kotzebue dock facilities available to all shippers of commercial quantities of petroleum products on a non-discriminatory basis. Crowley shall maintain the right to schedule the use of the Kotzebue dock facility, but may not exercise this right so as to make the facilities unavailable to Crowley's competitors under reasonable and normal business practices.

*None Similarly Situated*  
3. Crowley may not charge more than the prevailing competitive market rate for seasonal throughput storage at these facilities and other facilities similarly situated, which at the time of the approval of this Consent Decree is approximately 6 cents per gallon. Nothing herein shall prevent Crowley from charging a lesser amount at its discretion, or a greater amount according to market conditions.

4. Crowley shall refrain from selling petroleum products from its storage facilities in Nome, Kotzebue and St. Michael at discriminatory rates. It is the intent of this paragraph that Crowley shall not discriminate against any of its customers because the customer is also a competitor of Crowley.

5. Crowley is not required to offer storage space at these facilities if the entity requesting storage builds a storage facility or otherwise acquires access to storage capacity in the area that can be used for the same purpose. It shall not constitute a violation hereof for Crowley to refuse to do business with any firm or individual that is not credit worthy in Crowley's reasonable judgment, or for legitimate safety concerns.

X B. It is the intent of this section to facilitate competition in the delivery, transportation, storage, and sale of petroleum products to coastal and inland areas of Western Alaska. This section shall be interpreted and construed to accomplish this intent to the fullest extent possible. Crowley agrees that it will not use its ownership and control of these facilities in any manner that will restrain competition.


C. The terms of this Consent Decree shall replace and supercede the "Agreement regarding Crowley Maritime Corporation's Acquisition of Chevron Tank Farms in Nome and Kotzebue" executed on or about July 26, 1985, between the State and Crowley.

## **VII. OPTIONS ON PROPERTY IN BETHEL**

A. Crowley is the owner of certain property in Bethel identified as Lot 40 within U.S. Survey No. 4117. Crowley is ordered and directed to make this property available for sale at fair market value to Delta Western as part of this Consent Decree. If Delta Western declines to purchase the property, Crowley may offer the property for sale to third parties. Before completing the sale of the property to a third party, Crowley must provide Delta Western the opportunity to purchase the property on substantially the same terms and conditions offered by the third party. If the offer made by the third party is not a bona fide, good faith offer, Delta Western shall have the option of purchasing the property at the fair market value.

B. YFC is the lessee of a parcel of property located adjacent to the YFC tank farm, consisting of approximately 14.97 acres. YFC leases this property from William Hatley under lease No. 01-ONC-01 (the "Hatley lease"). The term of the lease is

25 years beginning on April 1, 2001. Subject to the receipt of all required third party consents, this lease will be assigned to Crowley as part of the Acquisition. Crowley is directed and ordered to give Delta Western the option to take an assignment of all of Crowley's rights and duties under this lease at any time in the next five years. If Crowley receives a bona fide, good faith offer from a third party to take an assignment of the lease after this time, Crowley must first give Delta Western the option to take an assignment of the lease, on the same terms and conditions contained in the original lease with YFC.

C. If for any reason Crowley is unable to obtain an assignment of the Hately lease, and therefore unable to offer Delta Western an option on the lease consistent with paragraph B above, the Attorney General retains the authority to consider and  implement any appropriate remedy consistent with the intent of this Consent Decree to foster and insure competition.

D. Crowley agrees it will not unreasonably withhold its consent to give Delta Western all necessary easements, or to enter necessary agreements to access or traverse property owned by Crowley for the purpose of connecting new tank farm facilities constructed by Delta Western to the Bethel Dock or other loading/unloading facilities that are required for the operation of the newly constructed tank farm. It is the intent of this paragraph that Crowley will not use its property ownership status as a means to interfere with or impede the construction and practical use of new tank facilities in Bethel.

## VIII.

### OTHER REMEDIAL PROVISIONS

*Office space*

A. Crowley is ordered and directed, following the consummation of the Acquisition, to provide Delta Western with private office space at the combined facility of YFC and Crowley in Bethel. The office space provided must be of a size and configuration suitable for the daily management and operation of Delta Western's fuel business in Bethel. The space must be located so as to minimize the potential for illegal communications between Crowley and Delta Western concerning the marketing and sales strategy of each company.

*Signage*

B. Crowley is ordered and directed, following the consummation of the Acquisition, to provide Delta Western with suitable space at the combined Crowley/YFC facility for the purpose of erecting or placing a sign of the same general size and nature as the largest sign used by Crowley at the combined facility. The location chosen must be at least as visible and noticeable as other prominent signs at the facility.

C. Crowley is ordered and directed, following the consummation of the Acquisition, to allow Delta Western to use its facilities in Bethel for tug and barge docking and loading/unloading in accordance with other provisions of the Consent Decree.

D. Crowley shall not engage in any conduct that directly or indirectly interferes with Delta Western's ability to operate its fuel business in a competitive manner consistent with the purpose and goals of this Consent Decree.

## **IX.**

### **PROHIBITION ON ACQUIRING DIVESTED ASSETS**

For a period of 20 years from the date this Consent Decree is entered, Crowley, either individually or jointly, shall not acquire any of the assets or the right to utilize fuel storage capacity divested pursuant to this Consent Decree without the prior approval of the Attorney General. The Attorney General shall approve or disapprove a request to acquire divested assets or storage capacity within 60 days of receipt of a written request for approval. Failure to act within this time will be deemed an approval by the Attorney General.

## **X**

### **SALE OF CROWLEY OR YFC TANK FARM**

For the term of this Consent Decree, Crowley shall not dispose of the Bethel Tank Farms except in accordance with all applicable antitrust and other laws of the State of Alaska and the United States. Crowley agrees to provide the Attorney General with 30 days notice before executing a sale of the Bethel Tank Farms.

## **XI.**

### **COMPLIANCE INSPECTION**

A. For the purpose of determining or securing compliance with this Consent Decree, and subject to any legally recognized privilege, authorized representatives of the State, including consultants and other persons, shall, upon the written request of the Attorney General, and on reasonable notice to Crowley, be permitted:

1. Access during office hours to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Crowley, which may have counsel present, relating to this Consent Decree; and
2. Subject to the reasonable convenience of Crowley and without restraint or interference from them, to interview directors, officers, employees, and agents of Crowley, which may have counsel present, regarding any such matters.

B. Upon written request, Crowley shall submit written reports as requested by the State concerning the matters contained in this Consent Decree.

C. No information nor any documents obtained by the means provided in this paragraph nor the Crowley/Sellers Purchase Agreement or the Crowley/Delta Western Purchase Agreement shall be divulged by any representative of the State to any person other than a duly authorized representative of the Alaska Attorney General, except for the purpose of enforcing compliance with this Consent Decree, or as otherwise required by law or directed by the court.

## **XII.**

### **NOTICES**

Any notices required by this Consent Decree shall be delivered to the parties at the following addresses:

A. For the State of Alaska:

Attorney General's Office  
Attn: Clyde E. Sniffen, Jr.  
Assistant Attorney General  
1031 W. 4<sup>th</sup> Avenue, #200  
Anchorage, AK 99501  
(907) 269-5200  
(907) 276-8554 (fax)

B. For Defendants Crowley:

Jesse W. Markham, Jr.  
Morrison & Foerster LLP  
425 Market Street  
San Francisco, CA 94105-2482  
(415) 268-7448  
(415) 268-7522 (fax)

and

William P. Verdon,  
Senior Vice President & General Counsel  
Crowley Maritime Corporation  
Lake Merritt Towers  
155 Grand Avenue  
Oakland, California 94512  
(510) 251-7574  
(510) 251-7610 (fax)

C. For Defendant Sellers:

Yukon Fuel Company  
Attn: Mark Smith, President  
7941 Sandlewood Place, Suite 100  
Anchorage, AK 99507  
(907) 777-5508  
(907) 777-5556 (fax)

with a copy to:

Patton Boggs LLP  
Attn: Douglas J. Serdahely, Esq.  
601 West Fifth Avenue, Suite 700  
Anchorage, AK 99501  
(907) 263-6310  
(907) 263-6345 (fax)

### **XIII.**

#### **RETENTION OF JURISDICTION**

Jurisdiction is retained by this court for the purpose of enabling any of the parties to this Consent Decree to apply to this court at any time for such further orders and directions as may be necessary or appropriate for the construction, implementation, or modification of any of the provisions of this Consent Decree, for the enforcement of compliance herewith, and for the punishment of any violations hereof.

### **IX.**

#### **OTHER RELIEF**

A. If Defendants fail to comply with the terms of this Consent Decree, the Court may order appropriate relief pursuant to AS 45.50.580 on motion of the State for cause.

B. The State is awarded its expert fees of \$17,500. Defendants shall pay this sum to the State within thirty (30) days of entry of this Consent Decree.



## **XV.**

### **VOLUNTARY ACT OF THE PARTIES**

The parties hereto expressly acknowledge and agree that this Consent Decree is voluntarily entered into as the result of arm's-length negotiation, and all parties hereto were represented by counsel in deciding to enter into this Consent Decree.

## **XVI.**

### **PUBLIC COMMENT**

This Consent Decree is being submitted by the parties to the court for approval pursuant to AS 45.50.584. In accordance with this procedure, the Consent Decree does not become final until 60 days after its filing. During this 60-day period, interested persons may file verified exceptions to the form or substance of the Consent Decree, and after a hearing on such exceptions, the court may approve or refuse to enter the Consent Decree. Copies of all such verified exceptions shall be served by the submitting person on the parties to the Consent Decree for their review, and each party may respond to such exceptions at the hearing as each party deems appropriate or as directed by the court. Defendants agree to publish, at Defendants' expense, notice, the form and contents of which are subject to the State's approval, of the execution and terms of the Consent Decree, the place or places at which members of the public may obtain copies of the Consent Decree and/or any summaries thereof or comments thereon prepared by the parties, and the procedure for submitting verified exceptions thereto. Such notice shall be published in the Anchorage Daily News, Fairbanks Daily News-Miner and the Juneau Empire on two occasions, the first being within ten (10) days after Crowley/Yukon Consent Decree

the lodging of this Consent Decree with the court, and the second between ten (10) and twenty (20) days after the lodging of this Consent Decree with the court. Other notice as necessary to inform residents in Western Alaska may also be required by the court.

**XVII.**

**CONSUMMATION OF MERGER**

The Acquisition may not be consummated prior to entry of an order by the court approving this Consent Decree.

**XVIII.**

**TERMINATION**

This Consent Decree will expire on the 30<sup>th</sup> anniversary of the date of its entry, or upon order of this court for good cause. This Consent Decree will automatically terminate upon any termination of the Crowley/Sellers Purchase Agreement without the consummation of the Acquisition.

**XIX.**

**PUBLIC INTEREST**

The terms of this Consent Decree are fair and reasonable and the entry thereof is in the public's interest.

STATE OF ALASKA  
GREGG D. RENKES  
ATTORNEY GENERAL

DATED: \_\_\_\_\_

By: \_\_\_\_\_  
Clyde E. Sniffen Jr.  
Alaska Bar # 8906036  
Assistant Attorney General

CROWLEY MARINE SERVICES, INC.

DATED: \_\_\_\_\_

By: \_\_\_\_\_  
Bruce Love  
Corporate Secretary

CROWLEY MARITIME CORPORATION

DATED: \_\_\_\_\_

By: \_\_\_\_\_  
William P. Verdon  
Senior Vice President  
General Counsel

YUKON FUEL COMPANY

DATED: \_\_\_\_\_

By: \_\_\_\_\_  
Herman E. Schliesing  
Vice President

NORTHLAND VESSEL LEASING  
COMPANY LLC

DATED: \_\_\_\_\_

By: \_\_\_\_\_  
Herman E. Schliesing  
Senior Vice President

YUTANA BARGE LINES, LLC

DATED: \_\_\_\_\_

By: \_\_\_\_\_  
Michael J. Doan  
Manager

NORTHLAND FUEL, LLC

DATED: \_\_\_\_\_

By: \_\_\_\_\_  
Herman E. Schliesing  
Vice President

**[PROPOSED] ORDER**

IT IS SO ORDERED.

Dated: \_\_\_\_\_

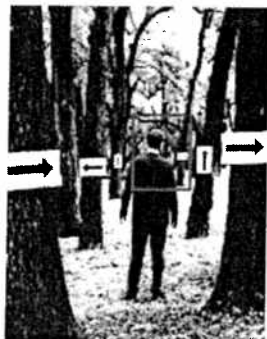
\_\_\_\_\_  
Alaska Superior Court Judge

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#### • REGULATION PRACTICE IN BRIEF

##### **Special session of Alaska State Legislature on natural gas issues**

This past summer, the Alaska State Legislature approved a license to TransCanada for the construction of a natural gas pipeline running from the North Slope in Alaska to the Canadian province of Alberta. This license gives TransCanada access to \$500 million in Alaska state funds for engineering and pre-construction work. Once completed, the pipeline would be capable of delivering more than 4 billion cubic feet of gas per day to U.S. markets--approximately 6 percent of total U.S. consumption. Econ One was retained several years ago by the Alaska State Legislature to serve as its economic advisor on issues relating to the State's attempts to commercialize North Slope gas resources. Barry Pulliam testified on two separate occasions this summer relating to the legislature's consideration of the TransCanada proposal and license. On the first occasion, Mr. Pulliam, who was the first witness to testify, outlined the TransCanada proposal, discussed the economics of the tariff structures proposed by TransCanada, and highlighted issues for consideration by the legislature. On the second occasion, Mr. Pulliam testified regarding the viability of alternative projects designed to export Alaska gas via LNG to Asian markets.

##### **Gas sales agreements proposed by Enstar Natural Gas Company with ConocoPhillips and Marathon Oil**

In this proceeding before the Regulatory Commission of Alaska, Enstar Natural Gas Company, a gas distribution company, proposed two new supply agreements that would set its prices for gas supply in Cook Inlet based on levels in the Lower 48 states. Econ One was retained by Chugach Electric Association, an intervenor in the proceeding, to review and comment on Enstar's economic justifications regarding the reasonableness of its pricing provisions. Jeff Leitzinger offered both prepared and direct testimony before the Commission stating that the pricing provisions in the two agreements (1) would reverse the long-standing price advantage enjoyed by Cook Inlet gas users relative to gas consumers in the Lower 48 states and (2) were not supported with any reasonable economic justifications for doing so.

##### **Econ One has been retained by the Alaska Legislature**

to assist in the evaluation of a contract or contracts between the State and potential developers of a large-scale natural gas pipeline designed to move more than 4 billion cubic feet (bcf) per day from the North Slope of Alaska. Once constructed, the pipeline is expected to bring natural gas supplies totaling approximately 5% of U.S. demand and is expected to cost in excess of \$13 billion. Econ One was initially retained by the legislature in the Spring of 2005. The Econ One consulting team includes energy economists and experts, including former senior executives with major oil and gas producers. Econ One has advised the legislature on issues including the role of Alaska gas in U.S. gas markets, the potential impact and consequences on the State of various contract provisions and the analysis of alternative projects. In addition to its work on gas line matters, Econ One has advised the Legislature over the course of the spring and summer of 2006 regarding the overhaul of Alaska's petroleum severance tax laws.

##### **Merger review for the State of California**

Tesoro acquired Shell Oil's Los Angeles refinery (100,000 barrels per day) and 278 retail gasoline stations in Southern California for \$1.8 billion in the spring of 2007. Earlier in 2007, Tesoro also acquired USA Petroleum's 138 gasoline stations in California for \$273 million. These two acquisitions resulted in a large increase in Tesoro's refining capacity in California and also dramatically increased its presence in retail gasoline operation within the state. Econ One was retained by the California Attorney General to assist the State in its review of these acquisitions. Barry Pulliam and Tony Finizza analyzed potential competitive issues associated with these transactions.

**Barry Pulliam issued a study for the Alaska Department of Natural Resources (DNR)**

His report examined valuation and royalty policies related to natural gas production on federal, state and provincial lands in both the U.S. and Canada. Alaska's interest in natural gas royalty policies had increased as the prospect of economically feasible development of its vast gas resources seems brighter. This report follows an earlier study (January 2002) for DNR concerning U.S. natural gas and NGL markets. Both reports are available at [www.dnr.state.ak.us/](http://www.dnr.state.ak.us/).

**Barry Pulliam presented testimony on behalf of the State of Alaska.**

He appeared before the Federal Energy Regulatory Commission and Alaska Public Utility Commission at a joint hearing concerning the Quality Bank on the Trans Alaskan Pipeline (TAPS). TAPS utilizes the prices of both intermediate and finished petroleum products (including naphtha) in the operation of the system's Quality Bank. Mr. Pulliam testified as to the market value of naphtha produced on the West Coast of the U.S. and the ability of valuation methodologies proposed by the TAPS shippers to predict naphtha values. As part of his work on this matter, Mr. Pulliam analyzed more than 300 contracts entered into by West Coast refiners, all of which involved naphtha.

**Barry Pulliam consulted with the Federal Trade Commission in its investigation of Sunoco, Inc.'s**

proposed acquisition of the Coastal Eagle Point refinery from El Paso Corporation. The investigation by the FTC focused on the potential for the acquisition of the New Jersey refinery to cause price increases in reformulated gasoline sold in Philadelphia (where Sunoco owns other refineries) and/or conventional gasoline delivered at points along the Laurel Pipeline, which extends from Philadelphia to Pittsburgh. Upon completion of its investigation, the FTC voted 5 to 0 to allow the acquisition to proceed.



**Econ One consulted with the State of Alaska regarding the potential competitive impact of Crowley Marine Services Inc's acquisition of Yukon Fuels**

Both firms provided transportation services and sold petroleum products to a number of regional utilities and to cities and communities in Western Alaska, including the City of Bethel. After its investigation, the State of Alaska required the parties to divest some storage and distribution assets as part of a consent decree. The City of Bethel and eight utilities opposed the acquisition in Alaska Superior Court, arguing that the consent decree would not be sufficient to prevent price increases to consumers in Western Alaska. They argued that there were significant entry barriers involved in providing barge-delivered petroleum services to Western Alaskan cities and communities that would allow Crowley to dominate the market and raise prices. Barry Pulliam testified on behalf of the State of Alaska in support of the consent decree during a hearing in Superior Court in Anchorage. His testimony included the conclusion that the consent decree adequately addressed the competitive concerns identified in the investigation, including

the potential entry barrier concerns. The Court ruled in favor of the State. After the hearing, the utilities attempted to obtain a temporary restraining order in Federal Court preventing the acquisition from proceeding. Their request was denied.

**We're not obsessed with details**

(if we were, we'd tell you this sentence  
is off-center by .0001%).





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• PRACTICE-IN-BRIEF

• INTELLECTUAL  
PROPERTY

• ECONOMIC  
DAMAGES

• EMPLOYMENT  
ISSUES



#### • ANTITRUST

Identifying non-competitive activity and quantifying its effects are not exactly simple, straightforward tasks. Each requires rigorous, empirical analysis of real world activity to answer the difficult questions. We have the tools and expertise it takes to accurately reveal the competitive nature of firms within a market, and to measure how it might have operated under competition.

Our antitrust experience includes :

- Market Definition
- Price Fixing
- Vertical/Horizontal Arrangements
- Predatory Conduct
- Price Discrimination
- Unfair Competition
- Market Power
- Damages Analysis/Calculation
- Class Certification
- Bundling/Tying
- Exclusive Contracts
- Market Structure/Conduct/Performance Analysis

Over your head.  
Sorry, we don't speak that.



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

ALASKA VILLAGE ELECTRIC  
COOPERATIVE, INC.; INN  
ELECTRIC COOPERATIVE, INC.;  
KOTZEBUE ELECTRIC ASSOCIATION,  
INC.; NAKNEK ELECTRIC  
ASSOCIATION, INC.; CITY OF  
NOME D/B/A NOME JOINT UTILITY  
SYSTEM; NUSHAGAK ELECTRIC &  
TELEPHONE COOPERATIVE, INC.;  
and UNALAKLEET VALLEY ELECTRIC  
COOPERATIVE, INC.,

Plaintiffs,

vs.

CROWLEY MARINE SERVICES, INC.;  
CROWLEY MARITIME CORPORATION;  
YUKON FUEL COMPANY; NORTHLAND  
HOLDINGS, INC.; NORTHLAND  
VESSEL LEASING COMPANY, LLC;  
and YUTANA BARGE LINES, LLC,

Defendants.

Case No. A05-0210 CV (RRB)

ORDER DENYING MOTION FOR  
TEMPORARY RESTRAINING ORDER

This is an action brought by Plaintiffs seeking to  
prevent the sale of one business to another that allegedly violates

federal antitrust law.<sup>1</sup> Crowley Marine Services, Inc. ("Crowley"), a supplier of bulk fuel to Western Alaska, seeks to purchase Yukon Fuel Company ("Yukon"), a similar company.<sup>2</sup> Plaintiffs argue that the sale violates federal antitrust laws because its effect "may be substantially to lessen competition."<sup>3</sup>

Before the Court reaches the merits of whether a temporary restraining order should be granted, the Court must consider whether it may be involved in this dispute at all.

Plaintiffs' Motion for Temporary Restraining Order is not the first instance where a court has considered the potential antitrust ramifications of this sale. In November of 2003, Plaintiffs filed an antitrust lawsuit in Alaska State Court to stop the sale. In March of 2004, the Alaska Attorney General initiated a formal investigation of the contemplated transaction. The State Court stayed its action until completion of this investigation. The Attorney General's investigation included interviewing people involved in large transportation services, retaining an antitrust economist to review relevant documents, meeting with the City of Bethel, the utility groups, and Plaintiffs, and consulting with

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<sup>1</sup> Clerk's Docket No. 2 at 3.

<sup>2</sup> Id.

<sup>3</sup> Id. (citing 15 U.S.C. § 18).

antitrust attorneys in other states and federal authorities. As a result, the Attorney General determined that modifying the sale was necessary to avoid state anti-trust violations. Thus, at the end of the eight month investigation, a consent decree was reached that allowed the sale of Yukon to go forward as long as Crowley divested certain assets and provided other accommodations to Delta Western, another supplier of bulk fuel in western Alaska. The consent decree was then published and subjected to a public comment period. The State then initiated its own complaint in State Superior Court alleging that the sale would be an antitrust violation, but that its proposed consent decree would remedy the violation.

After the expiration of the comment period, the State Superior Court proceeded to have a hearing<sup>4</sup> where Plaintiffs presented their arguments, the Assistant Attorney General presented

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<sup>4</sup> While the court limited its review to determine whether the settlement was within the reaches of the public interest, it was not a rubber-stamp and the court considered: "(1) the degree to which the decree achieves the relief sought in the complaint; (2) the nature of the case, including the size of the defendant, the scope and complexity of the proposed settlement, and the importance of the case to the economy as a whole; (3) the quantity and quality of information available to the court on which to base an evaluation of the decree, including the competitive impact statement, public comment and government responses, and any pretrial discovery and trial evidence actually presented; (4) any prior or current history of attempts by the same parties to evade public scrutiny of alleged anti-competitive practices." Clerk's Docket No. 12 at Ex. A at 6.

his comments, and expert economists were heard.<sup>5</sup> On August 25, 2005, State Superior Court Judge Ben Esch issued his opinion approving consent decree and allowing the sale to proceed. Judge Esch concluded that the sale was in the public interest. This Court has reviewed Judge Esch's opinion and found it thoughtful, thorough, and well-reasoned.

Plaintiffs now wish this Court to issue a temporary restraining order preventing the sale while it considers whether the sale, as modified by the consent decree, is a violation of federal antitrust law. In so doing, this Court would effectively prevent the judgment of the State Superior Court from taking effect. The Anti-Injunction Act, 28 U.S.C. § 2283, "precludes federal courts from enjoining state court actions unless (1) Congress has expressly authorized such relief by statute, (2) an injunction is necessary in aid of the court's jurisdiction, or (3) an injunction is necessary to protect or effectuate the court's judgments."<sup>6</sup> "In the interest of comity and federalism, these three exceptions must be strictly construed."<sup>7</sup> Therefore, "doubts

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<sup>5</sup> While Plaintiffs were not a party to the lawsuit, they were participants and were parties to a companion lawsuit that raised identical issues. Furthermore, the Attorney General provided them documentary evidence and they submitted formal objections to the court and participated in the hearing.

<sup>6</sup> Alton Box Board Co. v. Esprit de Corp., 682 F.2d 1267, 1270-71 (9th 1982) (quotations omitted).

Id. at 1271.

as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy."<sup>8</sup> The Act applies to any stage of state proceedings, including judgments and appeals.<sup>9</sup> Additionally, "[i]t makes no difference whether the injunction applies to the private litigants or is imposed directly on the State Court itself."<sup>10</sup>

Here, Plaintiffs move for a temporary restraining order that would preclude the State Court's decision approving the sale from taking effect. Thus, the Act applies to prohibit this Court from so acting, unless an exception to the Act applies, which does not appear to be the case here. First, there has been no statutory authorization by Congress for the relief sought by Plaintiffs. Second, such an order is not necessary to aid the Court's jurisdiction. Third, such an order is not necessary to protect or effectuate a judgment of the Federal District Court. Thus, it appears that this Court is likely barred from granting the relief requested by Plaintiffs.

Moreover, after having reviewed the briefs and documentation supplied by the parties, and noting the extensive

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<sup>8</sup> Id. (citation omitted).

<sup>9</sup> Hill v. Martin, 296 U.S. 393, 403 (1935).

<sup>10</sup> Alton Box Board Co. v. Espirit de Corp., 682 F.2d 1267, 1271 (9th Cir. 1982).

nature of the investigation and litigation that led to the consent decree and subsequent State Court decision, and without even considering the issue of collateral estoppel, the Court concludes that Plaintiffs have not shown probable success on the merits or that there is a high degree of irreparable harm, which is critical to the issuance of a temporary restraining order.<sup>11</sup>

Therefore, the Court **DENIES** Plaintiffs' Motion for a Temporary Restraining Order.

This is not to say that Plaintiffs' complaint lacks merit or that Plaintiffs will ultimately fail. Indeed, although Defendants are not precluded from proceeding with the sales transaction, they do so with full knowledge of the pending litigation and its potential consequences.

ENTERED at Anchorage, Alaska, this 2<sup>nd</sup> day of September, 2005.

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RALPH R. BEISTLINE  
UNITED STATES DISTRICT JUDGE

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<sup>11</sup> Earth Island Inst. V. United States Forest Service, 351 F.3d 1291, 1298 (9th Cir. 2003).

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West's Alaska Statutes Annotated Currentness

Title 45. Trade and Commerce

Chapter 50. Competitive Practices, Regulation of Competition, Consumer Protection

Article 4. Monopolies; Restraint of Trade

→ § 45.50.562. Combinations in restraint of trade unlawful

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is unlawful.

**§ 45.50.564. Monopolies and attempted monopolies unlawful**

It is unlawful for a person to monopolize, or attempt to monopolize, or combine or conspire with another person to monopolize any part of trade or commerce.

**§ 45.50.566. Transactions and agreements not to use or deal in commodities or services unlawful**

It is unlawful for a person to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, or services, whether patented or unpatented, for use, consumption, enjoyment, or resale, or fix a price charged for it, or discount from, or rebate upon, that price, on the condition, agreement, or understanding that the lessee or purchaser will not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodity or service of a competitor or competitors of the lessor or seller, if the effect of the lease, sale, or contract for sale, or of the condition, agreement, or understanding may be substantially to lessen competition or tend to create a monopoly in any line of commerce.

**§ 45.50.568. Mergers and acquisitions unlawful when competition lessened**

(a) It is unlawful for a person to acquire and hold, directly or indirectly, the whole or a part of the stock, or other share capital, or assets of any corporation after August 5, 1975 if the effect of the acquisition and holding may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in the state or in a section of the state. This subsection does not apply to persons purchasing such stock solely for investment if it is not used by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nothing in this subsection prevents a corporation from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions of it, or from owning and holding all or a part of the stock of the subsidiary corporation, when the effect of the formation is not substantially to lessen competition.

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(b) When the court finds that the effect of the holding of such stock, share capital, or assets is substantially to lessen competition or tends to create a monopoly and no other remedy will eliminate the lessening of competition or the tendency to create a monopoly, the court shall order the divestiture or other disposition of the stock, share capital, or assets and shall prescribe a reasonable time, manner, and degree of the divestiture or other disposition of it.

(c) This section does not apply to mergers, acquisitions, or holding companies permitted by AS 06.05.235 or to a merger carried out in accordance with AS 21.69.590 - 21.69.600, or to mergers, acquisitions, or holding companies permitted and regulated by a regulatory agency of the United States having jurisdiction and control over those mergers and acquisitions.

#### **§ 45.50.570. Interlocking directorates and relationships**

(a) It is unlawful for a person to be at the same time a director, officer, partner, or trustee in any two or more firms, partnerships, trusts, associations, or corporations or any combination of them engaged in commerce, if these firms, partnerships, trusts, associations, or corporations or a combination of them, are by virtue of their business and location or operation, competitors and if the effect may be substantially to lessen competition or tend to create a monopoly.

(b) A person may not by the use of a representative accomplish the result prohibited in (a) of this section.

(c) The validity or invalidity of an act of a director, officer, or trustee done by the director, officer, or trustee while occupying the position in violation of this section shall be determined by the statutory and common law of the state relating to corporations, trusts, or associations.

(d) The attorney general may bring an action at any time to cause a director, officer, or trustee who may be occupying such a position in violation of this section to vacate the office or offices to effect the termination of the prohibited interlocking relationship.

(e) A person affected by an act of a director, officer, or trustee may bring an action at any time to cause the director, officer, or trustee who may be occupying the position in violation of this section to terminate the prohibited interlocking relationship.

(f) The court, upon finding that a director, officer, or trustee is holding office in violation of this section, shall order the person to terminate the interlocking relationship, and, in the case of a trustee, the court may, when it considers it appropriate, order the trustee to vacate the office of the trustee. A remedy provided in this section does not limit and is in addition to any other remedy available under another section of this chapter or another law.

### § 45.50.572. Exemptions

(a) AS 45.50.562 - 45.50.596 do not forbid the existence or operation of labor, agricultural, horticultural, or marine pilot organizations created for the purpose of mutual help, and not conducted for profit, or forbid or restrain members of those organizations from lawfully carrying out the legitimate objectives of them; nor are these organizations or members illegal combinations or conspiracies in restraint of trade under the provisions of AS 45.50.562 - 45.50.596.

(b) AS 45.50.562 - 45.50.596 do not forbid actions or arrangements authorized or regulated under the laws of the United States that exempt these actions or arrangements from application of the antitrust laws of the United States or under the following statutes of this state:

(1) AS 06.05.235 and 06.05.570;

(2) AS 10.15; and

(3) AS 31.05.110.

(c) AS 45.50.562--45.50.596 do not forbid persons engaged in the fishing industry as fishermen who catch, collect, or cultivate aquatic products from acting together in associations for the purpose of collectively catching, producing, preparing for market, processing, handling, and marketing their product. Associations may have marketing agencies in common and may make contracts and agreements necessary to achieve the purposes of this subsection. In this subsection, "association" means an association, corporate or otherwise, with or without capital stock, that

(1) is operated for the mutual benefit of its members;

(2) does not deal in the aquatic products of nonmembers to an amount greater in value than the association handles for its members; and

(3) either

(A) does not allow a member of the association more than one vote because of the amount of stock or membership capital the member may own in the association; or

(B) does not pay dividends on stock or membership capital in excess of eight percent a year.

(d) AS 45.50.562 - 45.50.596 apply to long distance telecommunications services provided by public utilities. AS 45.50.562 - 45.50.596 do not apply to other services provided by public utilities that have been issued a certificate of public convenience and necessity under AS 42.05.

(e), (f) Repealed.

(g) AS 45.50.562 - 45.50.596 do not forbid activities expressly required by a regulatory agency of the state. Activities permitted by a regulatory agency of the state are not forbidden by this chapter if the regulatory agency has given due consideration to the possible anticompetitive effects before permitting the activities, and enforcement of the provisions of AS 45.50.562 - 45.50.596 would be disruptive of the regulatory scheme.

(h) AS 45.50.562 - 45.50.596 do not forbid actions or arrangements necessary to carry out the provisions of the Alaska Native Claims Settlement Act. [FN1]

(i) AS 45.50.562 - 45.50.596 do not prohibit activities of the Alaska Housing Finance Corporation to stabilize the market price of and demand for residential housing in the state under AS 18.56.210.

(j) AS 45.50.562--45.50.596 do not forbid persons engaged in the fishing industry as fishermen, including fishermen acting through associations allowed under (c) of this section, from collectively agreeing with fish processors, including fish processors acting through associations of processors, on the (1) price paid to the fishermen for aquatic products; and (2) minimum price that fish processors will accept for the sale of processed aquatic products. Nothing in this subsection allows fish processors to agree among themselves on the price paid to fishermen or the minimum price that fish processors will accept for the sale of processed aquatic products if fishermen did not participate in the making of the agreement and are not a party to the agreement.

(k) AS 45.50.562--45.50.596 do not apply to action taken by a person to comply with AS 45.25 or to action refrained from by a person in order to comply with AS 45.25 (motor vehicle transactions).

(l) AS 45.50.562--45.50.596 do not forbid the existence or operation of organizations of physicians acting in accordance with AS 23.50, or forbid or restrain members of those organizations from lawfully carrying out the legitimate objectives of them; nor are these organizations or members illegal combinations or conspiracies in restraint of trade under the provisions of AS 45.50.562--45.50.596.

[FN1] See 43 U.S.C.A. § 1601 et seq.

#### **§ 45.50.574. Contracts voidable**

A contract or agreement in violation of a provision of AS 45.50.562 - 45.50.596 is voidable by either party as to future performance by either party; however, the court may, in its discretion, order payment for goods or services already received to prevent unjust enrichment.



**§ 45.50.576. Suits by persons injured; treble damages; costs**

(a) A person who is injured in business or property by a violation of AS 45.50.562--45.50.570, or a person so injured because the person refuses to accede to a proposal for an arrangement that, if consummated, would be a violation of AS 45.50.562--45.50.570, may bring a civil action

(1) for damages sustained by the person, and, if the judgment is for the plaintiff, the plaintiff shall be awarded threefold the amount of damages sustained by the person, plus the costs of the suit, including reasonable attorney fees; and

(2) to enjoin the unlawful practice, and, if the judgment is for the plaintiff, the plaintiff may be awarded costs of the suit, including reasonable attorney fees.

(b) If a home rule or general law city or borough or other governmental entity is injured by reason of a violation of AS 45.50.562--45.50.570, it may maintain an action in the same manner as prescribed in (a) of this section for an injured person, and the city, borough, or other governmental entity is entitled to the same relief as provided in (a) of this section.

(c) In a civil action brought under AS 45.50.562--45.50.570, if judgment is for the defendant, the defendant shall be awarded the defendant's costs of the suit, including reasonable attorney fees in accordance with rules adopted by the supreme court for awarding costs and attorney fees to prevailing parties in civil actions. If the plaintiff in a civil action brought under this section in which judgment is for the defendant is a class certified under Rule 23, Alaska Rules of Civil Procedure, any award of costs and attorney fees to the defendant

(1) may be satisfied only through funds, if any, that the class has collected from settlements with or judgments against other defendants; and

(2) is not a liability of any individual member of the class.

**§ 45.50.577. Enforcement by attorney general**

(a) The attorney general may bring a civil action in superior court to secure monetary relief as provided in this section on behalf of the state and its agencies injured either directly or indirectly by reason of any violation of AS 45.50.562--45.50.570.

(b) The attorney general may bring a civil action in superior court in the name of the state, as *parens patriae* on behalf of governmental entities or persons doing business or residing in this state, to secure monetary relief as provided in this section for injuries directly or indirectly sustained by persons by reason of any violation of AS 45.50.562--45.50.570.

(c) The court shall exclude from the amount of monetary relief awarded in an action under

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(a) or (b) of this section any amount of monetary relief that

(1) duplicates amounts that have been awarded for the same injury; or

(2) is properly allocable to persons who have excluded their claims under (e) of this section.

(d) The court shall award the attorney general as monetary relief three times the total damage sustained as described in (a) or (b) of this section and, additionally, the costs of the action, including reasonable attorney fees.

(e) In any action brought under (b) of this section, the attorney general, at the times, in the manner, and with the content the court directs, shall cause notice of the action to be given by publication. Any governmental entity or person on whose behalf an action is brought under (b) of this section may elect to exclude from civil action the portion of the state claim for monetary relief attributable to that governmental entity or person by filing notice of the election with the court within the time specified in the attorney general's notice given in accordance with this subsection.

(f) The final judgment in an action under (a) or (b) of this section is res judicata as to any claim under AS 45.50.576 by any governmental entity or person on whose behalf the action was brought and who fails to give notice of election to exclude under (e) of this section within the period specified in the attorney general's notice given under (e) of this section.

(g) An action under (b) of this section may not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given by publication at the times, in the manner, and with the content the court directs in accordance with (e) of this section and AS 45.50.584.

(h) Monetary relief recovered in an action under this section shall be (1) distributed in the manner the court, in its discretion, authorizes; or (2) deemed a civil penalty by the court and deposited in the general fund, and may be appropriated to the Alaska permanent fund (AS 37.13.010(a)) or for any other public purpose. A distribution procedure authorized by the court under this subsection must afford each governmental entity or person participating in the civil action a reasonable opportunity to secure that entity's or person's appropriate portion of the net monetary relief.

(i) Only the attorney general, in a suit brought under this section, may seek monetary relief for injury indirectly sustained for a violation of AS 45.50.562--45.50.570.

#### **§ 45.50.578. Certain violations constitute misdemeanor**

A person who violates AS 45.50.562 or 45.50.564 is guilty of a misdemeanor and upon con-

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viction is punishable, if a natural person, by a fine of not more than \$20,000, or by imprisonment for not more than one year, or by both; and if not a natural person, by a fine of not more than \$50,000.

#### **§ 45.50.579. Proof of aggregate damages**

In a civil action brought by the attorney general under AS 45.50.577, the attorney general may recover aggregate damages by using statistical sampling or sampling methods, by the computation of illegal overcharges, or by a similar, reasonable system of estimating aggregate damages that the court, in its discretion, permits, without the necessity of separately proving the individual claim or amount of damage to governmental entities or persons on whose behalf the civil action was brought.

#### **§ 45.50.580. Injunction by attorney general**

(a) In addition to any other relief provided by AS 45.50.562 - 45.50.596, the attorney general may bring an action to enjoin a violation of AS 45.50.562 - 45.50.596. This action may be brought as a sole action or in conjunction with another action that the attorney general is authorized to bring.

(b) The court may make additional orders or judgments as may be necessary to restore to a person in interest any money or property, real or personal, that may have been acquired by an act prohibited by AS 45.50.562 - 45.50.596, and as may be necessary to prevent continuing or future violations of AS 45.50.562 - 45.50.596.

#### **§ 45.50.582. Jurisdiction of court**

An action arising under AS 45.50.562 - 45.50.596 shall be brought in the superior court.

#### **§ 45.50.584. Consent judgment**

(a) In an action maintained under AS 45.50.562 - 45.50.596, the parties to it may file with the court a consent judgment or decree. The consent judgment or decree shall set out the alleged violations, future obligations of the parties, if any, damages, or other relief, the defendant agrees to make, if any, and the reasons for entering into the consent judgment or decree.

(b) A consent judgment or decree does not become final until 60 days from its filing. During the 60-day period an interested party may file verified exceptions to the form or substance of the consent judgment or decree, and the court, upon a full hearing on those exceptions, may approve or refuse to enter the consent judgment or decree.

### **§ 45.50.586. Judgment in favor of the state as evidence in another action**

A final judgment rendered in a civil or criminal action brought by the state under AS 45.50.562 - 45.50.596 is prima facie evidence against the defendant in any other action under AS 45.50.562 - 45.50.596 brought by another party, or by the state, a city, a borough, or other governmental entity; however, this section does not apply to consent judgments or decrees entered under AS 45.50.584.

### **§ 45.50.588. Limitation of actions**

An action to enforce a claim arising under AS 45.50.562 - 45.50.596 is barred unless commenced within four years after the claim accrues, except that when an action is brought by the attorney general under AS 45.50.562 - 45.50.596, the running of this period of limitation, with respect to every private right of action for damages that is based in whole or in part on a matter complained of in the action by the attorney general, shall be suspended during the pendency of the action brought by the attorney general. For the purpose of this section, a claim for a continuing violation is considered to accrue at any time during the period of the violation.

### **§ 45.50.590. Powers of the attorney general**

If the attorney general determines, upon complaint or otherwise, that a person has engaged in, or engages in, or is about to engage in an act or practice prohibited or declared unlawful by AS 45.50.562 - 45.50.596, or that a person has assisted or participated in a plan, scheme, agreement, or combination of the nature described in AS 45.50.562 - 45.50.596, or when the attorney general believes it to be in the public interest, the attorney general may commence an investigation. The attorney general may compel production of documentary material and take testimony, under oath, before the institution of an action under AS 45.50.562 - 45.50.596.

### **§ 45.50.592. Investigatory demand for documentary evidence**

(a) If the attorney general determines that a person is in possession, custody, or control of a documentary evidence, wherever situated, that the attorney general believes to be relevant to an investigation authorized in AS 45.50.590, the attorney general may execute in writing and cause to be served upon that person an investigative demand requiring the person to produce the documentary material and permit inspection and copying.

(b) Each demand must

(1) state the specific statute the alleged violation of which is under investigation, and the general subject matter of the investigation;

(2) describe, with reasonable specificity so as fairly to indicate the material demanded, the

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documentary material to be produced;

(3) prescribe a return date within which the documentary material is to be produced; and

(4) identify the state employees or representatives to whom the documentary material is to be made available for inspection and copying.

(c) A demand may not

(1) require the production of documentary material that would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the state; or

(2) contain a requirement that would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of the state; however, this does not limit the power of the attorney general to require production of documents located outside the state that pertain to matters affecting the state.

(d) The demand may be served by the attorney general or the designee of the attorney general by

(1) delivering a copy of it to the person to be served, or, if the person is not a natural person, to an officer of the person to be served;

(2) delivering a copy of it to a place of business in the state of the person to be served; or

(3) mailing by registered or certified mail a copy of it addressed to the person to be served at a place of business in the state, or, if the person has no place of business in the state, to principal office or place of business of the person.

(e) Documentary material produced pursuant to a demand, or copies of it, unless otherwise ordered by a superior court for good cause shown, may not be produced for inspection or copying by, nor may its contents be disclosed to, anyone other than an authorized employee of the state without the consent of the person who produced the material. However, under those reasonable terms and conditions the attorney general prescribes, copies of the documentary material shall be available for inspection and copying by the person who produced the material or an authorized representative of that person. The attorney general, or a designee, may use copies of the documentary material as the attorney general or designee considers necessary in the enforcement of AS 45.50.562-45.50.598, including presentation before a court; however, material that contains trade secrets may not be presented except with the approval of the court in which the action is pending after adequate notice to the person furnishing the material.

(f) At any time before the return date specified in the demand, or within 20 days after the demand has been served, whichever period is shorter, a petition to extend the return date for, or to modify or set aside a demand issued under (a) of this section, stating good cause, may

be filed in the superior court for the judicial district where the parties reside. A petition by a person on whom a demand is served, stating good cause, to require the attorney general or another person to act in accordance with the requirements of (e) of this section, and all other petitions in connection with a demand, may be filed in the superior court for the judicial district in which the person on whom the demand is served resides.

(g) A person upon whom a demand is served under this section shall comply with the terms of the demand unless otherwise provided by an order of court issued in response to a petition filed under (f) of this section. A person who, with intent to avoid, prevent, or obstruct compliance, in whole or in part, with an investigative demand under this section, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies, a documentary material in the possession, custody, or control of a person which is the subject of a demand duly served upon any person, or who otherwise wilfully disobeys any such demand, is guilty of a misdemeanor, and is punishable upon conviction by a fine of not more than \$5,000, or by imprisonment for a term of not more than one year, or by both. Failure of the state to serve the demand properly under (d) of this section is a defense to prosecution under this subsection, but invalidity of the demand under (b) or (c) of this section is not a defense, and that invalidity may be tested only in an action under (f) of this section to modify or set aside the demand.

(h) Nothing in this section impairs the authority of the attorney general or a designee to lay before a grand jury of this state evidence concerning a violation of AS 45.50.562 - 45.50.596, to invoke the power of a court to compel the production of evidence before a grand jury, or to file a civil complaint or criminal information alleging a violation of AS 45.50.562 - 45.50.596.

#### **§ 45.50.594. Investigatory demand for attendance of witness**

(a) In connection with an investigation authorized by AS 45.50.590, the attorney general may issue an investigative demand compelling the attendance of a person for examination under oath before the attorney general or before a court of record.

(b) Each demand shall

(1) state the specific statute the alleged violation of which is under investigation, and the general subject matter of the investigation;

(2) state the date, time, and place at which the examination is to take place.

(c) A demand may be served by the attorney general, or a designee, in accordance with the procedures prescribed in AS 45.50.592(d).

(d) If a person ordered to attend the inquiry fails to attend without good cause, the person is

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guilty of a misdemeanor and upon conviction is punishable by a fine of not more than \$5,000, or by imprisonment for not more than one year, or by both. If a person in attendance at the inquiry refuses to answer a question on the ground that the person may be incriminated by the answer, and if the attorney general, or a designee, in a writing directed to the person being questioned orders the person to answer the question, the person shall comply with the order. After complying, and if but for this section the person would have been privileged to withhold the answer given, the person may not be prosecuted for an offense or subjected to a penalty or forfeiture for or on account of a transaction, matter or thing concerning which the person gave evidence. However, the person may nevertheless be prosecuted or subjected to penalty or forfeiture for a perjury, false swearing, or contempt committed in answering or failing to answer. If a person refuses to testify after being granted immunity from prosecution and after being ordered to testify, the person may be adjudged in contempt and committed to jail until the time the person purges the contempt by testifying. A grant of immunity does not prevent the attorney general from instituting civil contempt proceedings against a person who violates any of the above provisions.

#### **§ 45.50.596. Definitions**

In AS 45.50.562 - 45.50.596,

- (1) "asset" includes any property, tangible or intangible, real, personal, or mixed and wherever located, and any other thing of value;
- (2) "documentary evidence" includes an original or copy of a book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical tabulation, magnetic tape, or other computer data storage system, or other tangible document or recording;
- (3) "trade" and "commerce" include but are not limited to, trade in goods, merchandise, natural resources, whether or not severed, extracted, harvested, or produced, agricultural products, produce, choses in action, commodities, and any other article of commerce; they include trade or business in service trades, transportation, banking, lending, advertising, bonding, and any other business whether or not that business furnishes a personal service.

#### **§ 45.50.598. Short title**

AS 45.50.562--45.50.598 may be cited as the Alaska Restraint of Trade Act.

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