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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SAN FRANCISCO DIVISION

FEDERAL TRADE COMMISSION, 600 Pennsylvania Ave., N.W. Washington, D.C. 20580 Plaintiff, vs. BP AMOCO, P.L.C., Brittanic House, 1 Finsbury Circus London EC2M 7BA, England and ATLANTIC RICHFIELD COMPANY, 333 S. Hope Street Los Angeles, California 90071 Defendants.	Civil No.

COMPLAINT OF FEDERAL TRADE COMMISSION
FOR A PRELIMINARY INJUNCTION PURSUANT TO
SECTION 13(b) OF THE FEDERAL TRADE COMMISSION ACT

Plaintiff, Federal Trade Commission ("FTC" or "Commission"), by its designated attorneys, brings this action for a preliminary injunction under Section 13(b) of the Federal Trade

Commission Act, 15 U.S.C. § 53(b), to restrain and enjoin defendant BP Amoco p.l.c. ("BP"), including its domestic and foreign agents, divisions, subsidiaries, affiliates, partnerships, or joint ventures, from acquiring through merger or otherwise, any stock, assets, or other interest, either directly or indirectly, of defendant Atlantic Richfield Company ("ARCO"). The proposed merger of BP and ARCO, if allowed to proceed, may substantially lessen competition in the markets for: crude oil sold to targeted West Coast refiners; all crude oil sold to West Coast refiners; crude oil produced on the Alaska North Slope ("ANS crude oil"); bidding for exploration rights on the Alaska North Slope ("ANS"); and oil pipeline and storage services into and in Cushing, Oklahoma. BP and ARCO are, by far, the two largest producers of ANS crude oil, the two largest suppliers of ANS crude oil to refineries in California and Washington, and the two most successful competitors in bidding for oil and gas leases on the North Slope and in exploring for and developing new producing oil fields on those properties. BP and ARCO also have large interests in the oil pipeline and storage facilities that serve the crude oil marketing center in Cushing, Oklahoma. The purpose of this action, pursuant Section 13(b) of the Federal Trade Commission Act, is to maintain the status quo during the pendency of an administrative proceeding challenging defendants' proposed merger, that will be commenced by the Commission pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18 and 21.

I.

JURISDICTION

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

2. BP and ARCO are engaged in commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12. BP and ARCO are engaged in, among other things, the production of crude oil in the State of Alaska and

the sale and delivery of that crude oil in the states of California, Oregon, Washington and Hawaii.

II.

VENUE

3. Venue is proper under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), under 28 U.S.C. § 1391(b), (c), and under Section 12 of the Clayton Act, 15 U.S.C. § 22. BP and ARCO transact business and are found within the Northern District of California. This action involves, in part, the threatened loss of competition in the sale of crude oil to refineries located within the Northern District of California. Defendant ARCO owns and operates gasoline service stations located within the Northern District of California.

III.

INTRADISTRICT ASSIGNMENT

4. Assignment of this action to the San Francisco Division is proper. This action involves, in part, the threatened loss of competition in the sale of crude oil to refineries located in the San Francisco Bay area. Defendant ARCO owns and operates gasoline service stations located within the counties encompassed by the San Francisco Division.

IV.

THE PARTIES

5. The Commission is an administrative agency of the United States Government established, organized, and existing pursuant to the FTC Act, 15 U.S.C. § 41 et seq., with its principal offices at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The Commission is vested with authority for enforcing, inter alia, Section 7 of the Clayton Act and Section 5 of the FTC Act.

6. Defendant BP is a corporation organized and existing under the laws of the United Kingdom, with its principal place of business at Brittannic House, 1 Finsbury Circus, London EC2M 7BA, England. BP's principal business offices in the United States are located at BP Amoco, Inc., 200 East Randolph Drive, Chicago, Illinois, 60601-7125.

7. Defendant ARCO is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 333 S. Hope Street, Los Angeles, California 90071.

V.

SECTION 13(b) OF THE FTC ACT

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

> (b) Whenever the Commission has reason to believe --
>
> (1) that any person, partnership or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public --
>
> the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond. . . .

VI.

THE PROPOSED MERGER AND THE COMMISSION'S RESPONSE

9. On March 31, 1999, ARCO, BP and Prairie Holdings, Inc., a wholly-owned subsidiary of BP, entered into an Agreement and Plan of Merger pursuant to which ARCO would merge with Prairie Holdings through an exchange of stock, with ARCO being the corporation surviving the merger with Prairie Holdings, and become a wholly owned subsidiary of BP. At the time the proposed merger was announced on April 1, 1999, the transaction was valued at about $26 billion.

10. On February 2, 2000, the Commission authorized the commencement of an action under Section 13(b) of the FTC Act to seek a temporary restraining order and a preliminary injunction barring the proposed merger during the pendency of administrative proceedings to be commenced by the Commission.

11. Defendant BP has advised the Commission that, in the absence of a court order to the contrary, it will consummate the proposed merger.

12. In authorizing the commencement of this action, the Commission determined that such an injunction is in the public interest and that it has reason to believe that the aforesaid proposed merger would violate Section 7 of the Clayton Act because the merger may substantially lessen competition and/or tend to create a monopoly in the relevant markets alleged below.

VII.

TRADE AND COMMERCE

13. The Alaska North Slope is a major oil-producing region of the United States, principally supplying oil refineries on the West Coast of the United States, specifically in California and Washington. Over 90% of the crude oil produced on the North Slope is refined on the West Coast of the United States and Hawaii.

14. The petroleum industry associated with the production and sale of ANS crude oil involves several successive stages of commerce. At the pre-production stage, companies first compete for oil and gas leases and the associated rights to engage in exploration and development on lands principally owned by the State of Alaska and the United States government. Exploration and development, if successful, are followed by production. With the exception of a small amount of ANS crude oil that is used by refineries in Alaska, ANS crude oil is then transported from the North Slope via the Trans-Alaska Pipeline System ("TAPS") to the port of Valdez on Alaska's Prince William Sound, for tanker shipment to refineries on the West Coast or elsewhere. All ANS crude oil production is commingled in TAPS, and all ANS crude oil produced from any field is thus undifferentiated when it reached Valdez. Some of the West Coast refineries are owned by integrated ANS producers such as ARCO and Exxon. Others are independent refiners without crude oil production. ANS crude oil is sold on the spot market and pursuant to term contracts to both independent and integrated refiners, some of which also use crude oil produced in California.

15. Unlike the sale of most crude oil elsewhere around the world, ANS crude oil is sold to refineries on a delivered basis by a producer with its own tanker fleet. West Coast purchasers do not have a practical option of hiring a tanker to carry ANS crude purchased in Valdez. The principal fleet operators are BP, ARCO, and Exxon. Independent producers without a tanker fleet either sell their oil to an integrated producer with a tanker fleet or to the small refineries in Alaska.

16. BP and ARCO are also engaged in providing pipeline transportation and oil storage services into and in the crude oil marketing hub located in Cushing, Oklahoma, which serves as the distribution center for refineries located in the central parts of the United States. Trading in West Texas Intermediate ("WTI") crude oil in Cushing sets a benchmark for crude oil pricing around the world because Cushing is the delivery point for light sweet crude oil futures contracts traded on the New York Mercantile Exchange ("NYMEX").

VIII.

LIKELIHOOD OF SUCCESS ON THE MERITS

17. The Commission is likely ultimately to succeed in demonstrating, in administrative proceedings to adjudicate the legality of the proposed merger, that the proposed merger would violate Section 7 of the Clayton Act as set forth in Counts I-III, Paragraphs 18 through 47, infra.

COUNT I:

LOSS OF COMPETITION IN THE PRODUCTION, SALE, AND DELIVERY OF CRUDE OIL TO WEST COAST REFINERS

18. As alleged below, BP currently exercises monopoly power in various markets for the sale of crude oil to refineries on the West Coast. BP exercises that monopoly power through price discrimination, including efforts to reduce the supply of crude oil to the West Coast by selling ANS crude to Asia, the United States Gulf Coast, or the United States Mid-continent. ARCO is the firm most likely to constrain BP's exercise of monopoly power, principally through ARCO's exploration and production activities, which, but for the merger, likely would increase

the amount of ANS crude oil discovered, produced and available to refiners (including ARCO).

A. Relevant Product Market

19. Crude oil used by targeted West Coast refiners is a relevant product market and line of commerce in which to analyze the competitive effects of this merger. Petroleum refineries use crude oil as the principal input in making gasoline, diesel fuel, kerosene jet fuel, asphalt, coke, and other refined petroleum products. There are no substitutes for crude oil as an input into petroleum refineries or otherwise for the manufacture of petroleum-based fuels.

20. The principal sources of crude oil for refineries on the West Coast are Alaska and California, although some West Coast refineries also use imported crude oil, principally from Latin America. Although all ANS crude oil is substantially undifferentiated, different crude oils have different gravity, sulfur, aromatics, metals and other characteristics. Changing crude oils in a particular refinery may change both the refinery's overall products yields and the yield of particular products. Therefore, refiners cannot freely substitute one crude oil for another, but must make complex decisions, typically assisted by extensive computer linear programs that solve many equations simultaneously, to evaluate the economics of crude substitution.

21. BP discriminates among its customers in the price it charges for ANS crude oil based upon each customer's ability to shift to alternative sources of crude oil.

22. BP exercises monopoly power by selling ANS crude to individual customers at different prices according to their "trigger points." Refiners with the least ability to substitute away from ANS crude are targeted for the highest prices, while those with more flexibility to substitute are charged lower prices. The difference between the prices charged to targeted customers and the prices charged to the most favored customers is significant. The ability to set ANS prices in this manner and price discriminate among customers demonstrates monopoly power (the unilateral ability to raise price profitably) in the sale of crude oil to targeted West Coast refineries.

23. BP also exercises monopoly power by charging targeted West Coast refiners higher prices than it charges foreign customers. BP exports ANS crude to Asia at a lower price,

net of transportation cost, than it could obtain by selling the same cargo on the West Coast. BP exports ANS crude oil, even at a lower price, in order to restrict the supply of crude oil on the West Coast and elevate its price to West Coast customers.

24. The production, sale, and delivery of all crude oil used by refiners on the West Coast is also an appropriate relevant product market within which to assess the likely effects of the proposed merger.

25. The production, sale, and delivery of ANS crude oil is also an appropriate relevant product market within which to assess the likely effects of the proposed merger.

B. Relevant Geographic Market

26. The West Coast, and smaller areas therein, is a relevant geographic market and section of the country in which to analyze the competitive effects of this merger. The refinery customers affected by this merger are located on the West Coast (in the Los Angeles, San Francisco and Seattle areas), and cannot practicably transfer their operations elsewhere.

C. Concentration

27. The proposed merger would substantially increase market concentration in all three relevant markets.

D. Effects of the Proposed Merger in Production and Delivery of Crude Oil

28. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the production and sale of crude oil used by targeted West Coast refiners by, among other things, eliminating ARCO as an effective competitor, eliminating substantial actual competition between BP and ARCO, eliminating the likelihood of even greater competition between BP and ARCO in the future, and increasing the market power that BP already is exercising in the sale of crude oil to targeted West Coast refiners.

29. BP and ARCO are substantial actual and potential competitors in the production of crude oil for West Coast refineries, specifically, ANS crude oil. BP and ARCO are the two largest explorers, developers and producers of ANS crude oil. As alleged below, BP and ARCO compete for exploration rights and to explore for, develop, and produce crude oil. The merger

will reduce competition in the market for crude oil to targeted refineries on the West Coast by reducing the amount of ANS crude oil reserves found and developed, and the amount of ANS crude oil produced. The elimination of an independent ARCO, therefore, is substantially likely to reduce the exploration for, development of and production of ANS crude oil, and, therefore, increase the price of crude oil to targeted refineries on the West Coast.

30. BP and ARCO are, have been, and in the future will be, substantial competitors in each of the relevant markets.

31. Substantial, timely, and effective entry into the relevant markets, sufficient to deter or counteract the anticompetitive effects of the proposed merger, is unlikely.

COUNT II:

LOSS OF COMPETITION IN BIDDING FOR RIGHTS TO EXPLORE ON THE ALASKA NORTH SLOPE

32. BP and ARCO are the two most important competitors in bidding for exploration leases for oil and gas on lands owned by the State of Alaska and the United States.

A. The Relevant Product Market

33. For the State of Alaska and the United States, there are no substitutes for the commercialization of their oil and gas resources. Accordingly, the purchase of exploration rights is a relevant product market and line of commerce within which to assess the likely effects of the proposed merger.

B. The Relevant Geographic Market

34. The State of Alaska and the United States own land, for which there are no geographic substitutes, that may be appropriate for exploration, development and production of crude oil on the Alaska North Slope. Accordingly, the Alaska North Slope is the appropriate section of the country and geographic market within which to assess the likely effects of the proposed merger on bidding for exploration rights.

C. Concentration

35. The proposed merger would substantially increase market concentration in an

already highly concentrated market for bidding on exploration rights for new ANS fields. After its merger with ARCO, BP would be the dominant bidder and alone would control a dominant share of exploration and development assets.

D. Effect of the Proposed Merger on Leasing, Exploration and Development Activities

36. The effect of the proposed merger, if consummated, may be substantially to lessen competition in bidding for leases on state and federal properties on the Alaska North Slope. The proposed merger will also raise the already formidable barriers to entry in the North Slope bidding market as well as in the markets alleged in Count I and enhance the incentive and capability of BP to reduce the pace of exploration and development, and ultimately, the amount of crude oil produced.

37. Substantial, timely, and effective entry into the relevant markets, sufficient to deter or counteract the anticompetitive effects of the proposed merger, is unlikely.

COUNT III:

LOSS OF COMPETITION IN PIPELINE AND OIL STORAGE SERVICES IN CUSHING, OKLAHOMA, AND RESULTING EFFECTS ON NYMEX TRADING IN LIGHT SWEET CRUDE OIL FUTURES

38. Cushing, Oklahoma is a major crude oil marketing hub in the United States. A substantial portion of the crude oil traded in Cushing consists of West Texas Intermediate (WTI) crude which arrives from pipelines originating in Texas, and imported crude which is offloaded from tankers on the Gulf Coast and transported to Cushing by pipeline. These crude oils are then transported by a network of pipelines to refineries located in the central parts of the United States.

39. Prices for WTI crude traded in Cushing serve as a benchmark for the pricing of many other crude oils around the world.

40. Cushing also serves as a focal point for light sweet crude oil futures trading on the NYMEX. When the NYMEX contracts expire, traders typically meet their obligations to deliver light sweet crude oil by tendering WTI crude oil. NYMEX contracts for crude oil futures typically designate Cushing as the delivery point.

41. Efficient functioning of the pipeline and oil storage facilities into and in Cushing is critical to the fluid operation of both the trading activities in Cushing and the trading of crude oil futures contracts on the NYMEX. Restriction of pipeline or storage capacity can affect the deliverable supply of crude oil in Cushing, and consequently affect both WTI cash prices and NYMEX futures prices.

A. The Relevant Product Market

42. There are no substitutes for pipelines for the transport of crude oil to Cushing, and no substitute for storage facilities in Cushing for the temporary storage of crude oil pending delivery. The oil pipeline and storage services into and in Cushing therefore are an appropriate relevant product market within which to assess the likely effects of the proposed merger.

B. The Relevant Geographic Market

43. Pipeline and storage facilities located in other regions cannot serve the crude oil trading activities in Cushing. Accordingly, Cushing is the appropriate section of the country and geographic market within which to assess the likely effects of the proposed merger on pipeline and storage services for crude oil trading based in Cushing.

C. Concentration

44. The proposed merger would substantially increase market concentration in an already highly concentrated market for pipeline and storage services into and in Cushing. After the proposed merger, BP would control over 40% of the pipeline and storage capacity serving Cushing.

D. Effect of the Proposed Merger on Pipeline and Storage Services in Cushing

45. The effect of the proposed merger, if consummated, may be substantially to lessen competition in pipeline and storage services into and in Cushing by, among other things, eliminating ARCO as an effective competitor, eliminating substantial actual competition between BP and ARCO, and creating or enhancing market power.

46. Market power over the pipeline and storage services into and in Cushing likely would enable BP to manipulate NYMEX trading in light sweet crude oil futures by restricting or

otherwise manipulating the deliverable supply of crude oil in Cushing.

47. Substantial, timely, and effective entry into the relevant market, sufficient to deter or counteract the anticompetitive effects of the proposed merger, is unlikely.

IX.

NEED FOR RELIEF

48. The reestablishment of ARCO as an independent viable competitive entity if it were to be acquired by and merged with BP would be difficult, and there is a substantial likelihood that it would be difficult or impossible to restore the two companies as they originally existed. Furthermore, it would be difficult or impossible for the Commission to devise effective divestiture remedies after an administrative proceeding, if ARCO or any part of ARCO were to be acquired by and merged with BP. Finally, it is likely that substantial interim harm to competition would occur even if suitable divestiture remedies could be devised.

49. For the reasons stated above, the granting of the injunctive relief sought is in the public interest.

WHEREFORE, the Commission requests that the Court:

(1) Preliminarily enjoin defendant BP, and all its affiliates, from taking any further steps to consummate, directly or indirectly, the proposed merger with ARCO, or any other acquisition of stock, assets, or other interest, either directly or indirectly, in ARCO;

(2) Order the defendants to maintain the status quo pending the issuance of an administrative complaint by the Commission challenging such merger, and until such complaint is dismissed by the Commission or set aside by a court on review, or until the order of the Commission made thereon has become final; and

(3) Award such other and further relief as the Court may determine to be proper and just, including costs.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
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SAN FRANCISCO DIVISION

FEDERAL TRADE COMMISSION, 600 Pennsylvania Ave., N.W. Washington, D.C. 20580 Plaintiff, vs. BP AMOCO, PLC, Brittanic House, 1 Finsbury Circus London EC2M 7BA, England and ATLANTIC RICHFIELD COMPANY, 333 S. Hope Street Los Angeles, California 90071 Defendants.	[Public Version] Civil No. _____ Date: February 4, 2000

POINTS AND AUTHORITIES IN SUPPORT OF FEDERAL TRADE COMMISSION MOTION FOR A PRELIMINARY INJUNCTION PURSUANT TO SECTION 13(b) OF THE FEDERAL TRADE COMMISSION ACT

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Preliminary Statement

BP Amoco plc ("BP"), the largest producer and seller of Alaska North Slope crude oil ("ANS crude"), today exercises demonstrable market power – "the power to control prices or exclude competition"[1] – in the sale of crude oil to refineries in California, Hawaii and Washington. BP proposes to acquire Atlantic Richfield Co. ("ARCO"), the firm most likely to constrain BP's exercise of market power. BP and ARCO were the pioneers in developing the North Slope, and today are the two most important oil companies operating there. They account for more than half of the ANS crude discovered over the last decade, and currently produce more than 70% of all ANS crude; they are the only two operators of ANS oil fields; they each own more proven ANS reserves than any other oil company; they have the largest leaseholds of exploration and production acres, and have drilled the largest number of exploration wells on the North Slope; and, individually, each has won more exploration tracts than any other company in the last decade.

The impact of this merger will be felt in Alaska, where competition to find and develop new sources of ANS crude will be lost; on the West Coast, where the merger will shore up BP's efforts to maintain higher crude oil prices; and in crude oil futures trading on the New York Mercantile Exchange ("NYMEX"). BP's acquisition of ARCO is likely "substantially to lessen competition [and] tend to create a monopoly," Clayton Act § 7, 15 U.S.C. § 18, and must be enjoined. Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), seeks a preliminary injunction, under FTC Act § 13(b), 15 U.S.C. § 53(b), enjoining this merger pending adjudication by the Commission.

The relevant inquiry under the Clayton Act is whether the transaction will give the merged firm market power, alone or in conjunction with competitors.[2] Courts usually have to predict

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[1] *U.S. v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (*quoting U.S. v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)). *See also Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1475 (9th Cir. 1997).

[2] *See e.g.*, 1992 U.S. Dept. of Justice and Federal Trade Commission Horizontal Merger (continued...)

whether the merger will create market power by drawing inferences from the market shares of the merging firms and their competitors.[3] This court need not rely upon a prediction because BP *already* exercises significant market power. This merger will eliminate the greatest threat to the perpetuation of that power.[4]

BP today exercises significant market power over the sale of crude oil to West Coast refiners that it has identified as vulnerable to noncompetitive pricing. A 1999 BP presentation to its own managers aptly summarizes BP's strategy toward the West Coast refineries:[5]

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[2](...continued)
Guidelines § 0.1 (hereinafter, "Merger Guidelines"), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (April 2, 1992; as amended, April 8, 1997)("unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise.")

[3]*See, e.g., California v. American Stores Co.,* 872 F.2d 837, 841 (9th Cir. 1989), *revd on other grounds,* 495 U.S. 271 (1990); *FTC v. Warner Communications, Inc.,* 742 F.2d 1156, 1162-63 (9th Cir. 1984).

[4]*See, e.g., United States v. El Paso Natural Gas Co.,* 376 U.S. 651, 661-62 (1964); *FTC v. Staples, Inc,* 970 F. Supp. 1066, 1082-83 (D.D.C. 1997) ("direct evidence shows that eliminating Staples' most significant, and in many markets only, rival, this merger would allow Staples to increase prices or otherwise maintain prices at an anti-competitive level").

[5]Spot price is the amount paid for an individual sale of crude oil, while term contract sales are pre-arranged sales of a specified quantity to be delivered over time. PX 54 at 14-15. [ ] PX 54 at 245-50; PX 206 at 1-2; PX 288 at 1. In BP's terminology, [ ] translate into higher ANS prices. [ ] translate into lower ANS prices. PX 206 at 1; PX 54 at 93-94.

]

Unless enjoined, this proposed merger would fortify BP's already dominant position by eliminating the firm most likely to challenge or constrain BP. ARCO is a substantial competitive force in Alaska and on the West Coast in the exploration, production, transportation, and sale of ANS crude oil.[6] ARCO was responsible for the discovery of the North Slope's vast reserves in the late 1960s. Today ARCO produces over 30% of ANS crude oil, controls 22% of the Trans-Alaska Pipeline System ("TAPS"), and is second only to BP in the marine tonnage used to ship ANS crude to the West Coast.

ARCO's presence at all levels of ANS crude exploration, production and transportation operates as a restraint on BP's prices to refiners on the West Coast. [7] ARCO's expansion (but for this merger) could lead to lower ANS crude oil prices in the near future. ARCO's production of ANS crude oil available to West Coast refiners will increase this year, when ARCO commences production at its new Alpine field, which is expected to give ARCO an additional 62 thousand barrels a day ("MBD") by 2001.

This merger would also eliminate competition between the two most important rivals for oil and gas exploration leases on the North Slope. Diminished competition will slow the pace of exploration and development of new oil fields, and reduce revenues to the owners of those properties, Alaska and the Federal Government. No longer will ARCO's vigorous competition hold the promise of increased crude supply.

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[6]ANS crude oil moves from producing fields on the North Slope to "Pump Station 1" at the northern end of the TAPS pipeline. From there, TAPS transports the ANS crude oil south to Valdez, Alaska, an ice-free port, for tanker shipment.

[7]Although ARCO currently consumes most of its ANS crude production at its refineries, it plays a small but significant role in merchant sales. PX 272 at 1; PX 285 at 1-2; PX 401 at 1 [

]. Even at its relatively small current position, [

] PX 274 at 1. For example, [

] PX 270 at 1; PX 287 at 2.

Other firms cannot replace ARCO as a competitor because BP and ARCO have substantial and unique advantages. They own the [ ] proprietary seismic and well data, are the only two operators of producing acreage, and together control the crude processing infrastructure and more than 70% of the transportation facilities on the North Slope. Those assets give BP and ARCO information and cost advantages that deter competitors from bidding aggressively.

The defendants' track records reflect these advantages. BP and ARCO, collectively, won more than [ ]% of the auctioned state tracts (measured in dollars) over the last decade and more than 70% of the tracts in the May 5, 1999, Federal lease sale in the National Petroleum Reserve – Alaska ("NPRA"). PX 110 at 10, 21. The failure of other major oil companies (*e.g.*, Shell, Amerada Hess, and Conoco), reflects the difficulty of competing against BP and ARCO. *See, e.g.*, PX 142, ¶ 13 [ ]; PX 157, ¶ 14. Their exit also serves as a cautionary tale for any firm that believes that it can compete against the merged firm.

BP also is a major oil trader. The merger would increase its ability to manipulate oil futures markets by enlarging its control of crude oil pipeline and storage facilities into and in Cushing, Oklahoma. NYMEX, the largest futures market in crude oil, trades futures contracts for crude oil delivered at Cushing. BP's substantial control over the Cushing crude oil infrastructure would increase its ability to monitor and control the supply of crude oil that can be delivered to satisfy NYMEX contracts, and thus manipulate NYMEX futures trading in crude oil.

The FTC seeks a preliminary injunction to prevent BP from acquiring ARCO pending FTC plenary adjudication of the transaction. The public interest requires that the Court act now, before the transaction closes and unwinding it is not practical. If the merger is not preliminarily enjoined, and the FTC or a reviewing court should subsequently determine that the merger is unlawful, appropriate relief will be difficult or impossible and competition will have been harmed for a substantial period.

Recognizing the considerable competitive concerns raised by this merger, BP and ARCO have attempted to fashion a separate peace with the Governor of Alaska through a "Charter for

Development" (the "Charter"). The Charter itself acknowledges Alaska's belief that the merger will reduce competition. Alaska chose the Charter as its compromise. The FTC and the West Coast states have not, and those states have commenced their own lawsuits challenging the merger.[8] The Charter has serious substantive and procedural disabilities. It utterly fails to provide a remedy for the West Coast refiners targeted by BP's exercise of market power, and does not purport to do so. As Alaska's Commissioner of Natural Resources acknowledged: "[T]o be frank, we aren't totally aligned with California on this issue. They'd like lower oil prices, we like higher oil prices."[9] Even if the divestitures contemplated by the Charter were fully implemented, BP would significantly increase its dominant position in each of the markets addressed by this motion.

ARGUMENT

I. BP's ACQUISITION OF ARCO VIOLATES § 7 OF THE CLAYTON ACT BECAUSE IT MAY SUBSTANTIALLY LESSEN COMPETITION IN SEVERAL MARKETS

The FTC is entitled to a preliminary injunction "upon a proper showing that, weighing the equities and considering the FTC's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C. § 53. Under this "public interest" standard, this Court "must 1) determine the likelihood that the Commission will ultimately succeed on the merits and 2) balance the equities." *FTC v. Warner Communications*, 742 F.2d 1156, 1160 (9th Cir. 1984). The FTC satisfies its burden if it "raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Id.* at 1162 (quoting *FTC v. National Tea Co.*, 603 F.2d 694, 698 (8th Cir. 1979)).

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[8]The FTC submits that these actions should be consolidated.

[9]Reuters, "Alaska won't push BP for more oil divestitures," Dec. 1, 1999, <http:\\www.biz.yahoo.com/rf/991201/6f7.html>. The State of Alaska benefits from high West Coast ANS prices, which is the basis for the calculation of severance taxes and royalties paid to the State. PX 427 at 8; PX 113 at 2, 4. The higher the ANS price to West Coast refiners, the better it is for Alaska.

A court's role in evaluating the Commission's likelihood of success on the merits "is not to make a final determination on whether the proposed merger violates Section 7, but rather to make a preliminary assessment of the merger's impact on competition." *Warner Communications,* 742 F.2d at 1162. Section 7 of the Clayton Act is intended to arrest anticompetitive mergers "in their incipiency" and, accordingly, requires a prediction of the merger's likely impact on future competition. *United States v. Philadelphia Natl Bank* , 374 U.S. 321, 362 (1963). Because the statute requires a forward-looking assessment, certainty is not required.

The central question under Section 7 is whether a merger is likely to create or enhance market power. BP *already* exercises market power here. Where a firm exercises market power, the acquisition of a significant rival may enhance that power and reduce the chances that it would be undermined. Thus, the courts have held that where a firm with market power acquires its most significant present and future competitor, "the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *Philadelphia Natl Bank* , 374 U.S. at 365 n. 42. *Accord Staples,* 970 F. Supp. at 1082-83. In such markets, competition depends on firms like ARCO with the potential and incentive to constrain the dominance of market leaders like BP.

A. The Merger is Likely to Lessen Competition Substantially in the Production and sale of Crude Oil to Targeted Refineries on the West Coast.

1. BP Exercises Market Power Today.

The ultimate objective of a merger inquiry is to determine whether, after the merger, the merged firm will be able to exercise market power,*i.e.*, raise prices or restrict output.[10] As this Circuit has held:

> a plaintiff may demonstrate market power either by direct evidence or by circumstantial evidence. *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir.), *cert. denied*, 116 S. Ct. 515 (1995). Direct proof of market power may be shown by evidence of restricted output and supracompetitive prices. *Id.* Such a showing is "direct proof of the injury to competition which a competitor with market power may inflict, and thus, of the actual exercise of market

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[10] *See U.S. v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *U.S. v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *Hospital Corp. of America v. FTC,* 807 F.2d 1381, 1387 (7th Cir. 1986); *Warner Communications,* 742 F.2d at 1162-63.

power." *Id.*

Forsyth, 114 F.3d at 1475. Direct proof of market power, not available in most cases, is readily evident here – in BP's price discrimination among buyers of ANS, and in its shipments to Asia intended to increase price on the West Coast. Given this direct evidence, "[t]he more common type of proof . . . circumstantial evidence," *i.e.*, defining markets and measuring shares is not strictly necessary.[11] *See Rebel Oil Co.*, 51 F.3d at 1434 (9th Cir. 1995) (a group of sales over which sellers have market power constitutes a market).

Most broadly defined, the market affected by BP's acquisition of ARCO is the production and sale of crude oil to targeted refineries on the West Coast.[12] Two facts constitute direct evidence of BP's market power in this market: (1) BP already engages in systematic and pervasive price discrimination among its targeted customers; and (2) BP elevates overall ANS crude oil prices on the West Coast through strategic exports to Asia.[13]

A refinery operates most efficiently with a particular "slate" of crude oil. Many West Coast refineries rely upon ANS crude oil for a substantial portion of their supply. PX 235 at 5-6. Other crude oils differ significantly from ANS in key characteristics, including gravity, sulfur content, metals content and pour point. PX 54 at 39-43. These characteristics affect the products that can be made from the crude oil, the equipment needed to refine it, and the costs of doing so. *Id.* Accordingly, refiners will not switch to other crude oil, even at the margin, until the price differential reaches [ ] "trigger point" – the point at which running the last

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[11] *See also* Baker, "Product Differentiation Through Space and Time: Some Antitrust Policy Issues," 42 ANTITRUST BULL. 177, 185 (1997).

[12] The relevant market could be defined narrowly as the production and sale of ANS crude oil. "Sale" includes internal transfers within vertically integrated producers and refiners. Each of the factors that compels the conclusion that crude oil sold to targeted refiners is a relevant market also supports the ANS crude oil market. Since the merger has demonstrable anticompetitive effects even in the broader market, it is not necessary to define a narrower "ANS crude oil" market.

[13] *E.g.*, PX 201 at 3, 11 [ ]

barrel of ANS crude oil is no more profitable than running a different crude oil given that refiner's equipment and product slate. Trigger points for ANS differ from refinery to refinery. PX 54 at 68-70, 199-202; PX 214 at 4; *see also* PX 236 at 1.

BP [

], the highest ANS price it could seek before the refinery would turn to another source of crude oil. PX 54 at 68-70. BP generally [

] PX 201 at 3, 9-10. BP then [

] exactly how much ANS crude oil to ship to Asia in order to tighten supplies and increase spot prices on the West Coast, and thereby to maximize its aggregate profits from ANS sales:

[

].

To control the disposition of ANS crude oil, and to discriminate among refineries with such precision, BP sells nearly all ANS crude on a "delivered" basis. PX 209 at 7 [

]. BP ships crude oil from Alaska to the West Coast in its tankers and delivers it to the refinery's storage tanks.

BP's ability to price discriminate, *i.e.*, to target specific refineries for supracompetitive prices, is the foundation for defining a product market composed of sales to those customers.[14] BP itself recognizes that its practice of delivered distribution and price discrimination distinguishes sales to West Coast refiners from a so-called "global market."

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[14] *See Merger Guidelines* § 1.12; *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 475-77 (1992) (price discrimination in sales of parts to different classes of customers supports separate market for sales to customers facing discrimination); P. Areeda & H. Hovenkamp, IIA ANTITRUST LAW ¶ 534d, at 183-85 (1995).

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PX 203 at 4. [ ] ANS crude oil is insulated from full competition from alternative crude oils.

Absent price discrimination, BP [

]. The fact that BP has already raised the price of ANS crude above a "competitive" price to targeted refineries sufficiently establishes a relevant product market of sales to those refineries. As Chief Judge Posner has explained, the ability to price discriminate demonstrates that a firm possesses market power:

> Price discrimination implies market power, that is, the power to charge a price above cost (including in "cost" a profit equal to the cost of equity capital) without losing so much business so fast to competitors that the price is unsustainable. The reason price discrimination implies market power is that assuming the lower of the discriminatory prices covers cost, the higher must exceed cost.[15]

BP [ ] firms up prices on the West Coast by exporting oil to Asia in order to short supply on the West Coast:

[

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PX 212 at 3. BP exports to Asia at netbacks [ ] per barrel *less* than it could realize on the

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[15] *In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d 781, 786 (7th Cir. 1999) ("manufacturers of brand name prescriptions engage in price discrimination, showing that they have market power"). *See also Coal Exporters Ass'n v. United States* , 745 F.2d 76, 91 (D.C. Cir. 1984) ("the ability of a firm to price discriminate is an indicator of significant market power"); *Transamerica Computer Corp. v. IBM,* 481 F. Supp. 965, 977 (N.D. Cal. 1979) (monopoly power indicated when firm is a "price maker" and can "set price according to utility to the customer"); H. Hovenkamp, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 130 (1994) ("the presence of persistent price discrimination is pretty good evidence that a seller has market power in the high priced markets."); F. Scherer & D. Ross, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 489 (3d ed. 1990).

West Coast spot price. PX 207 at 5.[16] BP has systematically shipped ANS crude oil to customers outside the West Coast not because those sales themselves were profit-maximizing, but to [ ] on the West Coast:

[

]

[17]

If BP did not have market power over its crude sales, BP's exports would not make economic sense. BP would simply lose money as its customers switched to alternative crudes. The fact that BP finds it profitable to export ANS crude to boost West Coast prices is proof that the relevant market is not world-wide – imports are not able to defeat BP's export strategy.

BP also takes it upon itself to mop up "excess" supplies of ANS [

] [18]

In sum, BP's market power is amply demonstrated by its pattern of systematic and successful price discrimination against targeted West Coast refiners and its exports of ANS crude

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[16] *See also* PX 211 at 1 [ ].

[17] PX 221 at 2. When authorizing the construction of the TAPS, Congress banned the export of ANS. In 1996, Congress removed that ban. PX 417 at 16.

[18] PX 426 at 1-3; PX 250 at 2; PX 54 at 253; PX 269 at 1 [ ]; *id.* [ ] In 1997, BP purchased a total of [ ] barrels (the equivalent of [ ] MBD) of ANS from ARCO. PX 234 at 11-24. *See also* PX 263 [ ]

to Asia, at lower netbacks, to maintain tight supplies on the West Coast. Here we have "[d]irect proof of market power" as described by the Ninth Circuit in *Forsyth v. Humana,* 114 F.3d at 1475: price discrimination directed at targeted refiners, and a restriction of supply on the West Coast in order to elevate price.[19]

2. BP's Acquisition of ARCO Will Eliminate the Firm Most Likely To Constrain BP's Exercise of Market Power

ARCO is the firm most likely to limit BP's exercise of market power. ARCO is BP's most aggressive competitor in bidding for, finding and producing oil in Alaska. ARCO sells ANS crude oil to other refiners from time to time and can disrupt BP's pricing. BP's acquisition of such a close competitor is likely substantially to reduce competition.[20]

BP and ARCO today have sharply divergent interests and incentives. PX 159 at 8; PX 131 at 3. BP ships ANS crude to Asia to short the West Coast market and elevate prices. ARCO, as an integrated refiner that normally uses more ANS in its refineries than it produces in Alaska, has an incentive to lower its crude costs by finding and producing new oil. And it has been successful. In 1994, ARCO found oil at Alpine, on the North Slope, the second largest discovery in Alaska in 12 years. PX 107-3. That field, which will begin producing oil this year, is expected to produce 80 MBD by 2001, PX 409, and increase ARCO's net production by [ ] MBD by 2004.[21] The additional supply on the West Coast would tend to put downward pressure on pricing.

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[19]*See also Re/Max Intl, Inc. v. Realty One, Inc.,* 173 F.3d 995, 1017-21 (6th Cir. 1999) ("[A]n antititrust plaintiff is not required to rely on indirect evidence of a defendant's monopoly power (such as high market share within a defined market) where there is direct evidence that the defendant has actually set prices or excluded competition");*Staples,* 970 F. Supp. 1082-83.

[20]*See FTC v. Staples*, 970 F. Supp. at 1082-83 ("the merger would result in the elimination of a particularly aggressive competitor in a highly concentrated market, a factor which is certainly an important consideration when analyzing potential anticompetitive effects").

[21]PX 417 at 12. Estimates for 2001 and beyond show Alpine production at 80 MBD; ARCO owns 78% of this field (62.4 MBD), PX 33. The [ ] MBD net production figure takes into account declining production from ARCO's other fields, mainly Prudhoe Bay and Kuparuk. PX 417 at 12.

ARCO also can constrain BP's market power by increasing the supply of ANS crude available to targeted refineries by selling them ANS crude. In the past, ARCO has purchased some foreign crude at a favorable price to run in its refineries, and then sold ANS crude to other refiners on the West Coast. PX 401 at 1; PX 448 at 1. ARCO recently [ ] [22] ARCO [ ] could sell [ ] MBD of ANS to BP's customers and substitute other oil – something other refiners cannot do because they do not have ANS production, infrastructure and transportation.[23] That [ ] MBD, together with ARCO's [ ] MBD of increased ANS production, would increase total crude oil available to targeted refineries by almost five percent – and vastly exceed the amount that BP has been exporting to Asia to tighten the West Coast market.[24]

This merger will eliminate these constraints on BP's market power. ARCO's spot market sales will be fully under BP's control. BP would have an incentive to use [ ] to manage ANS supplies on the West Coast to keep the market tight. It could choose to use ANS crude oil in ARCO's refineries instead of imported crude, and keep that much ANS crude off the open market, just as it exports ANS crude to Asia to maintain a tight West Coast market. By also eliminating its most aggressive competitor for oil and gas leases on the

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[22]PX 404 at 1. Before it agreed to merge with BP, ARCO [ ], including [ ] PX 298 at 2. ARCO [ ] when BP and ARCO agreed to merge. PX 77 at 93-94.

[23]ARCO also purchases ANS crude oil from independent producers that lack tanker capacity, (PX 401 at 1; PX 77 at 45-46), enabling it to resell that crude oil to other refiners. ARCO makes relatively small sales to refiners that lowers the spot market price and the prices under BP's term contracts (which are tied to the spot market price). PX 206 at 1. BP, on the other hand, [ ] purchase ARCO's excess crude, to keep ANS prices up. PX 269 at 1. ARCO has an incentive to reduce spot market prices because doing so will reduce severance taxes it pays to Alaska on all of its ANS crude production. PX 265 at 1; PX 289 at 1. Although BP must also pay taxes, it realizes enhanced profitability from higher spot market prices because its dominant role in selling ANS crude to West Coast refiners. PX 427 at 7-8.

[24]PX 211 at 3-4; PX 223 at 1; PX 224 at 1. ARCO's ability to substitute imported oil for ANS constrains BP, whether or not the substitution is actually made. PX 275 at 1.

North Slope, BP could simply leave the oil in the ground.

No other firm in Alaska today, or likely to enter in the future, can match ARCO's abilities or incentives. Exxon [ ] PX 108 at 4; PX 159 at 6 [ ]. Others have been leaving Alaska for a decade. PX 52 at 38-40 (Texaco, Amerada Hess, Conoco, Shell exiting). No other firm has the experience or assets in Alaska that BP and ARCO have.[25] BP and ARCO currently account for 67% of all State exploration acreage on the North Slope, PX 159 at 6, and more than 70% of all North Slope acreage (including production, exploration, State and Federal land), PX 110 at 25, most of the proven reserves, PX 108 at 3, and 74% of the barrels produced, PX 419 at 1-2; PX 420 at 2-3. After the merger, BP would be the only operator on the North Slope.

3. Entry by New Producers or Expansion by Current Producers Would Be Unlikely to Occur in a Timely or Sufficient Manner to Prevent the Anticompetitive Effects of the Acquisition.

Entry into the production and sale of ANS crude oil, or other crude oil to targeted refiners is unlikely to occur in a timely or sufficient manner to prevent BP from exercising its already significant market power.[26] Entry has not constrained BP's exercise of market power to date. Defendants admit that entry into Alaska production would take [ ] years. PX 413 at 3. Many major oil companies, including Shell, Amerada Hess, and Conoco, have tried and failed to succeed on the North Slope. PX 52 at 38-40; PX 156 ¶ 12. Given the difficulty of entry and

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[25]BP and ARCO own [ ] proprietary seismic and well data, which are essential in evaluating new properties. PX 112 at 1; *see also* PX 103 at 1; PX 126 at 7; PX 128 at 9; PX 129 at 1; PX 71 at 59. They are the only two operators of producing acreage, PX 159 at 9, which is a major advantage in further exploration and development efforts in the area. PX 142 ¶ 13; PX 52 at 45. They control most of the infrastructure necessary to produce ANS crude oil. *See* PX 159 at 5 (BP and ARCO have a majority interest in producing fields and infrastructure); PX 131 at 3 [ ].

[26]To defeat or deter the anticompetitive effects of an acquisition, entry must be likely to occur within two years, and at a sufficient scale to constrain the anticompetitive impact of the merger. *See FTC v. Cardinal Health, Inc.*, 12 F. Supp.2d 34, 55-58 (D.D.C. 1998); *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1071-80 (D. Del. 1991); *Merger Guidelines* § 3.

expansion in Alaska, it is not surprising that the two early leaders of development and production on the North Slope -- BP and ARCO -- are the only firms with a significant presence over thirty years later. This is clearly the type of market "which requires onerous front-end investments that . . . deter competition from all but the hardiest and most financially secure investors." *See United States v. Syufy*, 903 F.2d 659, 667 (9th Cir. 1990).

Nor is it likely that producers of other crude oil will begin supplying West Coast refineries in a manner that would constrain BP's ability to exercise market power. The most compelling evidence that other producers would not enter is that they have not entered: although BP has been exercising market power against targeted refineries for at least five years, new entrants have not prevented BP from doing so.[27] When BP raised prices relative to WTI[28] by approximately $1 per barrel in 1995, other producers of other crudes did not prevent BP from doing so or restore BP's prices to pre-1995 levels.

B. BP's Acquisition of ARCO is Likely to Lessen Competition Substantially in Bidding for ANS Exploration Leases.

The merger will eliminate competition between the two most significant firms bidding for oil and gas leases on the North Slope. For over 30 years, fierce rivalry between these two firms has spurred active exploration and development on the North Slope. Their merger is likely not only to reduce the amount of money received in future lease sales, to the detriment of the State of Alaska and the Federal Government, but (as described above) also threatens to reduce long-term exploration, development and production on the North Slope. PX 157 (U.S. Department of Interior concerned about merger); PX 154 ¶¶ 4, 5 (State of Alaska concerned about lack of North Slope competition and entry barriers); PX 118 at 1 (Alaska Governor Knowles concerned about merger).

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[27]Entry into California crude oil production is likewise unlikely. PX 446 at 4.

[28]WTI is the principal pricing benchmark throughout the petroleum industry in the United States. PX 309 at 1.

1. BP's Acquisition of ARCO Would Eliminate BP's Most Aggressive Bidding Competitor.

The State of Alaska and the Federal Government own mineral resources on the Alaska North Slope and offshore Alaska's north coast. These governments exploit these resources by auctioning exploration leases to oil companies. For these government owners of natural resources, who would be injured by the loss of competition, the relevant product market is exploration leases, and the relevant geographic market is where the resources are – the Alaska North Slope and offshore waters.[29] "The exercise of market power by buyers ("monopsony power") has adverse effects comparable to those associated with the exercise of market power by sellers." *Merger Guidelines* § 0.1.[30] In this case, BP's acquisition of ARCO may substantially lessen competition in the bidding for oil leases on the North Slope of Alaska.

The merger would combine the two most significant competitors on the North Slope. As described above, they own or control all exploration, development and production assets, and they won over 60% of all state lease auctions over the last decade (by dollar value). The top four firms (premerger) won 75%. PX 110 at 10.[31] BP's acquisition of ARCO would increase

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[29]A relevant market can be defined based on bidding for purchases among competing buyers. *See City of Long Beach v. Standard Oil Co.*, 872 F.2d 1401, 1405 (9th Cir. 1989) (reversing summary judgment for oil companies on an antitrust claim alleging they had agreed to depress prices paid for oil to the City of Long Beach and the State of California);*Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1296-99 (9th Cir. 1982) (affirming a lower court's verdict finding a Sherman Act violation in agreement to depress timber price paid to loggers).

[30] *See, e.g. Vogel v. American Soc'y of Appraisers,* 744 F.2d 598, 601 (7th Cir. 1984) ("[M]onopoly and monopsony are symmetrical distortions of competition from an economic standpoint"); *Addamax Corp. v. Open Software Foundation, Inc.,* 888 F. Supp. 274, 280 n.9 (D. Mass. 1995) (monopsony is the mirror image of monopoly).

[31]Courts have used value of winning bids to measure concentration in bid markets. *See, e.g., FTC v. PPG Industries, Inc.*, 798 F.2d 1500, 1504-05 (D.C. Cir. 1986) (bid market for aircraft transparencies); *Langenderfer, Inc. v. S.E. Johnson Co.,* 917 F.2d 1413, 1442-1443 (6th Cir. 1990) (bid market for road construction materials).

concentration by over 1700 HHI[32] points to a post-merger level of over 3900. Similar market shares and concentration levels on the buyers' side have led courts to find clear violations of Section 7 of the Clayton Act.[33]

The parties' own documents confirm that BP and ARCO are the only significant competitors. ARCO sees the competition with BP[ ] PX 137 at 9. BP views ARCO as [ ] on the North Slope. [ ] PX 106 at 2; PX 103 at 1 [ ]. Other firms, including even those still producing on the North Slope (such as Exxon, Mobil, Marathon, Unocal, Conoco, Texaco, and Amerada Hess), have exited bidding. PX 120 at 1.

2. Entry by New Developers and Expansion by Current Producers Would Not Be Sufficient, Timely or Likely to Prevent the Anticompetitive Effects of the Acquisition.

Entry into bidding will not be timely, likely or sufficient to undermine the anticompetitive effects of this acquisition. [ ] five percent decrease in the price of exploration leases would not encourage a firm to enter. PX 122 at 1. Preparation for bidding competition takes at least three years. PX 156 ¶ 8 [ ]; PX 141 ¶ 8 ([ ]). After 30 years in Alaska, BP and ARCO have three advantages that new bidders would need to overcome in order to be as significant in bidding as is ARCO: information, infrastructure

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[32]The HHI is calculated by squaring the market share of each competing firm and summing the results. The Merger Guidelines define a market with an HHI between 1000 and 1800 as moderately concentrated and one with an HHI of more than 1800 as highly concentrated. Mergers that produce an increase in the HHI of more than 100 in a moderately concentrated market or more than 50 points in a highly concentrated market potentially raise significant competitive concerns. *Merger Guidelines,* Section 1.51.

[33]*See United States v. Rice Growers Assn,* 1986-2 Trade Cas. (CCH) ¶ 67,288, at 61,465 (E.D. Cal. 1986) (post-merger firm would have controlled 61% of purchases and top four firms had accounted for 98% of purchases in most recent year); *United States v. Pennzoil Co.,* 252 F. Supp. 962, 982 (W.D. Pa. 1966) (post-merger firm would control 54%; top three firms controlled 77% of refining capacity and 85% of oil production).

and interest:

– *Information.* BP and ARCO would have [ ] proprietary three-dimensional seismic data,*see* n. 27 *supra*, which is critical to understand the geology and thereby estimate the value of lease properties. PX 52 at 71, 77; PX 71 at 13, 59; *see* n. 27 *supra*. They also have [ ] interpreting Alaska's oil resources. PX 52 at 78; PX 71 at 52. The merger will raise the entry barrier even further by widening the knowledge gap between the merged company and other bidders.

– *Infrastructure.* As the only operators and largest owners of oil interests in Alaska, BP and ARCO control the production infrastructure (*e.g.*, equipment, roads, facilities),*see* n. 27 *supra*, control the terms on which potential bidders would have access to that infrastructure, (PX 154 ¶¶ 5-6; PX 141 ¶ 16; PX 142 ¶¶ 19, 22), and thereby deter new entry and expansion by existing firms.

– *Interest.* Alaska is remote and highly regulated, compared to other exploration venues (such as the Gulf of Mexico). Firms seeking to invest exploration dollars in new areas will see higher costs relative to the likelihood of discovering substantial oil reserves in Alaska than in other opportunities. *See* PX 154 ¶ 5; PX 142 ¶¶ 19, 21-22; PX 141 ¶ 7, 14-16; PX 156 ¶ 13.

Lacking these assets, other firms that have not explored in Alaska are unlikely to do so in the future.

C. The Merger Would Significantly Increase BP's Ability to Manipulate the Price of WTI Crude Oil Futures.

The NYMEX light, sweet crude oil futures contract is the world's most actively traded futures contract of any physical commodity and one of the most important markets serving the petroleum industry. PX 309 at 1; PX 306 ¶ 6. Because of its liquidity and price transparency, the NYMEX light, sweet crude oil contract and its underlying commodity, WTI crude oil, is a principal pricing benchmark throughout the petroleum industry in the United States and the world. PX 309 at 1; PX 306 ¶ 6. [ ] PX 310 at 3. The existence of a highly liquid futures market in

crude oil makes it easier (and thus less costly) for oil companies to negotiate and price crude oil transactions. *See* PX 306 ¶ 12. Should that futures market become subject to manipulation, these benefits would be lost – increasing transaction costs throughout the industry.[34]

This merger presents that danger – that BP, as a result of this merger, would be increasingly able to manipulate the price of NYMEX crude oil futures. The merger would give BP greater control of the crude oil transportation and storage infrastructure in Cushing, Oklahoma, which underpins the NYMEX futures contract. PX 301 at 7; PX 309 at 1; PX 307 ¶ 11. [ ] and BP's previous acquisition of Amoco at the end of 1998 gave it control at that time of one of the major pipelines into Cushing[35] and [ ]% of the terminal storage at Cushing. PX 319 at 4. This merger would give BP control of the Seaway Pipeline, the only route by which imported crude oil can reach Cushing, ARCO's in-line transfer business at Cushing, and additional storage.

After the merger, BP would have increased strength to manipulate the WTI futures market. PX 306 ¶ 13; PX 307 ¶ 14.[36] Futures markets are tied to physical commodity markets by the obligation to take (or make) delivery of the physical commodity by the expiration of the contract month. *See* PX 307 ¶ 11. The NYMEX light, sweet crude oil futures contract thus requires the parties to make and take delivery of WTI crude oil in Cushing by the expiration of the contract. PX 301 at 7. However, nearly all futures contracts are closed by acquiring an offsetting

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[34]Manipulation makes prices less informative and increases the volatility of futures prices thereby distorting consumption and production decisions and reducing the hedging effectiveness of a futures contract. *See* S. Pirrong, *THE ECONOMICS, LAW, AND PUBLIC POLICY OF MARKET POWER MANIPULATION* 125, 132 (1996). Section 3 of the Commodity Exchange Act, 7 U.S.C. § 5, states that 'the transactions and prices of commodities on such boards of trade are susceptible to excessive speculation and can be manipulated, controlled, cornered or squeezed to the detriment of the producer or the consumer and the persons handling commodities and the products and byproducts thereof in interstate commerce."

[35]The Amoco Pipeline system transports up to 200 MBD of crude oil from East and West Texas into Cushing. PX 302 at 3.

[36]In 1998, BP was fined by the International Petroleum Exchange for manipulation of the Brent crude oil futures. PX 325 at 1.

position rather than by actual delivery;[37] and indeed the volume of trading in NYMEX crude oil futures vastly exceeds the amount of WTI crude oil available in Cushing to make delivery. PX 307 ¶ 11.[38]

This fact creates the opportunity for a squeeze. Futures markets can be manipulated by a "squeeze" when a trader acquires a large long position in expiring futures contracts, exceeding the physical supply of oil available for delivery. PX 303 at 2; PX 50 at 53, 61a, 61b.[39] By holding an open position rather than liquidating it, the long firm drives up the costs for holders of short positions, since there is insufficient deliverable crude to satisfy the outstanding contracts. PX 303 at 2. The large long trader then profits when he sells his remaining futures contracts at the higher price. [

] PX 311 at 2. The change in supply of a relatively small number of barrels can affect the price of WTI. PX 318 at 2.[40]

BP's increased control of the infrastructure used to deliver crude oil to Cushing increases its ability to manipulate crude oil futures, by giving BP greater information about the current and future amount of WTI available in Cushing, and greater control over the amount of WTI that

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[37]Participants in the crude oil futures market are either speculating on oil prices generally, or seeking to hedge their own crude oil production or needs elsewhere in the world. PX 307 ¶ 11; see PX 328 at 3.

[38]For example, on February 2, 2000, the "open interest," representing outstanding futures contracts on the March contract was 133 million barrels. Wall Street Journal, Feb. 2, 2000, at C-20. BP's estimate of deliverable pipeline supply plus storage is approximately [ ] million barrels of crude oil. See PX 302 at 6; PX 319 at 8; PX 330 at 2.

[39]The seller of a futures contract is called a "short," obligating the seller to make delivery in the specified month; the buyer is called a "long," obligating the buyer to receive delivery. PX 301 at 8, 9; PX 310 at 6, 8.

[40]Under CFTC and NYMEX rules, traders are not able to take a sufficiently large long position to affect a squeeze. see PX 328 at 4; see PX 306 ¶ 11. BP, however, is able to take large positions in the ordinary course of its petroleum business, because [

] PX 50 at 56, 57; PX 306 ¶ 11; PX 319 at 4.

reaches Cushing. PX 306 ¶ 11; PX 307 ¶¶ 14, 17. This merger would give BP control of significant new facilities and access to nonpublic information about the WTI supply handled by those facilities – in particular, the Seaway and Basin pipelines[41] and ARCO's Cushing in-line transfer business.[42] BP would know more than others about the amount of WTI likely to be available in Cushing for delivery, and therefore would be better able to know when and how hard to squeeze the market.[43]

ARCO operates, and owns 50% of, Seaway Pipeline, which transports up to 350 MBD of crude oil, including foreign crude oil, into Cushing from the Gulf Coast. PX 302 at 3; PX 306 ¶ 10; PX 307 ¶ 9. Because domestic onshore crude oil production is rapidly declining, the incremental barrel of oil needed to satisfy the NYMEX contract will be foreign oil. PX 307 ¶ 9. As an ARCO employee explained to a NYMEX official, foreign crude oil is also necessary to maintain liquidity of futures and prevent price squeezes. PX 311 at 4. Therefore, Seaway will increasingly become the primary source of foreign crude oil supply to Cushing. PX 70 at 12; PX 306 ¶ 10.[44]

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[41]ARCO operates Seaway, which requires shippers to nominate the amount of capacity they want to use up to 90 days in advance. PX 70 at 29. As operator, BP would manage the nominations process. PX 312 ¶ 9. BP also would have access to information about shipping volumes and types of oil coming into Cushing on ARCO's share of Basin (approximately 40 MBD). PX 302 at 3.

[42]ARCO's in-line transfer business is a means of transferring title to crude oil in pipeline transit. BP's acquisition of this business would give BP's traders information about the quantity of WTI available in Cushing, and who owns it. PX 307 ¶¶ 15, 18; see PX 70 at 51, 52.

[43][ ] PX 50 at 26, 27. [ ] PX 51 at 37.

[44]ARCO also has an approximately [ ] undivided joint interest in the Basin Pipeline (meaning that it controls the marketing of its portion of capacity), which carries crude from West Texas to Cushing at a capacity of 350 MBD. PX 302 at 3. Thus, BP and ARCO have ownership interests in all three of the major pipelines into Cushing. BP currently owns [ ] percent of overall (continued...)

After the merger, BP would succeed ARCO as operator of Seaway and continue to operate its own Amoco pipeline system. PX 312 ¶ 7; see PX 302 at 3. As operator, BP would have discretion to control all aspects of the everyday business of the pipeline, including decisions that affect the availability of capacity to ship crude to Cushing and the timing and scheduling of these shipments.[45] PX 312 ¶¶ 7, 9; PX 51 at 8.

Storage tanks holding crude oil are also a source of supply of crude oil for delivery against the NYMEX futures contract. BP is currently the largest single owner of tank storage at Cushing with [ ] percent of total capacity, and ARCO owns about [ ]. PX 302 at 6. BP would have a post-acquisition share of 42.2% of a highly concentrated market, and the top 4 firms would have 92.4%. Concentration in tank capacity, would increase by 220 HHI points, in a highly concentrated market to a post-acquisition HHI of 3128.

Effective entry would require building new pipelines and tanks to address the potential bottleneck at each level of the transportation infrastructure into and in Cushing. Apart from the doubtful incentive to undertake the enormous cost of constructing such facilities, the time required to construct pipelines, including obtaining the necessary permitting, would be considerably longer than the two-year benchmark of the *Merger Guidelines*. PX 304 ¶¶ 2, 3, 4. Thus, entry is highly unlikely to prevent competitive harm.

Thus, BP's increased control of pipeline and storage delivery capacity at Cushing would increase BP's ability to manipulate prices in the crude oil futures market, increasing the cost of using the NYMEX futures contract to hedge against adverse crude oil price movements, and

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[44](...continued)
pipeline capacity into Cushing, and ARCO currently owns [ ] percent. After the merger, BP would own 37.3 percent of pipeline capacity into Cushing. BP and ARCO currently operate the Amoco and Seaway pipelines, respectively. After the merger, BP would operate pipelines that account for 48.7 percent of total capacity into Cushing.

[45]A pipeline operator's responsibilities include scheduling of crude oil shipments; electing when to use or not use drag reducing agents (DRAs), which increase capacity by up to 10%; deciding on the timing of pipeline maintenance, which can also affect the pipeline's capacity; and determining the amount of pipeline capacity to be allocated whenever the volume of requested shipments exceeds pipeline capacity. PX 312 ¶¶ 8-11; PX 51 at 8, 15, 16, 18, 19.

impairing the functioning of this crucial market and its benefits to the petroleum industry.[46]

D. Defendants' Asserted Efficiencies Cannot Save This Transaction

The defendants asserted before the Commission that the proposed acquisition would result in significant efficiencies, but did not provide information sufficient to allow the Commission to verify these claims. The Supreme Court has stated that "possible economies cannot be used as a defense to illegality" in Section 7 merger cases. *FTC v. Procter & Gamble*, 386 U.S. 568, 580 (1967). *See also Philadelphia Natl Bank* , 374 U.S. at 371. Other courts nevertheless have held that in appropriate circumstances, a defendant can rebut the presumption that a merger "would substantially lessen competition" by proving "substantial efficiencies that benefit competition and, hence consumers," *FTC v. University Health, Inc.*, 938 F.2d 1206,1222 (11th Cir. 1991), just as the antitrust agencies consider pro-competitive efficiencies in evaluating a merger's likely competitive effect. *Merger Guidelines* § 4.0, at 18-20. All courts agree that the ultimate issue under Section 7 is whether a proposed merger is likely to lessen competition substantially in any line of commerce in any section of the country. If a merger would have such an impact, proven efficiencies, "however great, will not insulate the merger from a Section 7 challenge." *University Health*, 938 F.2d at 1222 n.29.

II. THE COURT SHOULD GRANT A PRELIMINARY INJUNCTION AGAINST BPS ACQUISITION OF ARCO BECAUSE THE FTC IS REASONABLY LIKELY TO SUCCEED ON THE MERITS AND AN INJUNCTION IS IN THE PUBLIC INTEREST

Where, as here, the Commission has demonstrated a likelihood of success on the merits, it is entitled to a preliminary injunction to preserve the Commission's ability to adjudicate the merits and order proper relief. The courts recognize the strong public interest in effective enforcement of the antitrust laws and in preservation of competition while a transaction that poses a significant competitive threat is analyzed in detail. *E.g., Warner Communications*, 742 F.2d at 1165. Although private equities may be considered in the balance, courts "must afford such concerns

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[46]A recent DOJ consent agreement involving the merger of two large grain traders reflects similar concerns. *See U.S. v. Cargill, Inc.*, C.A. No. 99CV01875 (D.D.C. 1999).

little weight, lest [they] undermine section 13(b)'s purpose of protecting the public-at-large, rather than individual private competitors." *University Health,* 938 F.2d at 1225 (*quoting National Tea Co.*, 603 F.2d at 697 n.4). *See also Warner Communications*, 742 F.2d at 1165 ("private equities alone do not outweigh the Commission's showing of likelihood of success").

Potentially illegal acquisitions must be enjoined because a combined operation can seldom be reconstituted as separate, viable entities after the acquisition is consummated. As the Ninth Circuit has held, "denial of a preliminary injunction would preclude effective relief if the Commission ultimately prevails" in a full trial. *Warner Communications*, 742 F.2d at 1165.[47] A merger that threatens to reduce competition also should be enjoined to prevent the interim harm to competition that would result even if a suitable divestiture remedy could be devised. "Later remedies cannot remove retroactively the harm that has already occurred. Courts should, therefore, prohibit consummation of a merger pursuant to Section 13(b) where serious questions are raised about its legality."[48]

The parties' efforts to resolve the concerns of the State of Alaska through the Charter should in no way affect the Court's analysis or the Commission's ability to obtain a preliminary injunction from the Court.[49] As the Supreme Court stated long ago, the very words of Section 7 suggest that competition is best protected by restoring the merger parties to their premerger status as independent competitors. *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S.

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[47] *See also Marathon Oil Co. v. Mobil Corp.*, 530 F. Supp. 315, 320 (N.D. Ohio 1981) ("no satisfactory method exists that would restore Marathon to its present competitive position in the marketplace. The disruption of a business the size of Marathon cannot be ignored even in light of the remedy of divestiture").

[48] *FTC v. Bass Bros. Enters.*, 1984-1 Trade Cas. (CCH) ¶ 66,041 at 68,622 (N.D. Ohio 1984).

[49] *Consolidated Gold Fields, PLC v. Anglo American Corp.*, 698 F. Supp. 487, 502 (S.D.N.Y. 1988) (defendants' "announced intention" or promise to divest certain properties after the takeover "should properly be accorded no weight in a preliminary injunction hearing"), *aff'd in part and rev'd in part on other grounds,* 871 F.2d 252 (2d Cir. 1989); *Chemetron Corp. v. Crane Co.*, 1977-2 Trade Cas. (CCH) ¶ 61,717, at 72,930 (N.D. Ill. 1977) (settlement offer of divestiture properly considered "only if it appears that the divested business will continue as an independent entity whose competitive position in the newly structured market is comparable to or better than its predivestiture position").

316, 329 (1961) (holding that 'the undoing of the acquisition is a natural remedy"). The Charter proposes a divestiture of only half the assets giving rise to competitive problems, and permits BP to add to its existing dominant share of ANS crude oil supply. The Commission has the statutory right and authority to conduct a plenary review of the transaction and, if appropriate, to order BP not to acquire any part of ARCO in the relevant markets.[50] A preliminary injunction is the proper route to protecting that authority.[51]

CONCLUSION

For the foregoing reasons, the Court should grant the Commission's request for a preliminary injunction.

Respectfully submitted,

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Dated: February 4, 2000

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[50]The Commission has been given considerable discretion in crafting remedies for illegal mergers, and such orders are affirmed on appeal when supported by "substantial evidence." *See Olin Corp. v. FTC*, 986 F.2d 1295, 1307 (9th Cir. 1993).

[51]*See California v. American Stores Co.*, 495 U.S. 271, 295-96 (1990) (finding that California may seek more divestitures than FTC had obtained in consent agreement).

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, vs. BP AMOCO p.l.c., and ATLANTIC RICHFIELD COMPANY, Defendants.	Case No.: 00-00416 SI (Related to C 00-00420 SI) **SUMMARY OF ARGUMENT AND EVIDENCE RE: DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** **DATED: MARCH 1, 2000**

Introduction

The Federal Trade Commission has asked this Court to enjoin the closing of the merger between BP Amoco p.l.c. and ARCO. The European Commission approved the transaction in September, 1999.[1] The State of Alaska, with its wealth of expertise and great interest in the matter, also investigated the merger, negotiated the Charter agreement, and has intervened in support of the transaction. The FTC, however, is attempting to frustrate this global merger with a fatally flawed attack that ignores well established case law, the FTC's own Horizontal Merger Guidelines and its own prior practice.

Contrary to the FTC's claims, the merger between BP Amoco and ARCO, as announced on April 1, 1999, will benefit competition worldwide and in the United States, both in Alaska and in the lower 48 states. It will not substantially lessen competition nor tend to create a monopoly in any relevant market.

Count I

The FTC cannot demonstrate a lessening of competition in crude oil sales to West Coast refiners for several key reasons. First, BP Amoco and ARCO do not compete in the U.S. West Coast states. BP Amoco sells Alaska crude oil in those states; ARCO does not. ARCO sells refined products in those states; BP Amoco does not. BP Amoco in Alaska produces crude oil to sell to others; ARCO in Alaska produces crude oil for its own refineries. Indeed, ARCO is a net buyer of crude oil from other sources because it does not have enough to supply its West Coast refining needs. (Defs.' Brief, § I(D))

Even if BP Amoco and ARCO competed in the sale of crude oil, which they do not, the FTC's allegations fail from the first key step of proper merger analysis: the definition of relevant market. The worldwide sale of crude oil is the relevant market. Expert economic and industry evidence, the evidence of the parties' own witnesses, and the parties' documents all demonstrate that Alaska Norht Slope crude oil sold into the West Coast is part of a worldwide market for the sale of crude oil. Indeed, the State of California has admitted it is part of an integrated world oil market.[2] (*Id.* at § I(A))

BP Amoco's refinery customers are sophisticated buyers who know market conditions, know what alternate crude oils are available from around the world, know what competitive prices are for those crude oils, and know how to negotiate contracts that reflect those facts. BP Amoco's conduct in selling to long-term customers, in selling on the spot market, and in selling some of its ANS crude oil to the Far East is lawful, rational profit maximizing competitive conduct like that of numerous others in a competitive worldwide crude oil market. (*Id.* at § I(A))

The FTC also fails to follow its Guidelines in claiming that ARCO is a competitor or potential

competitor in the sale of ANS crude oil. The FTC confuses, apparently deliberately, different economic activities. It repeatedly refers to "production" in arguing ARCO's alleged competitive position on the West Coast, but crude oil production is not a relevant market. Secondly, the FTC fails properly to recognize that ARCO's ANS production is used in its own refineries. Under the Commission's Guidelines such committed captive production is not part of the relevant crude oil sales market. Indeed, in the last major case in which the FTC sought to enjoin a merger, Dr. Carl Shapiro, the BP Amoco/ARCO expert economist here, testified on behalf of the FTC. His opinion there for the FTC was that captive supply should not be included in market calculations, a position adopted by the Court.[3] That same rule applies here. (*Id.* at § I(D-E))

Count II

The FTC's claim that the merger will impair competition for oil and gas exploration leases in Alaska is also wrong. Again proper analysis shows that this merger does not raise antitrust concerns. There will be no reduction in output -- the amount of acreage put up for bid -- or in crude oil production as a result of the merger. Total revenues to Alaska and to the federal government from leasing for exploration will increase, not decrease, after the merger. The FTC's claim that the merger will allow the combined BP Amoco/ARCO to exclude competition in lease bidding is wrong. (*Id.* at § II)

Section 7 of the Clayton Act deals in probabilities, not ephemeral possibilities. The law establishes proper ways to analyze a Section 7 claim. The FTC apparently has decided that in this case the normal steps in the analysis should be ignored. The reason is clear. Under proper analysis, the FTC cannot demonstrate a likelihood of succeeding on its theory that the proposed transaction is likely to lessen competition in the sale of crude oil on the West Coast or in bidding for leases on the North Slope. (*Id.* at § I(E), II)

The Alaska Charter And New Long Term Contracts

Eight months after announcement of the merger, BP Amoco and ARCO agreed to contracts that will alter the way the merger will be implemented. As previously briefed, the Court must take into consideration the effect of the Alaska Charter and new long-term supply contracts to refiners in assessing the competitive effects of this transaction. The Charter with Alaska obligates BP Amoco, immediately upon the merger, to divest 175,000 barrels per day of production of ANS crude oil, to provide transportation assets, to sell hundreds of thousands of exploration acres, to make available seismic data, and to provide access to North Slope facilities and infrastructure. The long-term supply contracts assure 140,000 barrels per day to West Coast refiners that are substantial users of ANS oil. These transactions enhance the pro-competitive effects of the merger as it will be implemented. (*Id.* at §§ I(G); II(B))

Count III

The FTC's complaint that the merger would increase BP Amoco's ability to manipulate WTI oil futures markets for trading at Cushing, Oklahoma, raises alarms that are unfounded in fact and that are not properly the concern of the antitrust laws. The FTC has not adequately alleged nor attempted to prove any viable theory of adverse competitive effects resulting from this merger. The acquisition of ARCO assets, including the interests ARCO owns in the Seaway and Basin pipelines, crude oil storage tanks and pipelines in Cushing, and the ARCO in-line transfer business will not enhance BP Amoco's alleged ability to exercise market power. Moreover, the conduct feared by the FTC is not an antitrust harm and is fully regulated by other entities, including the Commodity Futures Trading Commission, the Federal Energy Regulatory Commission, and the New York Mercantile Exchange. Here, again, the FTC fails to act in this case as it does normally in analyzing mergers; the FTC regularly recognizes other regulations

and assumes that companies will abide by those regulations. (*Id.* at III)

Finally, the FTC's manipulation specters are not ground to enjoin this worldwide transaction. The Cushing issue is a very small matter, involving less than 1/2 of 1% of the companies' combined assets. Divestiture after closing of the few ARCO assets in dispute easily could be accomplished. It is not necessary, however. Following through on assurances made to the FTC in meetings starting last November, BP Amoco/ARCO will have in place prior to the hearing definitive agreements to sell the ARCO assets at Cushing. Accordingly, BP Amoco will never have any interest in or control over the assets the FTC claims it should not acquire. (*Id.* at §§ III, V)

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In addition to the FTC's failure of proof, the closing of this merger should not be enjoined because the transaction will result in significant efficiencies which will be threatened by delay of the closing. As announced last April, the broad strategic purpose of this merger is to strengthen the worldwide competitive position of the merged BP Amoco/ARCO. That purpose will be accomplished by strengthening BP Amoco's competitive position in West Coast refining and marketing, in Asian natural gas production, and by eliminating substantial duplication of operations and activities between the companies in Alaska. Approximately $1 billion annually in pro-competitive efficiency savings were identified; approximately 80% of these outside of Alaska. Because of the Alaska Charter, approximately $60 million of the projected efficiencies in Alaska will not be achieved. Outside Alaska, the more than $800 million in efficiencies targeted worldwide remain. (*Id.* at § IV)

The equities, both public and private, weigh heavily in favor of closing this transaction without delay. Insecurities and uncertainty in Alaska, permanent losses in revenues to Alaska, the U.S. Government, and others because of delay in achieving increased production, loss of expected efficiencies and injury to employees and shareholders of the defendants will occur if closing is delayed. (*Id.* at § V)

The public interest will be served by denying the request for preliminary injunction and allowing the merger to close and the committed transactions to proceed.

DATED: March 1, 2000

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[1]On September 29, 1999, the Competition Directorate of the European Commission approved the transaction subject only to BP Amoco divesting a few, small gas infrastructure assets in the southern North Sea.

[2]Regional Petroleum Product Reserve Feasibility Study, California Energy Commission (Dec. 1993) at vii, 37-38 (DX 468)

[3]FTC v. Cardinal Health, Inc., 12 F. Supp.2d 34, 48 (D.D.C. 1998)

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

BP AMOCO, P.L.C.,

and

ATLANTIC RICHFIELD COMPANY,

Defendants.

[Public Version]

Civil No. C 00 0416 (SI)
Consolidated Case No. C 00 0420

STATE OF ALASKA'S OPPOSITION TO FTC'S MOTION FOR PRELIMINARY INJUNCTION PURSUANT TO SECTION 13(b) OF THE FEDERAL TRADE COMMISSION ACT

Date: March 20, 2000
Time: 9:00 a.m.
The Honorable Susan Illston

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I. INTRODUCTION

The State of Alaska ("State" or "Alaska") opposes the extraordinary relief sought by the Federal Trade Commission ("FTC" or "Commission") in this case: a preliminary injunction blocking the pro-competitive merger of BP Amoco, P.L.C. ("BP") and Atlantic Richfield Company ("ARCO"). In addition to the reasons advanced by BP Amoco and ARCO, Alaska here sets forth its own reasons — which, as this Court already has recognized, it is uniquely capable of stating — why the injunction sought by the FTC cannot be granted.

The FTC alleges that the proposed merger of BP Amoco and ARCO will violate Section 7 of the Clayton Act. FTC Complaint ¶ 12. Specifically, the FTC alleges that the proposed merger is likely to substantially lessen competition (i) in bidding for leases on Alaska's North Slope; and (ii) in the production and sale of Alaskan North Slope ("ANS") crude oil to a "targeted" set of refiners on the West Coast. FTC Complaint ¶¶ 26, 36; FTC Memorandum of Points and Authorities in Support of FTC's Motion for a Preliminary Injunction ("FTC Mem.") at 14 l. 15-20. The FTC does not allege, let alone seek to prove, any impact on consumer welfare, *i.e.*, retail gasoline prices.

Moreover, in asserting these claims, the FTC ignores the "Charter for Development of the Alaskan North Slope" (the "Charter") (attached hereto as Exhibit 1), a contract executed among Alaska, BP Amoco, and ARCO, that substantially modifies the original Agreement and Plan of Merger between BP Amoco and ARCO. The Charter cannot, however, be disregarded. It is essential to the analysis. The Charter lowers barriers to entry and ensures enhanced competition such that the FTC cannot succeed on the merits of its Section 7 claims. The Charter also ensures increased efficiencies in the production and distribution of crude oil, maintains BP Amoco's presence in Alaska, and bolsters the Alaskan economy and the social welfare of its citizens. Consequently, in addition to the increased competition which the proposed merger will provide, the equities decidedly weigh against blocking the merger. Given that the FTC cannot succeed on the merits and that the equities heavily favor denying injunctive relief, the FTC can raise no "substantial question" warranting a preliminary injunction. *See FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984). On the other hand, a preliminary injunction will likely end BP Amoco's acquisition

efforts. *See, e.g., Federal Trade Commission v. Staples, Inc.*, 970 F. Supp. 1066, 1093 (D.D.C. 1997).

For these reasons, the FTC has failed to discharge the burden cast upon it by § 13(b) of the FTC Act, and its request for injunctive relief should be denied. This Court should allow BP Amoco and ARCO to consummate the proposed merger, as modified by the Charter.

II. ALASKA'S PERTINENT BACKGROUND FACTS

A. ALASKA'S EXPERIENCE WITH OIL PRODUCTION AND DEVELOPMENT

Since Statehood, the economic history of Alaska has been inextricably linked to the development of its oil resources. Alaska lands contain rich reservoirs of oil and natural gas. The nation's two largest oil fields, the Prudhoe Bay (discovered in 1968) and Kuparuk River (discovered in 1969) fields operate under leases from the State. Charter at 1.

Article VIII of the Alaska Constitution requires the State "to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest." Alaska Const., art. VIII, sec. 1. To that end, Alaska's Commissioner of Natural Resources has leased hundreds of thousands of state acres to spur future oil exploration and development. The State also regulates oil exploration and production and receives compensation for the exploitation of its resources from royalties and severance taxes.[1] "Oil has been Alaska's most important industry." Declaration of Commissioner Wilson Condon ("Condon Decl.") (attached hereto as Exhibit 2) at 3. The oil industry in Alaska — which generates 76 % of unrestricted state revenues — provides many private sector jobs and opportunities for Alaskans. *Id.* at 3. There is no question that Alaska's economy is petroleum dependent.

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[1] Alaska reserves a royalty share of the oil that is produced from State lands. AS §§ 38.05.135-38.05.181 (1999). It also levies a production tax, AS § 43.55.011 (1999), and corporate income tax, AS § 43.20.072 (1999), on the petroleum industry. One measure of the State's knowledge is the State's investment over the past twenty years of more than $100 million dollars in expert and other litigation costs concerning the proper valuation of ANS oil and determination of reasonable rates for its transportation.

The environment for developing and producing oil and gas in Alaska, however, is challenging. One of the most important factors affecting the total amount of oil and gas resources that may be recovered from Alaska's North Slope is the cost of development. This greatly affects the competitiveness of Alaska in attracting capital commitments from qualified developers worldwide. In addition, Alaska's harsh climate and the environmental sensitivity of the areas in which ANS crude oil is developed and transported impacts the production of North Slope resources.

Moreover, production of ANS crude oil has declined, and continues to decline, dramatically. The largest oil fields on the North Slope — Prudhoe Bay and Kuparuk — are aging. Oil production from Alaska's North Slope was at its peak in 1988, totaling approximately 2.1 million barrels per day ("mmbd"). Production fell to 1.8 mmbd in 1991, 1.6 mmbd in 1994, and 1.4 mmbd in 1997. Now, a little over 1 million barrels of oil are produced each day. Indeed, Alaska's Commissioner of Revenue Wilson Condon reported that fiscal year 1999 was the worst year for state oil revenue since fiscal year 1979. Condon Decl. at 3-4.

Over this period of precipitous decline in Alaska's oil industry and the revenue it generates, Alaska's population has grown steadily. The decline of Alaska's most important industry has critical implications for the State's continued economic viability. As Commissioner Condon states:

> Alaska — unlike the FTC or the other States involved in this proceeding — is fighting for its survival, and the single most critical factor in this fight in the health and competitiveness of Alaska's oil and gas industry. As Alaska's fields dry up, BP Amoco and ARCO can look elsewhere in the world for new oil opportunities; Alaska cannot.

Condon Decl. at 4. Alaska's future depends upon a healthy and competitive oil industry in the State that can compete against other sources of world crude oil across the globe.

Given Alaska's interest in maintaining and enhancing competition on the North Slope, the announcement of BP Amoco's proposed acquisition of ARCO had tremendous significance. The merger would combine the two major participants in the development of Alaskan oil resources. Alaska Governor Tony Knowles emphasized that it was critically important to maintain a competitive environment in Alaska. As Commissioner Condon describes:

> The Governor's primary emphasis on maintaining and invigorating competition on the North Slope was the lodestar of our negotiations with BP and ARCO. We understood that the basic framework of the international oil industry had changed, that ARCO was not likely to stay independent and thus could not be counted on to be the competitive force in Alaska that it had in the past, and that, as a consequence, [Alaska] had to create a package of incentives to attract at least one new vigorous competitor to the remaining opportunities on the North Slope.

Condon Decl. at 8 Indeed, in Alaska's view, the proposed merger offered the State a unique chance to maintain and invigorate competition on the North Slope and thereby slow the industry's decline. Condon Decl. at 13

With these principles in mind, the Governor appointed a cabinet level team to review the proposed merger and its implications for Alaska.[2] The State commenced a lengthy antitrust investigation.[3] A.S. § 45.50.590. Alaska evaluated the potential impact of the proposed merger in six areas including: (i) valuation of ANS crude oil; (ii) marine transportation, (iii) operation of the Trans-Alaska Pipeline System ("TAPS"), (iv) further development and exploration of North Slope facilities and fields, (v) natural gas development, and (vi) current and future leasing of acreage on the North Slope for oil and gas development. The State retained experts in petroleum economics, antitrust law, pipeline transportation and oil and gas industry development to understand the implications of the proposed merger. The Governor and members of the cabinet team interviewed representatives of major oil companies about their roles in the recovery of Alaska's oil and gas resources post-merger.

After its investigation, Alaska concluded that there was potential for both benefit and risk to the State in the merger as initially proposed. Alaska determined that the merger would yield

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[2] The State's investigatory team was composed of cabinet-level officials, including the Commissioner of the Department of Natural Resources, the Commissioner of the Department of Revenue, the Special Counsel to the Governor and the Attorney General.

[3] The State also coordinated, as appropriate, its eight month long independent investigation with the parallel investigations of the FTC, California, Oregon and Washington. Attorney General's Report on the Charter for Development ("AG Report") (attached hereto as Tab E of Exhibit 2) at 3. The State, like the FTC, examined the possible anticompetitive effects of the proposed merger.

increased efficiencies and synergies which make Alaska more attractive to explorers and producers in the global oil marketplace. Therefore, the overarching issue for Alaska was what would it take to attract new players to Alaska to participate aggressively on the North Slope. Condon Decl. at 9 Any solution required that new entrants obtain the "critical mass" necessary to be an effective participant on the North Slope.

To achieve these goals, the State sought a solution that would both (i) enhance competition in Alaska post-merger, thereby seizing the opportunity presented by the merger of BP Amoco and ARCO, and (ii) preserve the merger's efficiencies and their great benefits. After months of negotiation with BP Amoco and ARCO, a solution was found, which is embodied in the contract called the Charter.

B. THE CHARTER FOR THE DEVELOPMENT OF THE ALASKAN NORTH SLOPE

Alaska, in an exercise of its sovereign law enforcement authority, required BP Amoco and ARCO to modify their proposed merger under the terms of the Charter. After a public notice and comment process, BP Amoco, ARCO and Alaska executed the Charter on the December 2, 1999 and have moved forward to implement its requirements.[4]

The Charter is not a mere compromise of private interests. Rather, it is an agreement entered into by the State Attorney General only after an exhaustive antitrust investigation of the proposed merger. A.S. §§ 44.23.020, 45.50.576 and 45.50.480. As a state law enforcement mechanism, the Charter ensures that, post-merger, Alaska has protected its interests in (i) the promotion of exploration and development of crude oil; and (ii) vigorous competition in these activities.

In the Charter, the State expressly conditioned its support for the proposed merger on BP Amoco and ARCO making substantial, competition promoting marketplace commitments. Specifically, and most significantly, the Charter mandates the divestiture of a substantial portion of BP Amoco's and ARCO's Alaskan assets including:

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[4] Significantly, the Charter is not conditioned on FTC approval, and is enforceable under Alaska law. Charter at 13, V.B.

(1) 175,000 barrels per day of ANS oil production;

(2) a majority of the Kuparuk River oil field;

(3) at least 40% of the new Alpine oil field;

(4) a corresponding share of interests in the TAPS and connecting feeder pipelines;

(5) 400,000 acres of undeveloped state leases, and

(6) 220,000 acres of undeveloped federal leases within the National Petroleum Reserve ("NPRA").

Charter at 2, I. A.-C. Additionally, the Charter requires that BP Amoco and ARCO must resign as operators of the Kuparuk and Alpine oil fields. BP Amoco and ARCO also are required to make their proprietary North Slope seismic and well data available for purchase to any company seeking to explore the North Slope.[5] *Id.* at 3, I.D. Further still, the Charter obligates BP Amoco and ARCO to divest any marine tankers that are surplus to the merged entity's requirements (but does not force divestiture of particular tankers.)[6] Charter at 5.

Collectively, the elements in the Charter create a package of opportunities and incentives carefully designed to lower barriers to entry and attract at least one new vigorous competitor to the remaining opportunities on the North Slope. Condon Decl. at 9-10. As Commissioner Condon explains:

> A key to understanding what the Charter does is the linkage among these divestitures. The Charter establishes packages of linked assets that will be divested to a Company A and Company B, though it is

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[5] In addition to these competitive benefits, the Charter also sets forth various community commitments undertaken by BP and ARCO affecting Alaska's environment and the educational and employment opportunities for Alaskans. Charter at 7, II.-III.

[6] As Commission Condon explains:

> [F]or cost and environmental reasons, potential new operators did not want us to be telling them which tankers they had to buy, and we did not want to force purchasers to acquire vessels they did not want when there was no compelling antitrust rationale for doing so.

Condon Decl. at 16.

> acceptable if one company seeks both the A and B assets. Financial qualifications are established for each asset set to ensure that the companies have the size and experience to be vigorous competitors.
>
> Company A will be the competitor with the larger share of BP/ARCO assets. It receives at least 125,000 barrels per day of gross working interest production. In simple dollar terms, at current prices, this is more than one billion dollars per year of oil. In addition, the merging parties must surrender to Company A a majority interest in the Kuparuk River field, the nation's second largest field. BP/ARCO must resign as operator of that field and take steps to ensure that Company A becomes the operator of the field. Company A receives a minimum of 75,000 acres of unexplored state lands and, with Company B, must receive a total of 250,000 acres of these lands. In addition, the package of divested lands must fall within identified "play fairways" so that the buyer receives a rationally integrated assemblage of lands.
>
> For federal lands, a similar requirement is established. Two hundred and twenty thousand acres of lands in the National Petroleum Reserve must be divested. Company A or Company B must receive not less than 100,000 net NPRA acres, with at least a strict majority of the merging parties' combined interests in one of three identified sections of the NPRA. In addition, BP/ARCO must work to ensure that the company is the exploration operator of that section. Similar requirements are established with respect to the exploration operatorships of state lands.

Condon Decl. at 11-12.

Not only does the Charter establish a foundation for a new entrant in existing production and transportation, but it also makes available to such a new player significant amounts of promising but undeveloped oil lands. The Charter-mandated divestitures and other remedies ensure that a new company will be well situated to replace the loss of ARCO as a meaningful competitor in lease bidding. Because of its linked packages of assets, more new entrants will successfully leapfrog barriers to entry and become aggressive participants in Alaska's oil industry. Because of the Charter, the proposed merger creates a more competitive environment for oil exploration, production, and development than would exist in the absence of the merger.

III. ARGUMENT

A. THE CHARTER IS ESSENTIAL TO THE PRELIMINARY INJUNCTION ANALYSIS REQUIRED HERE

The FTC's motion for a preliminary injunction is significant mostly for what it lacks: a true analysis of why the proposed merger, as modified by the Charter, is likely to have anti-competitive effects. Because of the Charter, the merger creates a more competitive environment for oil exploration, production, and development than would exist in the absence of the merger. In addition to its other benefits, the Charter is specifically designed to be a pro-competitive solution to the issues raised in the FTC Complaint. The FTC has not shown otherwise.

Instead, the FTC repeatedly attempts to preclude consideration of the Charter.[7] The FTC argues that the "parties' efforts to resolve the concerns of the State of Alaska through the Charter should in no way affect the Court's analysis or the Commission's ability to obtain a preliminary injunction from the Court." FTC Mem. at 23, l. 16-18. There is nothing in law or logic to support such a proposition. The Charter is directly relevant to the structure of the merger and its likely competitive effects, and, therefore, it cannot be ignored.[8]

First, this case does not concern the FTC's authority to challenge the proposed merger of BP Amoco and ARCO. Alaska has never questioned the FTC's statutory right to seek a preliminary injunction in this case under § 13(b) of the FTC Act. Rather, Alaska responds on the merits to the FTC's antitrust allegations and request for equitable relief. Alaska's position is simple: the proposed

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[7] For example, in its Opposition to Alaska's Motion to Intervene, the FTC mischaracterized the State's position as contending that the Charter: "preclude[s] the Commission from enforcing the antitrust laws" FTC's Opposition to Alaska's Motion to Intervene at 5, "preempts action by the Commission" *id.*, "trump[s] the federal antitrust laws, or otherwise justif[ies] an anticompetitive merger" *id.* at 6, or "constitutes a defense to the Commission's claims against them." *Id.* at 10.

[8] California, Oregon and Washington take the same position, suggesting that "the Alaska Charter, which provides only incomplete relief, is irrelevant to the matter before this Court [and] should be disregarded in reviewing this motions [sic] for a preliminary injunction." Plaintiffs' Memorandum of Points and Authorities in Support of Motion for a Preliminary Injunction at 14. Like the FTC, these States are simply wrong. The terms of the Charter are relevant in evaluating the effect that the merger will have on competition in oil markets, production, and exploration.

merger, as modified by the Charter, is pro-competitive and critical to Alaska's economic survival and therefore, should not be blocked.

Second, the potential effect of the merger cannot be evaluated properly without regard to the Charter. In this proceeding, the Court is asked to make a "predictive judgment" about the proposed merger's potential impact on competition. *See California v. Sutter Health System,* 2000 WL 194832 * 8 (N.D. Cal. 2000) (Chesney, J.) (denying preliminary injunction). For the FTC to obtain the equitable relief it seeks, it "must show a reasonable probability that the proposed transaction would substantially lessen competition in the future." *FTC v. University Health*, 938 F.2d 1206, 1218 (11th Cir. 1991); *see also FTC v. Staples*, 970 F.Supp. 1066, 1072 (D.D.C. 1997). Indeed, as the FTC concedes, "[Section 7] requires [this Court to make] a forward-looking assessment." FTC Mem. at 6, l. 6.; *accord United States v. General Dynamics,* 415 U.S. 486, 498 (1974) (in Section 7 cases, courts must analyze "the particular market — its structure, history and probable future").

There is no question that a court cannot evaluate "the probability of anti-competitive effects in a vacuum." *United States v. Atlantic Richfield Co.,* 297 F.Supp. 1061, 1066 (S.D.N.Y. 1969). Instead, this Court must review a proposed transaction as it will be implemented, including, of course, agreements that alter the original transaction by providing for the divestiture of assets. *See, e.g., FTC v. Butterworth Health Corp.,* 946 F. Supp. 1285, 1298-1303 (W.D. Mich. 1996) (denying preliminary injunction after considering a "community commitment" entered into by merging hospitals to freeze prices for certain number of years post-merger).[9]

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[9] Federal courts consistently held that it is proper to consider evidence of divestiture agreements or other actions taken to increase the pro-competitive effects of a proposed merger. *See Procter & Gamble Co. v. Federal Trade Comm'n*, 358 F.2d 74, 82-3 (6th Cir. 1966) ("where the evidence [of post-merger conditions] is obtained, it should not be ignored"), *rev'd on other grounds, Federal Trade Comm'n v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *United States v. Connecticut Nat'l Bank*, 362 F. Supp. 240, 282 (D. Conn. 1973) (the court "must view the proposed consolidation as a complete picture; the divestiture is an intrinsic aspect of the merger"), *vac. on other grounds*, 418 U.S. 656 (1974); *United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061, 1068 (S.D.N.Y. 1969) ("no merit" to government's argument that court should ignore post-merger divestiture). Indeed, one court vacated its own preliminary injunction after the merging companies presented evidence of a new divestiture agreement. *See White Consolidated Ind. v. Whirlpool Corp.*, 619 F. Supp. 1022, 1027-8 (N.D. Ohio, 1985), *aff'd*, 781 F.2d 1224 (6th Cir. 1986). These cases make clear that this

As described above, the Charter has modified significantly the original Plan and Agreement of Merger between BP Amoco and ARCO. The Charter-mandated divestitures and other remedies modify the very holdings to be acquired in this transaction. Post-merger, BP Amoco will not own the same property and rights that it would have owned if its merger agreement with ARCO had proceeded without the Charter. The rights and obligations specified in the Charter are now "part and parcel of the merger agreement" between BP Amoco and ARCO. *United States v. Connecticut Nat'l Bank*, 362 F.Supp. 240, 283 (D. Conn. 1973), *vacated on other grounds*, 418 U.S. 656 (1974) (defendant's divestiture agreements were "an inseparable and relevant element of the entire proof on likely competitive effects").

In its motion for a preliminary injunction, however, the FTC simply ignores the Charter and examines the state of competition post-merger as if the Charter did not exist. Nowhere does the FTC acknowledge or even consider the effects on competition of the significant divestitures and other remedies required under the Charter. And nowhere does the FTC address the significant benefits to the State and, in fact to the entire Nation, of the efficiencies anticipated by the proposed merger, as modified by the Charter — even though such factors bear directly on the balance of equities at issue in this case. Although the Charter completely changes the post-merger world, the FTC has decided that the Charter should not affect the FTC's — or this Court's — analysis.

B. THE FTC CANNOT SHOW THAT IT IS LIKELY TO SUCCEED ON THE MERITS

Section 13(b) of the FTC Act "was not enacted to authorize automatic preliminary injunctions." *FTC v. Great Lakes Chemical Co.*, 528 F.Supp. 84, 99 (N.D.Ill. 1981). To prevail under § 13(b), the FTC must make a "proper showing" that a preliminary injunction is in the public interest. 15 U.S.C. § 53 (1998). The FTC must demonstrate: (1) a likelihood of success on the merits in its case under Section 7 of the Clayton Act; and (2) that the equities tip in favor of injunctive relief. *See FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984); *see*

Court should review all evidence available "at the time of suit," *see United States v. E.I. DuPont de Nemours & Co.*, 353 U.S. 586, 607 (1957), and measure the effect on competition on that basis.

also, FTC v. Staples, Inc., 970 F.Supp. 1066, 1071 (D.D.C. 1997). The Commission meets its burden only if it "raise[s] questions going to the merits *so serious, substantial, difficult and doubtful* as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Warner Communications,* 742 F.2d at 1162 (emphasis added).

Section 7 of the Clayton Act does not condemn all mergers, only those having "demonstrable anti-competitive effects." *Brown Shoe Co. v. United States*, 370 U.S. 294, 319 (1962). Section 7 "deals with clear-cut menaces to competition and not with ephemeral possibilities." *United States v. FMC Corp.*, 218 F. Supp. 817; 823 (N.D. Cal. 1963), *appeal dismissed*, 321 F.2d 534 (9th Cir.). Here, the FTC does not make a "proper showing" under §13(b) because it cannot — the proposed merger, as modified by the Charter, enhances competition in bidding and leasing in Alaska and in the production and distribution of ANS crude oil downstream.

1. Because of the Charter, the Proposed Merger Will Not Lessen Competition in the Production and Distribution of Crude Oil

Based on more than a quarter century of experience with the ultimate markets for Alaskan oil, Alaska can find no support for the FTC's allegations in Count I that the merger would negatively impact competition in the production and distribution of ANS crude oil to West Coast refiners. FTC Complaint at ¶¶ 18-31. Once the relevant product and geographic markets are defined, it is clear that the proposed merger could not create the alleged anti-competitive effects.

First, the FTC's proposed market definition — crude oil used by "targeted" West Coast refiners — is not based on accurate facts and is not relevant for purposes of analyzing this transaction. FTC Mem. at 7, l.8-10. The FTC bases its purported market definition on the fact that BP Amoco charges different prices to different buyers of its ANS crude oil. To be sure, BP Amoco sells to about [ ] different customers on the West Coast, and there is currently a range of about

[ ]/bbl from the highest to the lowest price.[10] *See* Expert Report of Dr. Jeffrey J. Leitzinger ("Leitzinger Report") (attached hereto as Exhibit 4) at 14. But pricing differences, without more, is largely meaningless.[11] It does not define a relevant market or support the notion that BP Amoco exercises market power within such a market. Leitzinger Report at 14.

In the relevant product and geographic markets, it is clear that BP Amoco currently does not exercise market power and would be unable to exercise the alleged market power post-merger. The proper market for analyzing any potential anti-competitive effect of this transaction on West Coast refiners is the worldwide market for crude oil.[12] *See generally* Expert Report of Carl Shapiro at 5; *see also* Leitzinger Report at 8. This is consistent with the actual sources of supply for West Coast refiners. Leitzinger Report at 6. The available substitute supply of imported oil would simply swamp any effort by BP Amoco to exercise market power. *Id.* at 10. Refiners also, through a variety of means, could readily substitute other crudes if BP Amoco attempted to raise the price for ANS above competitive levels. *Id.* at 8.

Second, the FTC's conclusion that BP Amoco's acquisition of ARCO would eliminate constraints on BP Amoco's alleged market power is without foundation. FTC Mem. at 11. The FTC's analysis is misguided. BP Amoco's acquisition of ARCO is not likely to reduce competition in the sale of crude oil to West Coast refiners because BP Amoco and ARCO have never been

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[10] This range of prices is largely unremarkable. For example, a comparison of price variation for the benchmark crude WTI performed by Dr. Leitzinger reveals that prices vary by $.50 - $1.00/bbl within a week and up to $3.00/bbl within a month. Leitzinger Report at 18. Similarly, price variations are observed in commodity markets for natural gas that are widely regarded as competitive. *Id.*

[11] Indeed, price differences can be expected, for example, as a result of varying transportation and transaction costs. Leitzinger Report at 15-17.

[12] The behavior of prices on the West Coast for ANS crude confirm that ANS is part of a worldwide market. Leitzinger Report at 7, 10. Over the past four years, ANS prices on the West Coast have been at worldwide parity with West Texas Intermediate Crude ("WTI"), a widely recognized benchmark for crude oil price limits in the world generally. *Id.* at 7. This is true even though ANS shipments on the West Coast have declined by 200 mbd, nearly 67 % of BP Amoco's current sales level. *Id.* at 7, 10. If ANS were not part of the worldwide crude oil market, then ANS prices likely would have risen.

competitors in sales of ANS crude oil to the West Coast. Leitzinger Report at 11. BP Amoco is a producer of ANS crude oil and has no refineries on the West Coast. All of the production it ships to the West Coast is sold to third parties, known as "merchant sales." *Id.* at 6. ARCO, by contrast, is an integrated producer/refiner/marketer that uses its ANS production to supply its own refineries. Since 1996, ARCO has been a net merchant buyer, not a merchant seller, of ANS. Moreover, it is not reasonable to expect that, in the absence of the merger, ARCO would have become a surplus crude owner, and therefore, a significant merchant seller of surplus. It is also unreasonable to expect that, but for the proposed merger, ARCO would become a competitor to BP Amoco by selling ANS. Thus, BP Amoco's acquisition of a non-merchant producer makes no impact whatsoever on merchant production and sales.

Even if these allegations were to withstand scrutiny — and they cannot — the Charter has modified the proposed merger so as to ameliorate any and all concerns raised by the FTC about the merger's downstream effects.

Because of the Charter, BP Amoco's role as a seller of ANS crude oil on the West Coast will shrink post-merger. Leitzinger Report at 13. As noted above, ARCO is not a merchant seller of ANS crude oil and is not likely to ever become such a seller. Even if, hypothetically, ARCO would have sold some of its ANS crude oil on the merchant market, the Charter requires BP Amoco to divest far more oil than ARCO could ever be expected to sell to West Coast refineries. Specifically, the Charter mandates immediate release from BP Amoco's or ARCO's control, a supply of 175,000 barrels per day of North Slope oil production. Charter at 2, I.A. As a result of this divestiture, BP Amoco's available "merchant volume" will decline by 55% of its pre-merger merchant sales capacity. Leitzinger Report at 14.

The Charter also ameliorates the FTC's concern — albeit unfounded — that new entry into the production and distribution of ANS crude oil to targeted refiners is unlikely to occur. FTC Mem. at 13. To be sure, ease of entry is critical to a prospective new player's ability to compete meaningfully on the North Slope. The Charter has identified and addressed this very concern. The

merger, as modified by the Charter, requires BP Amoco and ARCO to establish a foundation for a new entrant in existing production and transportation. The Charter also makes available to such a new player significant amounts of promising but undeveloped oil lands. Post-merger, barriers to entry such as those described by the FTC, will be minimized significantly.

Accordingly, the FTC has failed to meet its burden of proof. There is no basis to conclude that the proposed merger would lessen competition in the production and sale of crude oil to West Coast buyers.

2. Because of the Charter, the Proposed Merger Will Not Lessen Competition in Bidding for ANS Exploration Leases

Alaska, which clearly has the most at stake in this case, also can find no support for the FTC's allegations in Count II that the merger would negatively impact competition in bidding for leases on the North Slope. FTC Complaint ¶¶ 32-37; *see* Condon Decl. at 2. Specifically, the FTC contends that the merger will reduce (i) "the amount of money received in future lease sales, to the detriment of the State of Alaska and the Federal government" and (ii) "long-term exploration, development, and production on the North Slope." FTC Mem. at 14, l.17-18. Having identified and resolved these very concerns, Alaska disagrees.

First, the FTC's concern that Alaska and the Federal government will be impacted detrimentally by the reduction of revenue received in future lease sales is misleading. Much of the governmental North Slope acreage considered prospective for oil and gas development already has been leased and is available, if at all, from private parties. Consequently, the State obtains relatively modest revenues from bidding and leasing, yielding most of its oil and gas revenues from production royalties and severance taxes. Condon Decl. at 24 n.12.

Second, the FTC's contention that the merger threatens to reduce lease revenues for Alaska and the Federal government is unwarranted. Alaska, like the FTC, analyzed the effect of the proposed merger on bidding for North Slope leases. Condon Decl. at 6. Initially, Alaska believed the merger would reduce the number of meaningful competitors in state and federal ANS lease sales. To ameliorate this concern, Alaska required BP Amoco and ARCO to modify their transaction under the

terms of the Charter. Notably, the FTC's analysis of competition in bidding for ANS lease proceeds in a vacuum, without reference to the Charter or the pro-competitive scheme it secures.

Because of the Charter, BP Amoco's acquisition of ARCO will not result in lessening of competition post-merger in bidding for ANS exploration leases. The Charter specifically conditions the merger upon BP Amoco's and ARCO's divestiture of exploration land and production. Under its divestiture provisions, the Charter makes available vast quantities of state and federal lands. Charter at 2, I.A.-B. Indeed, the Charter requires BP Amoco and ARCO to divest more than 780,000 exploration and producing acres. Moreover, the Charter does not allow BP Amoco or ARCO to divest its least desirable acreage, but specifically requires divestiture of geologically significant "play fairways." Charter at 3, I.C; *see generally*, Declaration of Kenneth Boyd ("Boyd Decl.") (attached hereto as Exhibit 3). The Charter also requires the merging parties to divest acreage representing an additional 24,000 barrels of oil production per day. Charter at 2.

Further, the Charter ensures that new bidders will be well situated to replace the loss of ARCO as a meaningful competitor in lease sales. By requiring divestiture of substantial producing assets, the Charter enables post-merger competitors to establish an immediate and credible presence in Alaska. The Charter creates three new exploration operatorships in significant geologic play fairways — at least one in the NPRA and at least two on state lands. Charter at 2-3. The Charter also ensures that these potential operators receive a foundation in existing production and access to transportation facilities. *Id.* at 4.

However, Alaska did not want the purchasers of producing assets to be mere harvesters of that production. Rather, the State wanted the purchasers to be committed to the future of the State through exploration. To that end, the Charter requires release of BP Amoco's and ARCO's proprietary seismic data within three months of the merger. Charter at 4, I.E. The importance of seismic data in oil and gas exploration simply cannot be overstated. Here, the release of such data will provide bidders with the critical information necessary to understand the complex geology, and

thereby evaluate the potential of undeveloped acreage. Like other Charter mandated remedies, these will enable meaningful post-merger competition with BP Amoco that does not presently exist.

The Charter also resolves the very concerns set forth by the Federal government about the potential impact of the merger on exploration and development of federal resources. For example, in support of its position that the merger will lessen competition, the FTC refers to a Department of Interior ("DOI") letter to Chairman Pitofsky where DOI raises concerns about the "potential effects of the proposed merger" on leasing of federally owned lands in Alaska. PX 158 (cited at FTC Mem. at 14).[13] Importantly, DOI states that its "concerns [about the merger] parallel those of the State of Alaska." PX 158.

Like Alaska, DOI concluded that the merger of BP Amoco and Arco should "be conditioned in such a way that at least one additional firm would become a strong participant in the Alaska petroleum industry." PX 158-2. The conditions to approving the merger set forth by DOI are essentially *identical* to the terms of the Charter discussed above:

(1) Divestiture of production capacity and leased acreage (compare Charter at 2, I.A-H);

(2) Access to facilities (compare Charter at 4, I.F);

(3) Reduction in pipeline tariffs (compare Charter at 5. I.H).

PX 158-2. Indeed, DOI explicitly urged the FTC to "give serious consideration to such remedies," which would allow consummation of the merger and "reduce barriers to entry and promote competition in the Alaska oil industry." PX 158-4. There is no question that the proposed merger of BP Amoco and ARCO, as modified by the Charter, provides for these pro-competitive remedies and much more. The Charter ensures that post-merger entrants will have the requisite "information, infrastructure, and interest" to compete in bidding for ANS exploration leases. FTC Mem. at 16, l. 16-17. There can be no serious dispute that the merger, as modified by the Charter, is pro-

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[13] The FTC mistakenly refers to this exhibit as "PX 157." FTC Brief at 14.

competitive and will not lessen competition in bidding for ANS exploration leases. Therefore, the FTC has failed to meet its burden of proof and an injunction is unwarranted.

C. THE EQUITIES REQUIRE DENIAL OF A PRELIMINARY INJUNCTION

Even if the FTC could show a likelihood of success on the merits — it cannot — this Court remains obligated to exercise independent judgment on the propriety of enjoining a merger. *FTC v. Staples* at 1091 (quoting *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1082 (D.C. Cir. 1982). "Independent judgment is not exercised when a court responds automatically to the agency's threshold showings. To exercise such judgment, the court must take genuine account of the equities." *Id.* (internal quotations omitted). A proper analysis of the equities includes the potential benefits, both public and private, that will be lost by a merger blocking preliminary injunction." *Id.* at 1083.; *see also FTC v. Butterworth Health Corporation*, 946 F. Supp. 1285 (W.D. Mich. 1996) (court must examine proposed merger's anticipated efficiencies).

The equities in this case require denial of the FTC's request for a preliminary injunction because the FTC seeks to block a merger which would only enhance, not substantially lessen, competition. Where, as here, the merger to be blocked will not have anti-competitive effects, the FTC's interests cannot outweigh the public interest in a merger with "beneficial economic effects and pro-competitive advantages." *See Warner Communications,* at 1165 (citation omitted) (identifying public equities). The grant of a preliminary injunction likely will force BP Amoco and ARCO to abandon its merger, depriving the public of the merger's benefits. *See, e.g., FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1093 (D.D.C. 1997) (order preliminarily enjoining merger of Staples and Office Depot and noting that "[t]his decision will most likely kill the merger") .

The potential public benefits to Alaska are enormous.[14] *See FTC v. Warner Communications, Inc.*, 742 F.2d at 1165 (public equities receive great weight). BP Amoco, ARCO, and Alaska, in the proposed merger and in the Charter, have been motivated by a desire to enhance the development of

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[14] The potential private benefits of the proposed merger to BP Amoco and ARCO will not be addressed by Alaska.

Alaskan resources. This is critical because Alaska's economy is dependent on its oil industry. The proposed merger will advance Alaska's interests in an efficient, competitive oil industry in the State and will promote the economic and social welfare of its citizenry. As modified by the Charter, the merger provides a strong foundation for new development on the North Slope and a renewed commitment by BP Amoco and ARCO to Alaska.

The merger also promises to increase efficiencies in dramatic ways affecting Alaska, the West Coast, and the worldwide supply and distribution of crude oil. Most of these efficiencies will result from the consolidation of BP Amoco and ARCO's interests and operations in the Prudhoe Bay field. Condon Decl. at 18. The merger aligns the interests of the Prudhoe Bay producers with respect to the allocation of product and the sharing of costs in the operation of the main reservoir in the Prudhoe Bay. *Id.* This greatly promotes the State and federal interest in efficient exploration and development of oil resources in Alaska and enables Alaska to compete in the worldwide crude oil market. *Id.*

To the contrary, if the FTC prevails in this litigation, it will thwart the pro-competitive scheme secured by the Charter and permanently compromise the State and national interest in a healthy oil industry in Alaska . Without the merger, Alaska's oil resources and the industry based on them will continue to decline. This poses a serious threat not only to Alaska's short term economic health but also to its very survival in the long run. In the absence of the merger, (i) BP Amoco will likely leave Alaska and take advantage of exploring, developing, and producing in other potentially less expensive and remote locales; (ii) ARCO will not be in a strong position to develop its Alaskan interests and may well choose to harvest them only passively; (iii) the inefficiencies of the Prudhoe Bay will further hamper already declining production; (iv) new entry will be increasingly unattractive as the already high barrier continue to grow and the potential rewards only diminish; (v) the negative secondary effects on Alaskan business will only increase; and (vi) the role of not only Alaska, but also the United States, in the worldwide crude oil market will suffer.

Given these facts, there really is no serious weighing of the equities to do. The threat of undoing the merger, should that become necessary, does not change the conclusion. Despite the FTC's best efforts in proving otherwise, there simply can be no public interest in enjoining a pro-competitive merger.

Accordingly, the FTC's request for a preliminary injunction should be denied.

CONCLUSION

This merger should not be enjoined. With the modifications required by the Charter, it will give new life to Alaska's declining oil industry. As hard as the FTC stretched to find anti-competitive effects, neither in its Complaint nor elsewhere did it allege or seek to prove any ultimate consumer welfare impact — on gasoline prices. That is because other agencies of the Federal government which have studied that issue, as well as a preliminary report of the State of California last summer, have not found such impact.

In the absence of any impact upon consumer welfare, the FTC endeavors to construct a case that a small set of refiners have been the target of discriminatory pricing. The FTC alleges this is so even though refiners on the West Coast have been described as having the largest gross refiner margins in the world. Condon Decl. at 26. The availability of huge sources of substitute crude supplies from throughout the world swamps any effort by BP Amoco to raise prices. The supposedly critical evidence of price differences proves nothing — such differences are due to a variety of causes and commonly occur in competitive markets.

The Commission's case on leasing is no stronger. For Federal leasing interests, the evidence that the FTC principally cites — a letter from the Department of the Interior — suggests that the merger could be approved with the very kind of changes that the Charter mandates. For state lands, the revenue impact is minor and the State of Alaska, based upon decades of experience, does agree that without the Charter there would have been a leasing problem. But that is not the world today. The Charter will jump start competition, easing barriers to entry, bring a large new competitor to the North Slope with its share of infrastructure, production, pipelines, unexplored acreage, seismic data, and operatorships. That strong foundation will provide the incentives for strong competition in bidding.

All of this brings the court to the equities. Alaska's economy is in a critical state because of the long term decline of its oil industry. Oil from its higher cost environment must compete in the world against other opportunities that are available to the merging parties and other large potential players. The merger can provide substantial efficiencies in the rational integration of interests in the Prudhoe Bay field, a rationalization that had yet to be achieved after years of effort. Careful effort by the State of Alaska, at its highest levels, informed by its own decades of experience, interviews with the rest of the petroleum industry, and world class consultants, have produced the Charter. The Charter creates a comprehensive structure for enhanced competition on the North Slope. Alaska believes that enjoining the merger, as modified by the Charter, will destroy the most promising solution for Alaska's central industry.

There is also a national interest, recognized by Congress, in lifting the export ban, to providing incentives upstream aimed at increasing supply of a major source of domestic oil. Alaska believes there is no equity in casting its oil industry into another long period of uncertainty and decline while the FTC takes a year or more, after nearly a year of investigation already, to decide finally whether there are competitive issues.

Because the FTC is unlikely to succeed on the merits and the equities decidedly favor Alaska, the FTC cannot raise a "substantial question" warranting injunctive relief. For the foregoing reasons, the FTC's Motion for a Preliminary Injunction should be denied, and BP Amoco and ARCO should be allowed to consummate the proposed merger.

Dated: March 1, 2000

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, v. BP AMOCO, P.L.C., and ATLANTIC RICHFIELD COMPANY, Defendants.	Civil No. C 00 0416 (SI) **SUMMARY OF ARGUMENT AND EVIDENCE REGARDING THE STATE OF ALASKA'S MOTION TO INTERVENE UNDER FEDERAL RULE OF CIVIL PROCEDURE 24** Date: [TO BE DETERMINED] Time: [TO BE DETERMINED] The Honorable Susan Illston

Pursuant to the Court's standing order of May 21, 1996, the State of Alaska submits this Summary of Argument and Evidence regarding the State of Alaska's Motion to Intervene under Federal Rule of Civil Procedure 24.

The Federal Trade Commission of the United States ("FTC") alleges that the proposed merger of BP and ARCO will violate Section 7 of the Clayton Act. FTC Complaint ¶ 12. Specifically, the Plaintiff alleges that the merger is likely to lessen competition in bidding for

leases on State and federal lands on Alaska's North Slope and in the production and sale of Alaska North Slope ("ANS") crude oil to refiners in West Coast markets. FTC Complaint ¶¶ 26, 36.

These allegations directly conflict with the "Charter for Development of the Alaskan North Slope" ("Charter"), a contractual agreement recently executed between Alaska, BP and ARCO. [1] That contract — reached only after the State's extensive antitrust investigation of the proposed merger — requires BP and ARCO to divest themselves of an extensive list of assets located in Alaska, including interests in North Slope producing properties, operatorships, undeveloped oil and gas leases, and oil pipelines. Charter at 9, ¶¶ I.A.-J.

The Charter-mandated divestitures together with other provisions of the Charter, eliminate the anticompetitive risks of the BP-ARCO merger in Alaska. *See id.* The Charter also will alleviate any concerns about the merger's potential impact on refiners in the states of California and Washington — even though it is unlikely that the proposed merger would have had an adverse impact on those refiners. At the same time, the Charter protects and enhances competitive oil development in Alaska. Report of Alaska Attorney General Bruce Botelho to Governor Tony Knowles dated Nov. 30, 1999 and attached as Exh. B. to the Declaration of Robert H. Loeffler (hereinafter, "AG Report"). Because the Court must determine the likely state of competition in a post-merger world, the Court will inevitably examine the terms of the Charter itself. Notably, the FTC's complaint does not address how the Charter has altered the original Agreement and Plan of Merger between ARCO and BP.[2] *See* FTC Complaint.

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[1] The Charter is attached as Exhibit A to the Declaration of Robert Loeffler.

[2] BP, ARCO and Alaska executed the Charter on December 2, 1999, and are now bound by its terms that eliminate the anticompetitive risks of the BP-ARCO merger in Alaska. AG Report at II. The Charter is not conditioned on FTC consent to the merger. Charter at 15, ¶ V.F. ("This Charter shall be effective as of the date it is entered. . .").

The disposition of the lawsuit could affect or impair Alaska's rights under the Charter. The Charter is a carefully crafted, pro-competitive solution to the antitrust issues concerning the acquisition, exploration and development of Alaska oil leases alleged in the FTC's complaint. Charter at 1; *see generally* AG Report. In addition, BP has committed itself under the Charter to undertake numerous actions in support of Alaska's environment and the welfare of its citizens. Charter at 7-12, ¶¶ II.A.-E. If the Court were to grant the relief requested by the FTC, and the proposed merger is enjoined, then BP and ARCO will be released from their obligations under the Charter. Charter at 15, ¶ V.F.

Alaska should be permitted to intervene as a matter of right. Alaska readily satisfies the requisite minimal showing for intervention as of right under Rule 24. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir. 1995). Both the core allegations of the FTC Complaint and the Charter definitively establish Alaska's interest in the subject matter of the litigation. The FTC Complaint specifically alleges that the merger will injure the interests of the State in the leasing of its own land. ¶¶ 32-34, 36.

Alaska's interests, moreover, cannot be adequately represented by the existing parties. Alaska has inherently different perspectives from either the FTC or BP and ARCO. The FTC's interests are directly opposed to Alaska's because it seeks to block a merger that Alaska supports under the terms of Charter. *Forest Conservation Council*, 66 F.3d at 1499. BP and ARCO have different private economic interests. Unlike the merging parties, Alaska's merger analysis required a delicate balancing of the competitive benefits and risks to the State from the merger — a balance which is reflected in the Charter. *United States v. Oregon*, 835 F.2d 635, 638 (9th Cir. 1988);

Sagebrush Rebellion v. Watt, 713 F.2d 525, 528 (9th Cir. 1983); *Sierra Club v. City of San Antonio*, 115 F.3d 311, 315 (5th Cir. 1997).

Even assuming Alaska were not entitled to intervene as of right, Alaska is entitled to permissive intervention under Rule 24(b)(2). The text of Rule 24(b)(2) explicitly endorses intervention where, as here, BP and ARCO inevitably will rely upon the Charter as part of their defense to the FTC's Complaint which was entered into by Alaska's Attorney General pursuant to A.S. §§ 44.23.020, 45.50.568, 45.50.576 and 45.50.580. Fed. R. Civ. P. 24(b)(2) ("[w]hen a party to an action relies for ground of . . . defense upon any . . . agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action"); *Nuesse v. Camp*, 385 F.2d 694, 705 (D.C. Cir. 1967); *see, e.g., Blowers v. Lawyers Coop. Publishing Co.*, 527 F.2d 333, 334 (2d Cir. 1975) (district courts should apply a "hospitable" approach to intervention motions by government agencies). As a party to the Charter, Alaska has relevant knowledge, interest, and evidence on its provisions. The core issue in this case — whether competition is likely to be lessened substantially in relevant markets post-merger — will be decided within the framework of the Charter.

The allegations of the FTC's complaint underscore Alaska's central interest. Count I concerns the merger's impact on the refiners of ANS oil. Complaint at ¶ 18-31. Alaska has relevant knowledge, interest, and experience on the sale of ANS oil, which is the State's largest unrestricted revenue source. Count II of the Complaint concerns the impact of the merger upon Alaska's leasing revenues. Complaint at ¶ 32-37. Again, Alaska has the best knowledge, interest, and evidence on this subject. In addition, with more than a quarter century of oil industry experience and having conducted its own antitrust investigation and subsequently negotiated the

Charter, Alaska is in a unique position to offer guidance and input to the Court on both the State's and the national interest in ANS oil leasing and production issues.[3]

In sum, intervention is wholly warranted here. Oil production is the foundation of Alaska's economy. The future of that economy, as embodied in the Charter, is at risk in this action. Alaska should not be forced to sit on the sidelines while vital state interests are litigated, and possibly irreversibly injured, by others. This is particularly true when Rule 24 favors intervention even under substantially less compelling circumstances and no delay or prejudice will be caused by Alaska's intervention. Accordingly, for all these reasons, Alaska's motion should be granted and Alaska should be permitted to participate fully in these proceedings.

Dated: February 7, 2000

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[3] At this time, Alaska takes no position on Count III which it believes not to be central to this suit.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

BP AMOCO, P.L.C.,

and

ATLANTIC RICHFIELD COMPANY,

Defendants.

Civil No. C 00 0416 (SI)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE STATE OF ALASKA'S MOTION TO INTERVENE UNDER FEDERAL RULE OF CIVIL PROCEDURE 24

Date: [TO BE DETERMINED]
Time: [TO BE DETERMINED]
The Honorable Susan Illston

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The State of Alaska ("Alaska" or "State") submits this memorandum of points and authorities in support of its motion for leave to intervene in this proceeding as a party in support of the defendants pursuant to Rule 24(a)(2) or, alternatively, pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure ("Rule(s)"). As set forth in the State's Notice of Motion, BP Amoco p.l.c. ("BP") and the Atlantic Richfield Co. ("ARCO") consent to intervention by the State. Alaska has thus far been unable to obtain the consent of the Plaintiff.

INTRODUCTION AND SUMMARY

The Federal Trade Commission of the United States ("FTC") alleges that the proposed merger of BP and ARCO will violate Section 7 of the Clayton Act. FTC Complaint ¶ 12. Specifically, the Plaintiff alleges that the merger is likely to lessen competition in bidding for leases on State and federal lands on Alaska's North Slope and in the production and sale of Alaska North Slope ("ANS") crude oil to a set of refiners in the Los Angeles, San Francisco, and Seattle areas. FTC Complaint ¶¶ 26, 36.

These allegations directly conflict with the Charter for Development of the Alaskan North Slope ("Charter"), a contractual agreement recently executed between Alaska, BP and ARCO. [1] That contract — reached only after the State's extensive antitrust investigation of the proposed merger — requires BP and ARCO to divest themselves of an extensive list of assets located in Alaska, including interests in North Slope producing properties, operatorships, undeveloped oil and gas leases, and oil pipelines. Charter at 9, ¶ I.A.-J.

The Charter-mandated divestitures together with other provisions of the Charter eliminate the anticompetitive risks of the merger in Alaska. *See id.* The Charter also will alleviate any concerns about the merger's potential impact on refiners in the states of California and Washington — even though it is unlikely that the proposed merger would have had an adverse impact on those refiners. At the same time, the Charter protects and enhances competitive oil development in Alaska. Report of Alaska Attorney General Bruce Botelho to Governor Tony Knowles dated Nov. 30, 1999 and attached as Exhibit B to the Declaration of Robert H. Loeffler, Esq., (hereinafter, "AG Report").

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[1] The Charter is attached as Exhibit A to the Declaration of Robert H. Loeffler, Esq.

Because the Court must determine the likely state of competition in a post-merger world, the Court will inevitably examine the terms of the Charter itself. Notably, the FTC's Complaint does not address how the Charter has altered the original Agreement and Plan of Merger between ARCO and BP.

The Charter is a carefully crafted, pro-competitive solution to the antitrust issues concerning the acquisition, exploration and development of Alaska oil leases alleged in the FTC's Complaint. In addition, BP has committed itself under the Charter to undertake numerous actions in support of Alaska's environment and the welfare of its citizens. Charter at 7-12, ¶ II.A.-E. The disposition of the lawsuit could affect or impair Alaska's rights under the Charter. *Id.* at 15, ¶ V.F. If the Court were to grant the relief requested by the FTC, and the proposed merger is enjoined, then BP and ARCO will be released from their contractual obligations under the Charter. *Id.*

Alaska should be permitted to intervene as a matter of right. As set forth more fully below, Alaska readily satisfies the requisite showing for intervention as of right under Rule 24. Both the core allegations of the FTC Complaint and the Charter definitively establish Alaska's interest in the subject matter of the litigation. The FTC Complaint specifically alleges that the merger will injure the interests of the State in the leasing of its own land. FTC Complaint ¶¶ 32-34, 36.

Moreover, Alaska's sovereign and proprietary interests cannot be adequately represented by the existing parties. Alaska has inherently different perspectives from either the FTC or BP and ARCO. The FTC's interests are directly opposed to Alaska's because it seeks to block a merger that Alaska supports under the terms of Charter. BP and ARCO also have different private economic interests. Unlike the merging parties, Alaska's merger analysis required a delicate balancing of the competitive benefits and risks to the State from the merger — a balancing which is reflected in the Charter.

Even assuming Alaska were not entitled to intervene as of right — which it is — Alaska is entitled to permissive intervention under Rule 24(b)(2). For the stated reasons, Alaska has an undisputed interest in the subject matter of the litigation which it seeks to protect. The core issue in this case — whether competition is likely to be lessened substantially in relevant markets post-merger — will be decided within the framework of the Charter. Inevitably, BP and ARCO will rely on the

Charter itself to conduct their defense to the FTC's Complaint. Indeed, the plain language of Rule 24(b) permits a State to intervene where, as here, a party in the case relies for its defense on an agreement made pursuant to a state statute. *See* Fed. R. Civ. P. 24(b).

The Charter is an agreement entered into by the Attorney General pursuant to A.S. §§ 44.23.020, 45.50.568, 45.50.576 and 45.50.480; *see also* AG Report. As a party to the Charter, Alaska has relevant knowledge, interest, and evidence on its provisions. The allegations of the FTC's Complaint underscore Alaska's central interest. Count I concerns the merger's impact on the refiners of ANS oil. Complaint at ¶¶ 18-31. Alaska has relevant knowledge, interest, and experience on the sale of ANS oil, which is the State's largest unrestricted revenue source. Count II of the Complaint concerns the impact of the merger upon Alaska's leasing revenues. Complaint at ¶¶ 32-37. Again, Alaska has the best knowledge, interest, and evidence on this subject. In addition, with more than a quarter century of oil industry experience and having conducted its own antitrust investigation and subsequently negotiated the Charter, Alaska is in a unique position to offer guidance and input to the Court on both the State's and the national interest in ANS oil leasing and production issues.[2]

In sum, intervention is wholly warranted here. Oil production is the foundation of Alaska's economy. The future of that economy, as embodied in the Charter, is at risk in this action. Alaska should not be forced to sit on the sidelines while vital state interests are litigated, and possibly irreversibly injured, by others. This is particularly true when Rule 24 favors intervention even under substantially less compelling circumstances and no delay or prejudice will be caused by Alaska's intervention. Accordingly, for all these reasons, Alaska's motion should be granted and Alaska should be permitted to participate fully in these proceedings.

I. BACKGROUND AND INTEREST OF PROPOSED INTERVENOR

A. Alaska's Experience with Oil Production and Development

Since Statehood, the economic history of Alaska has been inextricably linked to the development of its oil resources. Alaska lands contain rich reservoirs of oil and natural gas. The

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[2] At this time, Alaska takes no position on Count III which it believes not to be central to this suit.

nation's two largest oil fields, the Prudhoe Bay and Kuparuk River fields, operate under leases from the State. Charter at 1. Alaska's Commissioner of Natural Resources also has leased hundreds of thousands of acres of other state land to spur future oil exploration and development. Not only does the State lease land, but also it regulates oil exploration and production and receives compensation for the exploitation of its resources from royalties and taxes.[3] Alaska's economy is petroleum dependent: 70 % of unrestricted state revenues come from the petroleum industry. Last year, Alaska received over a billion dollars in revenues from the disposition of its royalty oil and taxes on its oil industry.

Given Alaska's interests, the announcement of the BP/ARCO merger had tremendous significance. The State immediately announced that its objective was to maintain a competitive environment in Alaska. To further this objective, the State commenced a lengthy investigation of possible antitrust issues under its own antitrust statute.[4] A.S. § 45.50.590. The State also coordinated, as appropriate, its eight month long independent investigation with the parallel investigations of the FTC, California, Oregon and Washington. AG Report at 3.

The State, like the FTC, examined the possible detrimental impact of the merger on competition in ANS leasing and bidding. The State also recognized, however, increased efficiencies and synergies from the proposed merger. Thus, the State sought a solution that would enhance competition in the post-merger world while simultaneously preserving the merger's efficiencies. After months of negotiation with BP and ARCO, a solution was found, which is embodied in the contract called the Charter. The State explained the design and content of its Charter to the FTC before this suit was filed. Nonetheless, by a three to two vote on February 2, 2000, the Commissioners of the FTC authorized the FTC staff to file suit.

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[3] Alaska reserves a royalty share of the oil that is produced from State lands. AS §§ 38.05.135-38.05.181 (1999). It also levies a production tax, AS § 43.55.011 (1999), and corporate income tax, AS § 43.20.072 (1999), on the petroleum industry. One measure of the State's knowledge is the State's investment over the past twenty years of more than $100 million dollars in experts and litigation over the proper valuation of ANS oil and determination of reasonable rates for its transportation.

[4] The State's investigatory team was composed of cabinet-level officials, including the Commissioner of the Department of Natural Resources, the Commissioner of the Department of Revenue, Special Counsel to the Governor and the Attorney General.

B. The Charter: The Pro-Competitive Solution To The Post-Merger World

In the Charter, the State expressly conditioned its support for the BP/ARCO merger on BP and ARCO making substantial marketplace commitments designed to promote competition. Specifically, and most significantly, the Charter mandates the divestiture of a substantial portion of BP's and ARCO's Alaskan assets. These include 175,000 barrels per day of ANS oil production, Charter at 2, ¶ I.A.1., including at least a majority of the Kuparuk River field and at least 40% of the new Alpine field. *Id.* at 5, ¶ I.H. A corresponding share of interests in the Trans Alaska Pipeline System and connecting feeder pipelines also will be sold to ensure that the new owners of the divested production may transport oil on their own pipeline space.

In addition to this divestiture, BP and ARCO must (1) sell or relinquish more than 620,000 acres of state and federal acreage, *id.* at 2-3, ¶ I.A.-C.; (2) resign as operators of the Kuparuk and Alpine oil fields, *id.* at 2, ¶ I.A.2-3; and (3) make their seismic data available for purchase. *Id.* at 3, ¶ I.E. Collectively, these steps will ensure that the new acquiring company will be well situated to replace the loss of ARCO as a competitor in lease sales. Indeed, not only will these steps establish a foundation in existing production and transportation, but they also will make available to other parties significant amounts of promising but undeveloped oil lands.[5] The benefits of the Charter will not be limited to Alaska. Based on more than a quarter century of experience with the ultimate markets for Alaskan oil, Alaska can find no economic support for the conclusion that the merger would negatively impact gasoline prices at the pump in California. Indeed, the FTC does not even allege any such effect in its Complaint. Even so, the Charter will release from BP or ARCO's control, a supply of 175,000 barrels per day of North Slope oil production. Charter at 2, ¶ I.A.

After a public notice and comment process, BP, ARCO and Alaska executed the Charter on December 2, 1999, and are now bound by its terms. AG Report at II. The Charter is not conditioned on FTC consent to the merger. Charter at 15, ¶ V.F. ("This Charter shall be effective as of the date it is entered. . ."). BP has moved forward to implement its requirements.

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[5] In addition to the competitive benefits, the Charter also sets forth various community commitments undertaken by BP and ARCO affecting Alaska's environment and the educational and employment opportunities for Alaskans.

C. Scope of Alaska's Proposed Intervention

Even a cursory examination of the FTC's Complaint demonstrates that this antitrust case involves the State of Alaska. The State does not seek to add new claims or defenses to this litigation. It seeks to intervene because of its interest in a contract executed under authority of State law. As an intervenor it seeks to present evidence concerning issues that affect its lands, treasury, oil industry, and competition within its borders and the principal destinations for North Slope crude outside its borders. Alaska is best situated to contribute the information this court needs to resolve equitably the legal and factual questions presented.

To that end, Alaska, if permitted to intervene, plans to present three categories of evidence.[6] One economic expert with years of experience with leasing issues, as well as with substantial experience in the enforcement of the antitrust laws of the United States, will testify to the impact of the merger, with and without the Charter, on the leasing of prospective oil bearing lands in Alaska. A second economic expert with nearly twenty years of experience in the market for ANS crude oil in California and other Western States will testify that ANS crude oil is not a relevant product market of its own but a product that competes in a world crude oil market. He will also testify as to the impact *vel non* of the merger on California gasoline refiners. The third category of evidence will address the Charter and the State's reasons for viewing the Charter as a pro-competitive solution to the issues raised in the FTC Complaint. Further specification of witnesses and areas of testimony must await examination of the preliminary injunction papers filed with the Complaint which the FTC has filed under seal.

STATEMENT OF ISSUE

Has Alaska satisfied the standards for intervention under Fed. R. Civ. P. 24?

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[6] Because at this time Alaska seeks to intervene solely for the purpose set forth herein, Alaska has not filed a complaint in intervention with its motion to intervene.

ARGUMENT

I. ALASKA IS ENTITLED TO INTERVENE AS OF RIGHT UNDER RULE 24(A)(2)

The party with the most at stake in this case is arguably the State of Alaska. As discussed above, oil is central to the State's fiscal regime and to its economy at large. Any event that has a substantially detrimental impact on the oil industry in Alaska, such as the frustration of the Charter, will have a substantially detrimental impact on the State's fiscal regime. Likewise, no party is more able to explain the Charter, and the specific antitrust concerns it resolved, than the State. Preservation of the pro-competitive benefits of the Charter will not adversely affect West Coast refiners. Because ANS crude oil is one of many crude oils that compete in a highly competitive world market, this transaction will not adversely affect competition in the sale of crude oil. Although the State disagrees with the FTC's allegations regarding potential impacts on West Coast refiners, the Charter should, in any event, resolve such concerns through divestitures of 175,000 barrels of ANS crude oil production per day. Charter at 2, ¶ I.A.1.

As demonstrated below, Alaska easily satisfies the requirements for intervention as of right under Rule 24(a)(2). In the Ninth Circuit, an applicant for intervention under Rule 24(a)(2) must show that: (1) the motion to intervene is timely; (2) the applicant claims a "significantly protectable" interest relating to the transaction which is the subject of the action; (3) the applicant is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest is inadequately represented by the parties to the action. *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir. 1995). There can be no legitimate argument regarding the timeliness of the State's motion to intervene filed one business day after the FTC filed suit. The other requirements are discussed below.

A. Alaska Has More Than A Sufficient "Interest" In The Transaction At Issue Because The Charter Is At The Center Of This Dispute

Alaska has a contractual interest in the Charter, which will be frustrated if the merger between BP and ARCO is blocked. *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1990) ("[a]n agreement to settle a legal dispute is a contract and its enforceability is governed by familiar principles of contract

law"); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975); *Cumming v. Johnson*, 616 F.2d 1069, 1072 (9th Cir. 1979). Through the Charter, Alaska receives substantial marketplace and community commitments from BP and ARCO. Charter at 2-12, ¶¶ I.A.-II.E. Those commitments will create, among other things, efficiencies in oil exploration and development, promote the entry of new market participants, generate stable revenue for the State, and generally make Alaska a more attractive market for oil exploration and development. AG Report at 5-7. These objectives were achieved only after months of investigation and negotiation by the State pursuant to Alaska Statute § 45.50.590. The fruits of this labor could be altered by the outcome of this litigation.

Where, as here, a dispute may affect or destroy the contract interests of an applicant for intervention, the Supreme Court and Ninth Circuit have granted intervention as of right. *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 765 (U.S. 1989) (holding that "interest" in protecting collectively bargained contract rights of incumbent employees satisfies Rule 24(a)(2)); *Forest Conservation Council,* 66 F.3d at 1495 (finding that the Ninth Circuit and "'[o]ther circuits have recognized that 'an applicant has a sufficient interest to intervene . . . where the contractual rights of the applicant may be affected by a proposed remedy'" (citing cases)); *see also Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994) (holding that interests in existing timber contracts threatened by injunctive relief were sufficient to warrant intervention as of right).

The Ninth Circuit has repeatedly held, moreover, that "interests" less obviously protectable than Alaska's rights in the Charter suffice to allow intervention as of right. *Yniguez v. Arizona*, 939 F.2d 727, 735 (9th Cir. 1991) (granting intervention as of right for sponsors of ballot initiative declaring official language in litigation challenging constitutionality of that statute); *Sagebrush Rebellion v. Watt*, 713 F.2d 525, 527-28 (9th Cir. 1983) (granting intervention as of right to National Audubon Society in suit challenging creation of conservation area); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir.) (granting intervention as of right to advocacy group which had sponsored antinuclear statute in suit challenging that statute), *cert. denied*, 461 U.S. 913 (1982).

The State's contract rights in the Charter also clearly relate to the "transaction which is the subject of the action" as required by Rule 24(a)(2). The Charter and this case involve the same

proposed merger. *Sierra Club v. U.S. Environmental Protection Agency*, 995 F.2d 1478, 1483-85 (9th Cir. 1993) (granting intervention to City of Phoenix and holding that "[i]t is generally enough . . . that there is a relationship between the legally protected interest and the claims at issue."). The Court likely will hear from factual and expert witnesses for both sides regarding the terms and import of the Charter. And the Court will hear from both the FTC and Defendants regarding how the Charter would affect competition in the oil industry in Alaska, California, Oregon, and Washington. *See* FTC Complaint ¶¶ 32-37. Therefore, Alaska's "interest" in this action clearly satisfies the requirements of Rule 24(a)(2).

B. Resolution Of This Case May Impair Or Impede Alaska's Interest In The Charter Because The Remedy Sought By Plaintiff Would Eliminate Alaska's Contract Rights

In the Ninth Circuit, an applicant for intervention need only show that its interest *may* be impaired or impeded. *United States v. Oregon*, 839 F.2d 635, 639 (9th Cir. 1988). The possibility of practical impairment of its interests, as opposed to direct legal impairment of those interests, is sufficient to warrant intervention. *Sierra Club*, 995 F.2d at 1486 (holding that practical *stare decisis* effect of case at bar might constrain intervenor City of Phoenix in the future to meet water quality standards sought by plaintiff); Fed. R. Civ. P. 24 Advisory Committee Note (stating that "[i]f an absentee would be substantially affected in a practical sense by the determination made in the action, he should, as a general rule, be entitled to intervene").

Here, Plaintiff's Complaint seeks to enjoin the proposed BP/ARCO merger. FTC Complaint ¶ 49. The obligations of BP and ARCO under the Charter will be frustrated if this merger is enjoined. The benefits of the Charter to Alaska (and to others) will be eliminated if Plaintiff obtains the remedy it seeks. Charter at 15, ¶ F. As a result, Alaska is "so situated that the disposition of the action may as a practical matter impair or impede" Alaska's ability to protect its contractual interests. Fed. R. Civ. P. 24(a)(2); *Sierra Club*, 995 F.2d at 1486; *Oregon*, 839 F.2d at 639; *Forest Conservation Council*, 66 F.3d at 1495.

C. Alaska's Interests Will Not Be Adequately Represented By The FTC, BP, Or ARCO

The applicant-intervenor's burden of showing inadequate representation is minimal: it is sufficient to show that representation may be inadequate. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *Forest Conservation Council*, 66 F.3d at 1499. In making this determination, the Court may consider: (1) whether the interest of a present party is such that it will undoubtedly make all of the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect. *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996).

The minimal standard for showing inadequate representation is plainly satisfied here. The objective of the FTC suit, stopping the merger, is directly adverse to the interests of Alaska. The benefits of the Charter are lost if Plaintiff convinces the Court that the merger between BP and ARCO must be enjoined. Charter at 15,¶ F. Thus, far from "representing" Alaska's interests, Plaintiff affirmatively seeks to undermine them.[7]

Nor can BP and ARCO adequately represent the interests of Alaska in this case. The Charter was designed to remedy Alaska's concerns with the transaction under Alaska law. ARCO and BP are certainly not in a position to adequately represent Alaska's concerns with the proposed transaction or how the Charter satisfies those concerns. *Sagebrush Rebellion*, 713 F.2d at 528 (granting intervention as of right where "intervenor offers a perspective which differs materially from that of the present parties"). In addition, the State recognized that the merger had certain fiscal benefits to Alaska. Charter at 1-2. Again, neither BP nor ARCO are in as good a position to describe the benefits of the proposed merger to Alaska and the absence of negative consequences on consumers as

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[7] The Ninth Circuit has recognized, moreover, that states should be allowed to intervene where a federal agency does not adequately represent state interests. In *Forest Conservation*, for example, the Court found that the United States Forest Service was charged to represent broader objectives than the more specific interests of applicant-intervenors State of Arizona and Apache County. *Forest Conservation*, 66 F.3d at 1499 (granting intervention to Arizona). Here, just as Arizona did in *Forest Conservation*, Alaska seeks as an intervenor to protect different state interests vis-à-vis those the FTC seeks to protect. *Id.*

Alaska itself. *Oregon*, 839 F.2d at 638 (finding inadequate representation where plaintiff and intervenors shared differing views on need for and scope of types of remedial relief); *see Sierra Club v. City of San Antonio*, 115 F.3d 311, 315 (5th Cir. 1997) (finding inadequate representation where the interests of local government entities as parties would likely diverge from those of applicant-intervenor state agencies). Finally, due to its impact on royalty revenues, the State has closely studied the competitiveness of ANS oil in the world crude oil market. It is in a unique position to describe the competition ANS oil faces in that market.

Alaska should be allowed to intervene as of right under Rule 24(a)(2) to protect its contract rights related to the BP-ARCO merger transaction at issue. The interests of the State will not be adequately represented by the current parties in this case.

II. ALASKA IS ENTITLED TO PERMISSIVE INTERVENTION UNDER RULE 24(B)

Alaska also satisfies the standards for permissive intervention governed by Federal Rule of Civil Procedure 24(b)(2). The plain language of Rule 24(b)(2) permits state officers and agencies to intervene in the main action if a party to that action relies, as part of its claim or defense, on (1) any statute or executive order administered by such office or agency or (2) an agreement made pursuant to a state statute or executive order.[8] Fed. R. Civ. P. 24(b)(2). The intervenor's application for permissive intervention under Rule 24(b)(2) must be timely. *Id.*

It is well settled that permissive intervention "is committed to the broad discretion of the district court." *Orange County v. Air Cal.*, 799 F.2d 535, 539 (9th Cir. 1986). The "principal consideration" is whether permitting intervention would "unduly delay or prejudice the adjudication of the original parties." Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1913

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[8] Rule 24 "is to be construed liberally and not technically." *Fierro v. Gomez*, 1993 WL 414673 at *2 (N.D.Cal. 1993) (Patel, D.J.) (citing *Beckham Indus. Inc. v. International Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992)); *accord E.E.O.C. v. National Children's Center, Inc.*, 146 F.3d 1042, 1046 (D.C.Cir. 1998) (the "force of precedent compels a flexible reading of Rule 24(b)"). At minimum, Alaska satisfies the standards for permissive intervention articulated by the Ninth Circuit in *Beckham Indus. Inc. v. International Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992) (holding that an independent jurisdictional basis is not a prerequisite for permissive intervention in every case). Alaska requests permission to intervene for a limited, but critically important, purpose: to protect its interests in the Charter — a contractual agreement entered into by BP, ARCO and Alaska under Alaska law.

(1999). A court must also weigh whether the movant's interests are adequately represented by the parties to the main action, and must evaluate questions of judicial economy. *See Fierro v. Gomez,* 1993 WL 414673 at * 2 (N.D.Cal. 1993) (Patel, D.J.) *citing Venegas v. Skaggs,* 867 F.2d 527, 529 (9th Cir. 1989), *aff'd,* 495 U.S. 82 (1990). This Court may also consider factors, including the degree to which the intervenor can contribute to the full development of the underlying factual and legal questions presented. *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977).

As shown below, Alaska is entitled to permissive intervention under the plain language of Rule 24(b) because BP and ARCO will rely on the Charter — an agreement made pursuant to Alaska state law — as a defense to the antitrust violations alleged in the FTC's Complaint. Moreover, all of the considerations which guide the exercise of judicial discretion clearly weigh in favor of Alaska's permissive intervention. Alaska's intervention will also cause no undue delay or prejudice to the original parties. Rather, Alaska is in a position to assist the Court in understanding why the merger, as modified by the Charter, will have no anticompetitive impact in Alaska or downstream and, in fact, promotes the interests of the State and its citizens. The State is uniquely situated to provide information about the need for the Charter which was entered into by Alaska's Attorney General pursuant to Alaska law. Finally, there is no question that Alaska's motion for intervention is timely. Accordingly, Alaska's motion for permissive intervention is proper and should be granted.

A. The Plain Language of Rule 24(b)(2) Permits Alaska's Intervention

Under Fed. R. Civ. P. 24(b), a state office or agency is allowed to intervene in an action if a party to the action relies, for its claim or defense, on (1) any statute or executive order administered by the office or agency or (2) an agreement made pursuant to statute or executive order. Fed. R. Civ. P. 24(b)(2). This is a "specific provision for intervention by governmental agencies interested in . . . agreements relied upon by the parties in the action." *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 92 (3d Cir. 1979), *rev'd on other grounds,* 451 U.S. 1 (1981). As such, Rule 24(b) expands the traditional concept of claim or defense insofar as intervention by a governmental officer or agency is concerned. *Nuesse v. Camp*, 385 F.2d 694, 705 (D.C. Cir. 1967); *see, e.g., Blowers v. Lawyers Coop. Publishing Co.*, 527 F.2d 333, 334 (2d Cir. 1975) (district courts should apply a "hospitable" approach to intervention motions by government agencies).

Here, Alaska conducted an extensive antitrust inquiry of the proposed merger under Alaska state law. *See* A.S. 45.50.590. Recognizing that the proposed merger must be approved under parallel federal law, Alaska coordinated this investigation with the FTC. *See* Report at 3. Thereafter, Alaska entered into negotiations with BP and ARCO which resulted in a contractual agreement resolving its concerns about the merger. The Charter was entered into pursuant to the Attorney General's plenary power to investigate and settle legal disputes. A.S. §§ 44.23.020, 45.50.568, 45.50.576 and 45.50.480. Inevitably, BP and ARCO will rely on the Charter, and the pro-competitive scheme it contemplates, as one of its defenses to the FTC's Complaint. Accordingly, Alaska's permissive intervention is warranted under the plain language of Rule 24(b)(2).

B. Alaska's Participation Will Add Unique Value To The Pending Litigation

In its discretion, a court should, among other factors, examine whether the intervenor will contribute to the full development of the issues in the lawsuit. *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977).[9] Granting permissive intervention in complex litigation is particularly appropriate where the intervenor has special expertise or will provide unique input that may be of value to the court in the equitable resolution of claims. *See, e.g., General Motors Corp. v. Burns,* 50 F.R.D. 401, 405 (D. Haw. 1970) (intervention granted where intervenor has unique information that will help "to fully present to the Court all of the facts in this case").

A proper antitrust analysis in this proceeding will require examination of the oil industry on Alaska's North Slope and the provisions of the Charter. Alaska is uniquely situated to present evidence concerning issues that impact its own industry, its own economy, and competition within its borders. Alaska has intimate knowledge of the oil industry developed over more than twenty-five years of oil exploration and production in Alaska. This experience includes knowledge of how, where and why Alaska oil is sold — the issues raised by Count I. Alaska has unique expertise in all facets of the oil industry including leasing, exploration, development and production, and the ultimate sale of Alaska oil. Alaska requires a healthy petroleum industry, one driven by competition and

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[9] Other discretionary factors considered include the nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case. *See generally Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977) (citations omitted).

efficiency, to maximize production from State lands and to further healthy exploration and development. Accordingly, the State should be allowed to intervene because it can best explain why the merger, as modified will promote rather than injure the interests of the State in a competitive environment on the North Slope and will not affect adversely consumers of ANS crude oil.

C. Allowing Alaska To Intervene Will Cause No Prejudice Or Delay To The Original Parties

As an initial matter, the burden of demonstrating that intervention will cause prejudice or undue delay is on the original parties, not the intervenor. *Venegas v. Skaggs,* 867 F.2d 527, 530 (9th Cir. 1989). Nevertheless, there is nothing to suggest that allowing intervention will impair the adjudication of the rights of the original parties. To the contrary, Alaska's participation in this proceeding will inform this Court's understanding of the alleged antitrust issues *and* the appropriate resolution thereof, thereby contributing to the equitable adjudication of the legal questions presented. *Accord* Wright, Miller & Kane at § 1913 (finding by the court that presence of intervenor will not prejudice original parties encourages court to exercise its discretion to permit intervention).

Moreover, Alaska's participation is critical to its ability to protect its interests. If the FTC were to prevail in this litigation and succeed in blocking the proposed merger, Alaska would lose the benefits of its rights under the Charter and the State and national interest in a healthy oil industry in Alaska would be compromised.

CONCLUSION

For all the foregoing reasons, Alaska's motion to intervene should be granted.

Dated: February 7, 2000

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SAN FRANCISCO DIVISION**

FEDERAL TRADE COMMISSION, Plaintiff, vs. BP AMOCO, PLC, and ATLANTIC RICHFIELD COMPANY, Defendants.	**Case No.: 00 0416 SI** **SUMMARY OF FTC'S OPPOSITION TO MOTION OF STATE OF ALASKA TO INTERVENE** **Date: February 22, 2000** **Time: 3:00 p.m.** **Courtroom: 4**

The Federal Trade Commission ("Commission") opposes Alaska's motion to intervene as a defendant on the ground that it has not shown its entitlement to do so, either as of right under Fed. R. Civ. P. 24(a)(2), or permissively under Fed. R. Civ. P. 24(b)(2). The Commission consents to Alaska's participation in this proceeding as an *amicus curiae*, limited to the issues that directly concern it – its role as a lessor of oil exploration properties under Count II of the Complaint.

Rule 24(a)(2) requires an applicant to have an interest in the transaction that is the subject of the proceeding. This proceeding challenges a merger agreement between defendants, BP and

Atlantic Richfield Company ("ARCO"). Alaska is not a party to that transaction and has no legally protected interest in it. Accordingly, it does not satisfy the Rule's requirements.

Recognizing this deficiency, Alaska nonetheless argues that is may intervene as of right because: (1) it has a "contractual interest" by virtue of a compromise it reached with defendants addressing the illegality of the transaction that is the subject of this proceeding; (2) it has a substantial revenue interest in petroleum exploration, development, and production on state lands; and (3) its possesses knowledge, evidence, and general expertise that may be relevant to this proceeding. None of these rationales is sufficient to confer a right to intervene under Rule 24(a)(2).

Alaska's settlement is not the transaction that is the subject of this proceeding, and that settlement does not confer on it a sufficient interest in the challenged transaction to allow it to intervene as a defendant. *See, e.g., Donnelly v. Glickman,* 159 F.3d 405, 411 (9th Cir. 1998); *see generally, Arizonans for Official English v. Arizona,* 520 U.S. 43, 66 (1997).

Nor does Alaska have a right to intervene to ask the Court to consider the terms and benefits (to Alaska) of its settlement in assessing the Commission's right to a preliminary injunction. Alaska's settlement does not dictate the outcome of this proceeding. Under the statutory framework of the FTC Act, the Commission seeks a preliminary injunction to maintain the status quo in aid of an administrative proceeding to review the merits of the merger. Neither the merits nor the ultimate remedy are before the Court. *See, e.g., FTC v. Warner Communications, Inc.,* 742 F.2d 1156, 1162 (9th Cir. 1984); *FTC v. University Health, Inc.,* 938 F.2d 1206, 1225 (11th Cir. 1991). The terms of the Alaskan settlement do not bind the Commission here and do not preclude it in any way from seeking a full-stop preliminary injunction in the larger national interest. *See, e.g., United States v. Borden Co.,* 347 U.S. 514, 520 (1954) ("the Government's right and duty to seek an injunction to protect the public interest exist without regard to any private suit or decree"); *Northern Securities Co. v. United States,* 193 U.S. 197, 233-36 (1904); *cf. California v. American Stores Co.,* 495 U.S. 271 (1990) (a state may seek divestiture in a merger case, even after the parties have entered a consent agreement with the Commission).

Non-litigated settlements, such as Alaska's, are compromises that reflect only the relative

importance that opposing sides assign to various outcomes and, in the end, depend upon the bargaining powers and skills of the negotiators. *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971); *see United States v. ITT Continental Baking Co.*, 420 U.S. 233, 235-36 (1975). They plainly cannot vest the settling parties with the right to impose their agreement on other litigants. This is especially so here, where the Commission has a statutory mandate to enforce the national antitrust laws, while Alaska's interests are necessarily confined to matters that directly concern it and its citizens.

Even if the settlement bestows non-antitrust benefits on Alaska and its citizens, these "benefits" may not be invoked to justify an otherwise illegal merger. *See, e.g., United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 371 (1963) ("a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence . . . .").

Thus, Alaska's "contractual interests" in its settlement do not give it a sufficient interest to allow it to intervene in this proceeding. Similarly, Alaska may not intervene as a defendant here on the basis of its substantial interests in exploration and development of oil producing lands. While Alaska's proprietary interests would certainly have allowed it to challenge the merger *as a plaintiff*, Alaska has chosen to settle its claim with BP and ARCO. Having settled its dispute, Alaska has fully addressed its concerns and has no right to intervene here to prevent other plaintiffs from securing the relief to which they are entitled.

Nor may Alaska claim a right to intervene here merely because it may possess knowledge, evidence, or alleged expertise in some of the issues raised by the Commission's proceeding. At most, such information and expertise render Alaska a prospective third party witness – or justify its submission of an *amicus curiae* brief addressing the issues in which it has expertise. *E.g., Blake v. Pallan,* 554 F.2d 947, 955 (9th Cir. 1977). Nothing in Rule 24 allows either a fact witness or an expert to intervene in a case merely to present its evidence and opinion.

Alaska has not shown a sufficient interest to allow it to intervene as of right under Rule 24(a)(2). Moreover, whatever interest it may have is adequately represented by defendants here

(League of United Latin American Citizens ("LULAC") v. Wilson, 131 F.3d 1297, 1305 & n.5 (9th Cir. 1998)), even though the settlement agreement expressly provides that Alaska's legal expenses will be paid by BP and ARCO (Charter ¶ V.G). Given the fact that Alaska, BP, and ARCO all have the same ultimate objective -- denial of a full-stop preliminary injunction to enable the Commission to fulfill its statutory mandate and undertake a plenary review of the merger -- there is every reason to believe that defendants will adequately represent Alaska's asserted "interest" in this proceeding.

Rule 24(b)(2) provides that "anyone" may be permitted to intervene in an action "when an *applicant's claim or defense* and the main action have a question of law or fact in common" (emphasis added). Alaska admits, however, that it "does not seek to add new claims or defenses to this litigation" (Mem. at 8). This provision of the Rule is inapplicable here, and Alaska may not seek permissive intervention under it. *See Diamond v. Charles,* 476 U.S. 54, 76-77 (1986) (O'Connor, J., concurring).

The Rule also allows government officials or agencies to seek intervention when a party raises a claim or defense that bears on a statute or program administered by the government agency or official. In seeking to intervene on this basis, Alaska points to its settlement with BP and ARCO. That settlement, however, does not bestow on BP or ARCO any defense to the Commission's action for a preliminary injunction. *See, e.g., United States v. Borden Co.,* 347 U.S. at 520; *cf. California v. American Stores Co.*, 495 U.S. 271 (1990).

Alaska has wholly failed to show an adequate ground for seeking intervention as a defendant. Nonetheless, the Commission recognizes that, having investigated the merger and presumably concluded that, left unchecked, it would harm competition, Alaska may well have views on the merits of the transaction that this Court might find informative. Accordingly, it would be appropriate to allow Alaska to submit an *amicus curiae* brief limited to issues germane

to this proceeding and of direct interest to Alaska, specifically those raised by Count II of the Commission's complaint. *Blake v. Pallan,* 554 F.2d 947, 955 (9th Cir. 1977).

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION, Plaintiff, vs. BP AMOCO, PLC, and ATLANTIC RICHFIELD COMPANY, Defendants.	**Case No.: 00 0416 SI** **PROPOSED ORDER DENYING MOTION OF STATE OF ALASKA TO INTERVENE** **Date: February 22, 2000** **Time: 3:00 p.m.** **Courtroom: 4**

This matter comes before the Court on motion by the State of Alaska to Intervene as a defendant in this proceeding.

"Proposed Order Denying Intervention"

Upon consideration of the motion, memoranda, and exhibits filed in support thereof and in opposition thereto, and following a hearing on the motion, the Court finds as follows:

(1) This is a proceeding under Section 13(b) of the FTC Act, by which the Federal Trade Commission ("Commission") seeks a full-stop preliminary injunction to prevent defendants BP Amoco, plc ("BP") and Atlantic Richfield Company (ARCO) from merging until the Commission has had a full opportunity to undertake a plenary review of the merger in an administrative proceeding to be undertaken pursuant to Section 5 of the FTC Act, 15 U.S.C. § 45, and Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18, 21.

(2) Alaska has sought intervention as of right under Fed. R. Civ. P. 24(a), asserting (a) that it has a contractual interest in a settlement – the Charter – that it has reached with defendants; (b) a substantial interest in petroleum exploration, production, and development on state lands; and (c) that it has knowledge, evidence, and expertise, that will be relevant to this proceeding.

(3) The grounds asserted by Alaska in support of its motion to intervene as of right are not sufficient to allow intervention under Fed. R. Civ. P. 24(a). *See, e.g., Donnelly v. Glickman,* 159 F.3d 405, 411 (9th Cir. 1998); *see generally, Arizonans for Official English v. Arizona,* 520 U.S. 43, 66 (1997).

(4) Even if Alaska had demonstrated an interest sufficient to allow it to intervene, its alleged interests are more than adequately represented by defendants in this proceeding. *E.g., League of United Latin American Citizens ("LULAC") v. Wilson,* 131 F.3d 1297, 1305 & n.5 (9th Cir. 1998).

(5) Alaska alternatively seeks leave to intervene under Fed. R. Civ. P. 24(b)(2). That Rule allows anyone to seek to intervene when that person has a "claim or defense" that has "a question of law or fact in common" with the main action. However, Alaska's motion expressly disclaims any intent to add any new claims or defenses to this proceeding and its pleadings show that it has no claim or defense of its own to assert. In any event, its claimed interests in this proceeding are insufficient to allow it to intervene under Fed. R. Civ. P. 24(b)(2). *E.g., Donnelly v. Glickman,* 159 F.3d at 411. Alaska therefore may not obtain permissive intervention under this provision.

(6) Alaska may not invoke its status as a government entity to seek permissive intervention under Rule 24(b)(2). The Rule limits intervention by government officials and agencies to situations in which a party to an action asserts a claim or defense that relates to a law or program or other matter that is administered by the official or agency seeking to intervene. Here, the BP and ARCO settlement with Alaska is not a defense to the Commission's action. *See, e.g., United States v. Borden Co.,* 347 U.S. 514, 520 (1954). Accordingly, Alaska is not entitled to permissive intervention under Rule 24(b).

(7) The Court recognizes that Alaska has undertaken its own investigation of the merger, which it concluded with its settlement agreement. The Court would therefore accept from Alaska an amicus brief that addresses the effect of the merger on competition as delineated in Court II of the Commission's complaint. *Blake v. Pallan,* 554 F.2d 947, 955 (9th Cir. 1977).

NOW THEREFORE IT IS ORDERED that the Motion of the State of Alaska to Intervene be, and hereby is, DENIED in its entirety; and

IT IS FURTHER ORDERED that on or before March 1, 2000, the State of Alaska may submit an amicus brief to the Court that addresses (a) the effect the proposed merger would have on competition in bidding for leases on state and federal properties on the Alaska North Slope; (b) the effect of the proposed merger on barriers to entry in the North Slope bidding market; and (c) the effect of the proposed merger on BP's incentive and capability to reduce the pace of exploration and development, and ultimately, the amount of crude oil produced.

IT IS FURTHER ORDERED that on or before March 15, 2000 any party may submit a memorandum responding to the arguments raised by the State of Alaska in its amicus brief.

_____

UNITED STATES DISTRICT JUDGE

DATED:

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General Counsel

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SAN FRANCISCO DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, vs. BP AMOCO, PLC, and ATLANTIC RICHFIELD COMPANY, Defendants.	**Case No.: 00 0416 SI** **Date: February 22, 2000** **Time: 3:00 p.m.** **Courtroom: 4**

OPPOSITION OF PLAINTIFF FEDERAL TRADE COMMISSION TO MOTION OF STATE OF ALASKA TO INTERVENE

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7 C Charles A. Wright, Arthur R. Miller, Mary K. Kane, Federal Practice & Procedures § 1917 (Supp. 1999) 14

Preliminary Statement

The Federal Trade Commission ("Commission") here seeks a preliminary injunction in aid of an administrative proceeding in which it will fully review the merits of a proposed merger between defendants, BP Amoco ("BP") and Atlantic Richfield Company ("ARCO"), under Section 5 of the FTC Act, 15 U.S.C. § 45, and Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18 and 21. The State of Alaska, having also concluded that the transaction violates its antitrust laws, but having entered a settlement with defendants compromising its antitrust claims, moves to intervene as a defendant. The Commission opposes Alaska's motion and suggests that Alaska's participation in this proceeding be limited to that of an *amicus* addressing the narrow matters that directly concern it.

The only necessary parties to *this* proceeding are the defendants and the Commission.[1] Under Section 13(b) of the FTC Act, 15 U.S.C. § 56(b), the Commission is charged both with undertaking a plenary adjudication to determine the legality of the merger. Neither the ultimate legal status of the proposed merger, nor the appropriate choice of any final remedy is at issue in this proceeding under Section 13(b) of the FTC Act. 15 U.S.C. § 56(b). *See, e.g., FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984). In a Section 13(b) proceeding, there are only two issues for this Court. It "must 1) determine the likelihood that the Commission will ultimately succeed on the merits and 2) balance the equities." *Id.*, at 1160; *see generally* PI Mem. at 5-6; 22-24.

Alaska asserts in its memorandum that it conducted an "extensive antitrust investigation" of the merger (Mem. at 2) in coordination with the FTC (*id.* at 6), which must review the transaction before it may be consummated (*id.* at 16). Based on its own investigation, Alaska concluded that the merger would lessen competition in violation of its antitrust laws and therefore negotiated a settlement agreement – the Charter -- with defendants (*id.* at 3). This settlement

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[1]The Court should consolidate this action with the related case brought by the States of California, Oregon, and Washington. The two cases share common issues of fact and similar issues of law. Judicial economy warrants consolidation. Consolidation of the States' related action should have no bearing on Alaska's proposed intervention.

provides, *inter alia*, that, if the defendants consummate their planned merger, the combined company will divest selected portions of some of their overlapping assets to as-yet-unidentified buyers. Together, the putative buyers would own substantially fewer assets than does ARCO today. As an offset to its less-than-complete relief, the agreement "sets forth various community commitments undertaken by BP and ARCO affecting Alaska's environment and the educational and employment opportunities for Alaskans" (*id.* at 7 n.5). Alaska's settlement was thus motivated by Alaska's own variety of interests (*id.* at 5), and the settlement provides Alaska with some relief from its antitrust concerns (*id.* at 7, n.5).

Alaska asserts that it may intervene in this proceeding because (1) the settlement gives it a "contractual interest" in this proceeding; (2) "oil production is the foundation of Alaska's economy" and (3) it possesses much "knowledge" as well as "evidence" relating to the issues here (*id.* at 3-4). Alaska has not shown that it is entitled to intervene, either as of right under Fed. R. Civ. P. 24(a), or permissively under Fed. R. Civ. P. 24(b). Alaska's settlement is a contract entered in compromise of its views that the merger poses antitrust concerns. Having settled its difference with BP and ARCO and thereby secured a variety of "contractual interests" (Mem. at 8) in the remedy, gifts, and other "benefits" set forth in the settlement agreement, Alaska must now "sit on the sidelines" (*id.* at 5) while the Commission seeks judicial relief in the larger national interest – and to preserve full competition in Alaska.

An antitrust plaintiff or potential plaintiff that reaches a settlement with a defendant has no antitrust standing or other legally protectable interest in opposing the efforts of another antitrust plaintiff, especially the Commission, to secure more extensive relief. *See United States v. Borden Co.*, 347 U.S. 514, 520 (1954) ("[T]he [federal] government's right and duty to seek an injunction to protect the public interest exist without regard to any private suit or decree"). Alaska's settlement is by its terms a compromise, and like all settlements, indicates nothing, save the relative bargaining skills of the settling parties. *E.g., United States v. Armour and Co.*, 402 U.S. 673, 681-82 (1971). In any event, an anticompetitive merger may not be "saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 371 (1963).

For these reasons, Alaska's motion to intervene should be denied. The Commission recognizes, however, that Alaska is a sovereign state, that the challenged merger will affect competition in bidding for leases of Alaskan oil-bearing properties, and that in reaching its settlement with defendants, Alaska found that the proposed merger, left unchecked, would violate that state's antitrust laws. To the extent that the Court would find Alaska's views informative on these narrow issues, the Commission consents to Alaska's participation in this proceeding as an *amicus curiae*, limited to the bidding market for ANS exploration leases (Count II of the Complaint).[2]

ARGUMENT

I. Alaska is Not Entitled to Intervention as of Right Under Rule 24(a)(2)

A person may intervene in an action as of right:

> when the applicant claims an *interest relating to the property or transaction which is the subject of the action* and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by the existing parties.

Fed. R. Civ. P. 24(a)(2) (emphasis added).

A. Alaska Does Not Have An Interest In The Transaction That Is The Subject Of This Proceeding.

BP and ARCO reached an agreement to merge in March 1999 and later filed required pre-merger notification reports with the federal antitrust agencies. 15 U.S.C. § 18a. The State of Alaska was not a party to that private transaction, but, following its own investigation, entered into a settlement agreement with BP and ARCO. The defendants did not modify their proposed transaction in the wake of their settlement with Alaska, and it is that underlying transaction that remains the sole subject of this proceeding.

The Commission argues that the merger is probably unlawful, and a preliminary injunction should be granted so that it can effectively address the legality of the proposed merger.

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[2]Alaska's interest in the "revenue" generated by its oil fields (Mem. at 3) is not germane to this antitrust case – a taxing authority has never been allowed to intervene in an antitrust case to assert the fiscal virtues of monopoly rents. Likewise, the mere fact that Alaska has "knowledge" and "evidence" or even "expertise" pertinent to this action is, at most, sufficient to warrant third party discovery against it, but does not supply a basis for intervention.

Defendants will likely argue that the merger is lawful and a preliminary injunction should not be granted. Alaska does not attempt to argue a third position (Mem. at 8). No matter who prevails here, Alaska's contingent rights vis-a-vis the defendants will continue to be governed by the agreement. But in any event, the result in this proceeding -- which seeks to maintain the status quo and preserve competition in the national interest -- cannot be dictated by the agreement Alaska has reached to protect its own interests. *See Northern Securities Co. v. United States*, 193 U.S. 197, 233-36 (1904).

B. Alaska Has Not Shown That It Has Any Other Cognizable Legal Interest In The Transaction That Is The Subject of This Proceeding.

Alaska's motion broadly asserts three grounds for intervention: (1) it has a "contractual interest" in its settlement agreement; (2) it has a substantial economic interest in petroleum production; and (3) it has information and expertise that bear on the issues in this proceeding. None of these grounds provide a sufficient basis for intervention under Fed. R. Civ. P. 24.

Alaska's contractual interests are not legally cognizable in this proceeding. Alaska's settlement agreement with BP and ARCO does not give it an "interest" in the merger that the Commission challenges here. The Commission's complaint does not challenge Alaska's Charter. Moreover, that settlement is, by its terms, subject to the result of the Commission's review of the defendants' transaction. The Commission here is not interfering with Alaska's rights since its agreement contemplates this action and conditions Alaska's rights on occurrence of the merger following Commission review (without giving any right to Alaska as against BP and ARCO, much less the Commission, to demand that the merger proceed).[3] To the extent that Alaska suggests that the terms of Alaska's settlement are the guideposts for disposition of this proceeding (Mem. at 6),

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[3] *See, e.g.*, Charter ¶¶ V.I ("Nothing in this Charter is intended to reduce, eliminate or supersede any other obligations BP or ARCO may have under any State or federal law or regulation."); V.B ("If BP, ARCO and the Federal Trade Commission enter into a consent decree or other agreement related to the merger, the terms of that decree or agreement that relate directly to or affect Alaskan assets or activities within or touching Alaskan waters may be incorporated by the State into this Charter by reference, and are enforceable by the State as though fully set forth herein"); V.F ("in the event the merger agreement . . . is terminated, then any party may terminate this Charter . . . [which] shall become null and void . . .").

they are, as we show below, simply wrong.

Alaska's settlement cannot dictate the outcome of this proceeding. This is so for four reasons: First, this is not a proceeding to review, set aside, or to vindicate the Alaska settlement. It does not call upon this Court to decide whether Alaska has entered into a good deal, or a very bad deal. Rather, this action seeks to maintain the status quo between BP and ARCO pending a complete review of the transaction in a Commission adjudicative proceeding to be conducted under Section 5 of the FTC Act and Section 11 of the Clayton Act. In cases under Section 13(b) of the FTC Act, the only appropriate remedy, absent extraordinary circumstances, is a full-stop preliminary injunction. *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1506 (D.C. Cir. 1986) ("[h]aving found that the acquisition was almost certainly illegal, the district court faced a difficult task in justifying anything less than a full stop injunction"); *see FTC v. University Health, Inc.*, 938 F.2d 1206, 1225 (11th Cir. 1991), *citing and quoting Warner Communications,* 742 F.2d at 1165. The relief Alaska secured for itself in its settlement does not preclude the Commission from enforcing the antitrust laws by seeking the relief necessary to maintain the status quo pending final Commission action.

Second, the fact that Alaska and defendants have reached an agreement that satisfies Alaska is not an extraordinary circumstance that would justify less than a full-stop preliminary injunction. Indeed, it should be self-evident that the settlement does not -- and cannot -- pre-empt action by the Commission here. *E.g., Northern Securities Co.*, 193 U.S. at 233-36. The ultimate remedy should be determined in the first instance by the Commission, and on review of the Commission's final decision by a court of appeals, if necessary, but not by Alaska and the defendants in their private discussions. *See, e.g., United States v. Borden Co.*, 347 U.S. 514, 519 (1954) ("the Government's right and duty to seek an injunction to protect the public interest exist without regard to any private suit or decree"); *cf. California v. American Stores Co.*, 495 U.S. 271 (1990) (a state may seek divestiture in a merger case, even after the parties have entered a consent agreement with the Commission).

Third, non-litigated settlements are compromises. Their terms merely reflect the relative importance that opposing sides assign to various outcomes and, in the end, they depend upon the

bargaining skills of those who negotiate them. As the Supreme Court has observed:

> [A consent a]greement . . . normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.

United States v. Armour & Co., 402 at 681-82; *see also States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-36 (1975). Neither Alaska nor the parties have any cognizable "interest" in trying to inject the terms of the Alaska settlement into this proceeding.

Fourth, Alaska points out that its settlement was achieved, at least in part, when BP and ARCO made "various community commitments" by agreeing to bestow upon Alaska and its citizens many benefits outside that competitive arena. But no matter how great those benefits are, they do not trump the federal antitrust laws, or otherwise justify an anticompetitive merger. *See, e.g., Philadelphia Nat'l Bank,* 374 U.S. at 371 ("a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence . . . ."); *see also FTC v. Indiana Federation of Dentists,* 476 U.S. 447, 463 (1986). The settlement certainly does not preclude the Commission from undertaking the congressional mandate to preserve competition – especially to the extent that competition benefits the citizens of other states, whom Alaska is not charged with protecting.

Alaska's other arguments do not support intervention here. Alaska asserts a very substantial proprietary interest in petroleum exploration, development, and production on the lands that it owns. And plainly, had Alaska not settled, it could have maintained its own action, *as a plaintiff,* to protect that interest. Alaska, however, chose not to litigate, but to compromise its claims. Having chosen a compromise, Alaska has no role to play in this litigation.[4]

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[4]By way of example, if a builder were about to cut down part of a national forest where it abuts four pieces of private property and if one of the private property holders were to forgo an injunction action against the builder in exchange for a promise to hire locally, there is no principle that would allow that settling property owner to intervene on behalf of the defendant to oppose an (continued...)

Nor is Alaska's quest for an active role in this litigation advanced by its asserted expertise and its work in assessing the competitive effects of the proposed merger. Unsurprisingly, Alaska has not cited any case for the proposition that an expert witness (assuming its expertise is as claimed) has a right of intervention. Alaska's offer of "guidance and input to the Court on both the State's and the national interest" (Mem. at 4), could be accepted by allowing its testimony – if proffered by a party – or by allowing it to file an *amicus* brief. Furthermore, the notion that Alaska should intervene to vindicate the "national interest" in apparent opposition to an enforcement proceeding brought by a federal agency under federal law is novel and unsupported.

Alaska's arguments afford no basis for allowing it to intervene as of right under Rule 24(a)(2). The Supreme Court has expressed "grave doubts" whether persons may intervene in actions when they do not "have standing under Article III." *Arizonans for Official English v. Arizona,* 520 U.S. 43, 66 (1997).[5] Although the Ninth Circuit has not directly addressed the issue, [6] it has held that "to entitle a third party to intervene, the plaintiff's requested remedy . . . must have a 'direct, immediate, and harmful effect[]' on the third party's legally protectable interest."

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[4](...continued)
action by the government and the other three property holders to enjoin the destruction of the forest.

[5]In that case, the Court vacated the Ninth Circuit's *en banc* decision in *Yniguez v. Arizona,* 939 F.2d 727 (9th Cir. 1991), a case Alaska relies upon here to support its intervention. The Ninth Circuit subsequently recognized that *Yniguez* "is thus wholly without precedential authority." *League of United Latin American Citizens ("LULAC") v. Wilson,* 131 F.3d 1297, 1305, n.5 (9th Cir. 1998).

[6]Other courts generally have held that a prospective intervenor – whether seeking intervention as of right or permissive intervention – must demonstrate independent standing under Article III. *See, e.g., Rio Grande Pipeline Co. v. FERC,* 178 F.3d 533, 538-39 (D.C. Cir. 1999); *Planned Parenthood of Mid-Missouri & Eastern Kansas, Inc. v. Ehlmann,* 137 F.3d 573, 576-77 (8th Cir. 1998); *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers,* 101 F.3d 503, 507 (7th Cir. 1996); *compare American Maritime Transp., Inc. v. United States,* 870 F.2d 1559, 1561 (Fed. Cir. 1989) ("Intervention is proper only to protect those interests which are of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment" (internal quotation omitted)).

See, e.g., Donnelly v. Glickman, 159 F.3d 405, 411 (9th Cir. 1998) (*quoting Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1389, 1394 (9th Cir. 1995)); *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993)("[a]n economic stake in the outcome of the litigation, even if significant, is not enough"); *Silver v. Babbitt*, 166 F.R.D. 418, 427 (D. Ariz. 1994) (denying intervention to State of Arizona), *aff'd*, 1995 U.S. App. Lexis 29739 (9th Cir. 1995). Thus, the applicant for intervention must demonstrate a "significantly protectable interest" "relating to the property or transaction which is the subject of the action" *See Donaldson v. United States*, 400 U.S. 517, 531 (1970). Moreover, that interest must be one that requires immediate protection, not one that could be asserted "in due course" in subsequent proceedings. *Id.* Alaska's interests, however defined, are not significant enough to give it party status here, where the Commission simply seeks a preliminary injunction, which is not a form of remedy that will immediately harm Alaska.. *See e.g.,* Charter ¶ ¶ V.B, V.G.

In short, this case concerns a contract between BP and ARCO. Alaska's interests, if any, concern its contract with BP and ARCO. Alaska has not shown any interest in the "transaction" that is the "subject of this action" sufficient enough to allow it to intervene as of right.

C. Alaska's Interests Are Adequately Represented In This Proceeding

Alaska's interests in this proceeding are fully represented by defendants. The Ninth Circuit has repeatedly held that "[w]here an applicant for intervention and an existing party 'have the same *ultimate objective*, a presumption of adequacy of representation arises.'" *Northwest Forest Resource v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996); *LULAC v. Wilson*, 131 F.3d at 1305 (citing cases). Moreover, "[t]o overcome that presumption, petitioner ordinarily must demonstrate adversity of interest, collusion, or nonfeasance." *Id.,* at 1305 n.4.

Alaska cannot meet this standard. It admittedly has the same ultimate objective as defendants in this proceeding – the denial of the Commission's preliminary injunction motion. It has not shown any adversity of interest between it and the defendants in this proceeding – nor could it, given the provisions in the Charter by which defendants have agreed to pay for Alaska's legal expenses. Charter ¶ V.G. It has not shown any collusion among any of the parties to defeat the settlement agreement. Plainly it can not assert any nonfeasance on the part of BP or ARCO, or

their counsel, in defending the proceeding. Alaska's intervention in this case would merely give BP and ARCO an extra set of counsel in depositions and in the courtroom.

Accordingly, Alaska is not entitled to intervene as of right in this proceeding. It has not shown that it has any legally cognizable interest to protect here; and its interests are adequately represented by defendants.

II. Alaska Is Not Entitled To Permissive Intervention Under Rule 24(b)(2)

Alaska advances two potential bases for permissive intervention under Fed. R. Civ. P. 24(b)(2). Neither applies here. The Rule provides that "anyone" may be permitted to intervene in an action "when an *applicant's claim or defense* and the main action have a question of law or fact in common" (emphasis added). As Justice O'Connor has explained, this requirement necessarily implies that the applicant itself must have a legal "claim or defense":

> The words "claim or defense" manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit, as is confirmed by Rule 24(c)'s requirement that a person desiring to intervene serve a motion stating "the grounds therefor" and "accompanied by a pleading setting forth the claim or defense for which intervention is sought."

Diamond v. Charles, 476 U.S. 54, 76-77 (1986) (O'Connor, J., concurring).

Alaska "does not seek to add new claims or defenses to this litigation."[7] Mem. at 8. Nor could it. By settling with the defendants, it has forgone any possibility of asserting any claim in this action. Similarly, this proceeding does not challenge its agreement with the parties. Finally, Alaska's asserted expertise and its potential role as a witness or source of discoverable information does not give it a claim or defense of its own. Alaska therefore cannot seek permissive intervention under the first basis afforded by Fed. R. Civ. P. 24(b)(2).[8]

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[7]Alaska has not filed the requisite Rule 24(c) pleading – a tacit admission that it has no claim or defense of its own to assert.

[8]Alaska relies on *Beckman Indus., Inc. v. International Ins. Co.,* 966 F.2d 470 (9th Cir. 1992), for the proposition that an independent jurisdictional basis – *i.e.,* a distinct "claim or defense" capable of meeting Article III standing requirements – "is not a prerequisite for permissive intervention in every case" (Mem. at 14, n.7). Alaska's reliance is misplaced. *Beckman* held that normal Rule 24(b) requirements should not be strictly applied "when a party

(continued...)

Fed. R. Civ. P. 24(b)(2) also allows permissive intervention by government entities under certain circumstances. Broadly stated, the Rule provides that a government officer or agency may seek to intervene whenever a private party "relies for ground of claim or defense" upon some governmental program or action administered by the officer or agency that seeks to intervene. Under the Rule's plain language, the assertion of a claim or defense is a necessary (or at least immediately foreseeable) predicate to the intervention by the government officer or agency.

Here, no such claim or defense is possible, because Alaska's settlement with BP and ARCO does not give those parties any defense to the Commission's claims against them. *See, e.g., Borden Co.,* 347 U.S. at 519 ("the Government's right and duty to seek an injunction to protect the public interest exist without regard to any private suit or decree"); *cf. California v. American Stores Co.*, 495 U.S. 271 (1990) (a state may seek divestiture in a merger case, even after the parties have entered a consent agreement with the Commission).

Because BP and ARCO may not assert their settlement with Alaska as a defense to the Commission's cause of action here, Rule 24(b)(2) does not give Alaska any basis for seeking intervention.

III. S'\ould The Court Allow Alaska To Participate In This Proceeding, Either As An Intervenor Or As An Amicus, That Participation Should Be Limited.

Where a proposed intervenor raises no distinct claim or defense, and asserts no

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[8](...continued)
seeks to intervene only for the purpose of modifying a protective order" (966 F.2d at 474), reasoning that "an independent jurisdictional basis is not required because intervenors do not seek to litigate a claim on the merits," but only to ask the court to exercise its retained jurisdiction to modify its own order (*id.* at 473). Motions to modify protective orders are, however, the "narrow exception" to "the rule that permissive intervention generally requires an independent jurisdictional basis." *See* 7C Charles A. Wright, Arthur R. Miller, Mary K. Kane, Federal Practice & Procedure § 1917, at 65 (Supp. 1999). *Beckman* itself reaffirmed that "[p]ermissive intervention ordinarily requires independent jurisdictional grounds," 966 F.2d at 473. Ninth Circuit cases before and after *Beckman* have reaffirmed a strict requirement of independent jurisdictional grounds where an applicant seeks, as Alaska does, to intervene permissively on the merits of ongoing litigation. *See, e.g., Northwest Forest,* 82 F.3d at 839; *EEOC v. Pan American World Airways, Inc.*, 897 F.2d 1499, 1509-10 (9th Cir. 1990); *EEOC v. Nevada Resort Ass'n,* 792 F.2d 882, 886-87 (9th Cir. 1986); *Blake v. Pallan,* 554 F.2d 947, 955 (9th Cir. 1977).

independent legal rights (*see* Alaska Mem. at 8),[9] the more efficient and preferred vehicle to allow its participation is a grant of *amicus curiae* status. *See, e.g., California v. Tahoe Regional Planning Agency,* 792 F.2d 775, 779 (9th Cir. 1986) (where an applicant's "interests are adequately represented by existing parties . . . intervention would be redundant and would impair the efficiency of the litigation"); *Blake v. Pallan,* 554 F.2d at 955 (where government official "claim[ed] that the litigation would be substantially benefitted by his knowledge . . . such benefits might be obtained by an amicus brief rather than bought with the price of intervention"). As Judge Wyzanski explained long ago:

> It is easy enough to see what are the arguments against intervention where, as here, the intervenor merely underlines issues of law already raised by the primary parties. Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair. Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention.

Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc., 51 F. Supp. 972, 973 (D. Mass. 1943).[10]

Count II of the Commission's complaint in this proceeding asserts that "BP and ARCO are the two most important competitors in bidding for exploration leases for oil and gas on lands owned by the State of Alaska . . ." (Comp. ¶ 32); and that

> The effect of the proposed merger, if consummated, may be substantially to lessen competition in bidding for leases on state and federal properties on the Alaska North Slope. The proposed merger will also raise the already formidable barriers to entry in the North Slope bidding market . . . and enhance the incentive and capability of BP to reduce

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[9]Having disclosed its plans to inject an unknown number of fact witnesses and a minimum of three expert witnesses -- including one who will discuss "the market for ANS crude oil in California and the Western States," and one who will opine on the benefits of Alaska's settlement (Mem. at 7-8) – Alaska's motion to intervene seeks a role for Alaska that is far larger than it needs to protect any interest -- however contingent and tangential -- the Court might find that it could have in the outcome of this preliminary injunction proceeding

[10]*Accord, Texas v. United States Dep't of Energy,* 754 F.2d 550, 553 (5th Cir. 1985); *Bush v. Viterna,* 740 F.2d 350, 359 (5th Cir. 1984); *Philadelphia Elec. Co. v. Westinghouse Elec. Corp.,* 308 F.2d 856, 860 (3d Cir. 1962); *Silver v. Babbitt,* 166 F.R.D. 418, 434-35 (D. Ariz. 1994), *aff'd,* 1995 U.S. App. Lexis 29739 (9th Cir. 1995); *British Airways Bd. v. Port Auth.,* 71 F.R.D. 583, 585 (S.D.N.Y.), *aff'd,* 556 F.2d 554 (2d Cir. 1976).

> the pace of exploration and development, and ultimately, the amount of crude oil produced.

Id. ¶ 36. Given the significance of bidding competition to development of Alaska's natural resources (Mem. at 3-4), any participation by Alaska is appropriately confined to addressing the effect the merger would have on competition as set out in Court II of the complaint.[11]

Conclusion

For the above stated reasons, Alaska's motion to intervene should be denied. Should the Count should allow Alaska to participate in this proceeding, Alaska's role should be limited to an *amicus curiae* addressing the antitrust issues that directly concern it as the owner of

[11]We also submit that the parties and the Court should be spared any explanation by Alaska of the terms of its settlement with BP and ARCO, or its reasons for entering into it. The fact, and content, of the settlement may not dictate the outcome of this proceeding.

properties leased through competitive bidding. Should the Court afford Alaska intervenor status, its role should be similarly circumscribed.

Respectfully submitted,

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Dated: February 16, 2000

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