

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILES 8672

2639 SCOMM 117 JOINT SPECIAL COMMITTEE ON MERGERS, 1999-2000

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

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

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

10 COUNT II:

11 **LOSS OF COMPETITION IN BIDDING FOR RIGHTS** 12 **TO EXPLORE ON THE ALASKA NORTH SLOPE**

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

15 **A. The Relevant Product Market**

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

20 **B. The Relevant Geographic Market**

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

26 **C. Concentration**

27 35. The proposed merger would substantially increase market concentration in an
28

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

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

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

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

13 **COUNT III:**

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

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

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

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

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

6 **A. The Relevant Product Market**

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

11 **B. The Relevant Geographic Market**

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

16 **C. Concentration**

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

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

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

26 46. Market power over the pipeline and storage services into and in Cushing likely
27 would enable BP to manipulate NYMEX trading in light sweet crude oil futures by restricting or
28

1 otherwise manipulating the deliverable supply of crude oil in Cushing.

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

4 IX.

5 **NEED FOR RELIEF**

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

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

15 WHEREFORE, the Commission requests that the Court:

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

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

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

25 Respectfully submitted,

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9 Dated: February 4, 2000
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"FTC Complaint
for a Preliminary Injunction"

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11
12 **IN THE UNITED STATES DISTRICT COURT**
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
SAN FRANCISCO DIVISION

14
15 FEDERAL TRADE COMMISSION,
600 Pennsylvania Ave., N.W.)
16 Washington, D.C. 20580)

17 Plaintiff,

[Public Version]

18 vs.

19 BP AMOCO, PLC,
Brittanic House, 1 Finsbury Circus
20 London EC2M 7BA, England

Civil No. _____

21 and

Date: February 4, 2000

22 ATLANTIC RICHFIELD COMPANY,
333 S. Hope Street
23 Los Angeles, California 90071

24 Defendants.
25

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

Plaintiff FTC's Memorandum in Support
of Motion for Preliminary Injunction

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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

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...)

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

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

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17 ²(...continued)

18 Guidelines § 0.1 (hereinafter, "Merger Guidelines"), *reprinted in* 4 Trade Reg. Rep. (CCH)
19 ¶ 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.")

20 ³*See, e.g., California v. American Stores Co.*, 872 F.2d 837, 841 (9th Cir. 1989), *rev'd on*
21 *other grounds*, 495 U.S. 271 (1990); *FTC v. Warner Communications, Inc.*, 742 F.2d 1156,
22 1162-63 (9th Cir. 1984).

23 ⁴*See, e.g., United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 661-62 (1964); *FTC*
24 *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
25 Staples to increase prices or otherwise maintain prices at an anti-competitive level").

26 ⁵Spot 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. []
27 [] PX 54 at 245-50; PX 206 at 1-2; PX 288 at 1.
In BP's terminology, [] translate into higher ANS prices. [] translate
28 into lower ANS prices. PX 206 at 1; PX 54 at 93-94.

1
2]
3 Unless enjoined, this proposed merger would fortify BP's already dominant position by
4 eliminating the firm most likely to challenge or constrain BP. ARCO is a substantial competitive
5 force in Alaska and on the West Coast in the exploration, production, transportation, and sale of
6 ANS crude oil.⁶ ARCO was responsible for the discovery of the North Slope's vast reserves in
7 the late 1960s. Today ARCO produces over 30% of ANS crude oil, controls 22% of the Trans-
8 Alaska Pipeline System ("TAPS"), and is second only to BP in the marine tonnage used to ship
9 ANS crude to the West Coast.

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

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

21
22 ⁶ANS crude oil moves from producing fields on the North Slope to "Pump Station 1" at
23 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.

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

26]. Even at its relatively small current position, [
27] PX 274 at 1. For example, [

] PX 270 at 1; PX 287

28 at 2.

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

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

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

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

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

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

11 ARGUMENT

12 I. BP's ACQUISITION OF ARCO VIOLATES § 7 OF THE CLAYTON ACT 13 BECAUSE IT MAY SUBSTANTIALLY LESSEN COMPETITION IN SEVERAL 14 MARKETS

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

24 ⁸The FTC submits that these actions should be consolidated.

25 ⁹Reuters, "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
26 prices, which is the basis for the calculation of severance taxes and royalties paid to the State. PX
27 427 at 8; PX 113 at 2, 4. The higher the ANS price to West Coast refiners, the better it is for
28 Alaska.

1 A court's role in evaluating the Commission's likelihood of success on the merits "is not
2 to make a final determination on whether the proposed merger violates Section 7, but rather to
3 make a preliminary assessment of the merger's impact on competition." *Warner Communications*,
4 742 F.2d at 1162. Section 7 of the Clayton Act is intended to arrest anticompetitive mergers "in
5 their incipency" and, accordingly, requires a prediction of the merger's likely impact on future
6 competition. *United States v. Philadelphia Natl Bank*, 374 U.S. 321, 362 (1963). Because the
7 statute requires a forward-looking assessment, certainty is not required.

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

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

19 **1. BP Exercises Market Power Today.**

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

23 a plaintiff may demonstrate market power either by direct evidence or by
24 circumstantial evidence. *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421,
25 1434 (9th Cir.), *cert. denied*, 116 S. Ct. 515 (1995). Direct proof of market power
26 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

27 ¹⁰See *U.S. v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *U.S. v. E.I. du Pont de Nemours*
28 *& 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.

1 power.” *Id.*

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

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

13 A refinery operates most efficiently with a particular “slate” of crude oil. Many West
14 Coast refineries rely upon ANS crude oil for a substantial portion of their supply. PX 235 at 5-6.
15 Other crude oils differ significantly from ANS in key characteristics, including gravity, sulfur
16 content, metals content and pour point. PX 54 at 39-43. These characteristics affect the products
17 that can be made from the crude oil, the equipment needed to refine it, and the costs of doing so.
18 *Id.* Accordingly, refiners will not switch to other crude oil, even at the margin, until the price
19 differential reaches [] “trigger point” – the point at which running the last
20

21 ¹¹ See also Baker, ‘Product Differentiation Through Space and Time: Some Antitrust
22 Policy Issues,’ 42 ANTITRUST BULL. 177, 185 (1997).

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

¹³*E.g.*, PX 201 at 3, 11 []

1 barrel of ANS crude oil is no more profitable than running a different crude oil given that refiner's
2 equipment and product slate. Trigger points for ANS differ from refinery to refinery. PX 54 at
3 68-70, 199-202; PX 214 at 4; *see also* PX 236 at 1.

4 BP [
5], the highest ANS price it could seek before the refinery would turn to
6 another source of crude oil. PX 54 at 68-70. BP generally [
7
8] PX 201 at 3, 9-10. BP then [
9]
10 exactly how much ANS crude oil to ship to Asia in order to tighten supplies and increase spot
11 prices on the West Coast, and thereby to maximize its aggregate profits from ANS sales:

12 [
13
14
15].

16 To control the disposition of ANS crude oil, and to discriminate among refineries with
17 such precision, BP sells nearly all ANS crude on a "delivered" basis. PX 209 at 7 [
18]. BP
19 ships crude oil from Alaska to the West Coast in its tankers and delivers it to the refinery's
20 storage tanks.

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

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

1 []
2]
3 PX 203 at 4. [] ANS crude oil is insulated from full
4 competition from alternative crude oils.
5 Absent price discrimination, BP [
6]. The fact that BP has already raised the
7 price of ANS crude above a "competitive" price to targeted refineries sufficiently establishes a
8 relevant product market of sales to those refineries. As Chief Judge Posner has explained, the
9 ability to price discriminate demonstrates that a firm possesses market power:
10 Price discrimination implies market power, that is, the power to charge a price
11 above cost (including in "cost" a profit equal to the cost of equity capital) without
12 losing so much business so fast to competitors that the price is unsustainable. The
13 reason price discrimination implies market power is that assuming the lower of the
14 discriminatory prices covers cost, the higher must exceed cost.¹⁵
15 BP [] firms up prices on the West Coast by exporting oil to Asia in
16 order to short supply on the West Coast:
17 []
18]
19 PX 212 at 3. BP exports to Asia at netbacks [] per barrel less than it could realize on the
20
21
22

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 Assn 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).

1 West Coast spot price. PX 207 at 5.¹⁶ BP has systematically shipped ANS crude oil to customers
2 outside the West Coast not because those sales themselves were profit-maximizing, but to [
3] on the West Coast:

4 [

8]¹⁷

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

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

15]¹⁸

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

19 ¹⁶See also PX 211 at 1 [

20].

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

23 ¹⁸PX 426 at 1-3; PX 250 at 2; PX 54 at 253; PX 269 at 1 [

24]; *id.* [

25] In 1997,

26 BP purchased a total of [] barrels (the equivalent of [] MBD) of ANS from
27 ARCO. PX 234 at 11-24. See also PX 263 [

28]

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

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

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

11 BP and ARCO today have sharply divergent interests and incentives. PX 159 at 8; PX
12 131 at 3. BP ships ANS crude to Asia to short the West Coast market and elevate prices. ARCO,
13 as an integrated refiner that normally uses more ANS in its refineries than it produces in Alaska,
14 has an incentive to lower its crude costs by finding and producing new oil. And it has been
15 successful. In 1994, ARCO found oil at Alpine, on the North Slope, the second largest discovery
16 in Alaska in 12 years. PX 107-3. That field, which will begin producing oil this year, is expected
17 to produce 80 MBD by 2001, PX 409, and increase ARCO's net production by []
18] MBD by 2004.²¹ The additional supply on the West Coast would tend to put downward
19 pressure on pricing.

20
21 ¹⁹See also *Re/Max Intl, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1017-21 (6th Cir. 1999)
22 ('[A]n antitrust plaintiff is not required to rely on indirect evidence of a defendant's monopoly
23 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.

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

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

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

11 This merger will eliminate these constraints on BP's market power. ARCO's spot market
12 sales will be fully under BP's control. BP would have an incentive to use [

13] to manage ANS supplies on the West Coast to keep the market tight. It could
14 choose to use ANS crude oil in ARCO's refineries instead of imported crude, and keep that much
15 ANS crude off the open market, just as it exports ANS crude to Asia to maintain a tight West
16 Coast market. By also eliminating its most aggressive competitor for oil and gas leases on the
17

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

22 ²³ARCO also purchases ANS crude oil from independent producers that lack tanker
23 capacity, (PX 401 at 1; PX 77 at 45-46), enabling it to resell that crude oil to other refiners.
24 ARCO makes relatively small sales to refiners that lowers the spot market price and the prices
25 under BP's term contracts (which are tied to the spot market price). PX 206 at 1. BP, on the
26 other hand, [] purchase ARCO's excess crude, to keep ANS prices up. PX 269 at 1.
27 ARCO has an incentive to reduce spot market prices because doing so will reduce severance taxes
28 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.

²⁴PX 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.

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

2 No other firm in Alaska today, or likely to enter in the future, can match ARCO's abilities
3 or incentives. Exxon [

4] PX 108 at 4; PX 159 at 6 [] Others

5 have been leaving Alaska for a decade. PX 52 at 38-40 (Texaco, Amerada Hess, Conoco, Shell
6 exiting). No other firm has the experience or assets in Alaska that BP and ARCO have.²⁵ BP and
7 ARCO currently account for 67% of all State exploration acreage on the North Slope, PX 159 at
8 6, and more than 70% of all North Slope acreage (including production, exploration, State and
9 Federal land), PX 110 at 25, most of the proven reserves, PX 108 at 3, and 74% of the barrels
10 produced, PX 419 at 1-2; PX 420 at 2-3. After the merger, BP would be the only operator on the
11 North Slope.

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

14 Entry into the production and sale of ANS crude oil, or other crude oil to targeted refiners
15 is unlikely to occur in a timely or sufficient manner to prevent BP from exercising its already
16 significant market power.²⁶ Entry has not constrained BP's exercise of market power to date.
17 Defendants admit that entry into Alaska production would take [] years. PX 413 at 3.
18 Many major oil companies, including Shell, Amerada Hess, and Conoco, have tried and failed to
19 succeed on the North Slope. PX 52 at 38-40; PX 156 ¶ 12. Given the difficulty of entry and
20

21 ²⁵BP and ARCO own [] proprietary seismic and well data, which are
22 essential in evaluating new properties. PX 112 at 1; *see also* PX 103 at 1; PX 126 at 7; PX 128
23 at 9; PX 129 at 1; PX 71 at 59. They are the only two operators of producing acreage, PX 159 at
24 9, which is a major advantage in further exploration and development efforts in the area. PX 142
25 ¶ 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 ²⁶To defeat or deter the anticompetitive effects of an acquisition, entry must be likely to
27 occur within two years, and at a sufficient scale to constrain the anticompetitive impact of the
28 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.

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

6 Nor is it likely that producers of other crude oil will begin supplying West Coast refineries
7 in a manner that would constrain BP's ability to exercise market power. The most compelling
8 evidence that other producers would not enter is that they have not entered: although BP has been
9 exercising market power against targeted refineries for at least five years, new entrants have not
10 prevented BP from doing so.²⁷ When BP raised prices relative to WTI²⁸ by approximately \$1 per
11 barrel in 1995, other producers of other crudes did not prevent BP from doing so or restore BP's
12 prices to pre-1995 levels.

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

15 The merger will eliminate competition between the two most significant firms bidding for
16 oil and gas leases on the North Slope. For over 30 years, fierce rivalry between these two firms
17 has spurred active exploration and development on the North Slope. Their merger is likely not
18 only to reduce the amount of money received in future lease sales, to the detriment of the State of
19 Alaska and the Federal Government, but (as described above) also threatens to reduce long-term
20 exploration, development and production on the North Slope. PX 157 (U.S. Department of
21 Interior concerned about merger); PX 154 ¶¶ 4, 5 (State of Alaska concerned about lack of North
22 Slope competition and entry barriers); PX 118 at 1 (Alaska Governor Knowles concerned about
23 merger).
24
25

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

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

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

3 The State of Alaska and the Federal Government own mineral resources on the Alaska
4 North Slope and offshore Alaska's north coast. These governments exploit these resources by
5 auctioning exploration leases to oil companies. For these government owners of natural
6 resources, who would be injured by the loss of competition, the relevant product market is
7 exploration leases, and the relevant geographic market is where the resources are – the Alaska
8 North Slope and offshore waters.²⁹ "The exercise of market power by buyers ("monopsony
9 power") has adverse effects comparable to those associated with the exercise of market power by
10 sellers." *Merger Guidelines* § 0.1.³⁰ In this case, BP's acquisition of ARCO may substantially
11 lessen competition in the bidding for oil leases on the North Slope of Alaska.

12 The merger would combine the two most significant competitors on the North Slope. As
13 described above, they own or control all exploration, development and production assets, and
14 they won over 60% of all state lease auctions over the last decade (by dollar value). The top four
15 firms (premerger) won 75%. PX 110 at 10.³¹ BP's acquisition of ARCO would increase

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

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

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

1 concentration by over 1700 HHI³² points to a post-merger level of over 3900. Similar market
2 shares and concentration levels on the buyers' side have led courts to find clear violations of
3 Section 7 of the Clayton Act.³³

4 The parties' own documents confirm that BP and ARCO are the only significant
5 competitors. ARCO sees the competition with BP[] PX 137 at 9. BP views ARCO
6 as [] on the North Slope. [] PX 106 at 2; PX 103 at 1 []
7
8]. Other firms, including even
9 those still producing on the North Slope (such as Exxon, Mobil, Marathon, Unocal, Conoco,
10 Texaco, and Amerada Hess), have exited bidding. PX 120 at 1.

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

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

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

26 ³³See *United States v. Rice Growers Assn.*, 1986-2 Trade Cas. (CCH) ¶ 67,288, at 61,465
27 (E.D. Cal. 1986) (post-merger firm would have controlled 61% of purchases and top four firms
28 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).

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

4 This merger presents that danger – that BP, as a result of this merger, would be
5 increasingly able to manipulate the price of NYMEX crude oil futures. The merger would give
6 BP greater control of the crude oil transportation and storage infrastructure in Cushing,
7 Oklahoma, which underpins the NYMEX futures contract. PX 301 at 7; PX 309 at 1; PX 307 ¶
8 11. [] and
9 BP's previous acquisition of Amoco at the end of 1998 gave it control at that time of one of the
10 major pipelines into Cushing³⁵ and []% of the terminal storage at Cushing. PX 319 at 4. This
11 merger would give BP control of the Seaway Pipeline, the only route by which imported crude oil
12 can reach Cushing, ARCO's in-line transfer business at Cushing, and additional storage.

13 After the merger, BP would have increased strength to manipulate the WTI futures
14 market. PX 306 ¶ 13; PX 307 ¶ 14.³⁶ Futures markets are tied to physical commodity markets by
15 the obligation to take (or make) delivery of the physical commodity by the expiration of the
16 contract month. See PX 307 ¶ 11. The NYMEX light, sweet crude oil futures contract thus
17 requires the parties to make and take delivery of WTI crude oil in Cushing by the expiration of the
18 contract. PX 301 at 7. However, nearly all futures contracts are closed by acquiring an offsetting
19

20 ³⁴Manipulation makes prices less informative and increases the volatility of futures prices
21 thereby distorting consumption and production decisions and reducing the hedging effectiveness
22 of a futures contract. See S. Pirrong, *THE ECONOMICS, LAW, AND PUBLIC POLICY OF MARKET*
23 *POWER MANIPULATION* 125, 132 (1996). Section 3 of the Commodity Exchange Act, 7 U.S.C.
24 § 5, states that "the transactions and prices of commodities on such boards of trade are
25 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."

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

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

1 position rather than by actual delivery,³⁷ and indeed the volume of trading in NYMEX crude oil
2 futures vastly exceeds the amount of WTI crude oil available in Cushing to make delivery. PX
3 307 ¶ 11.³⁸

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

11] PX 311 at 2. The change in supply of a relatively small number of
12 barrels can affect the price of WTI. PX 318 at 2.⁴⁰

13 BP's increased control of the infrastructure used to deliver crude oil to Cushing increases
14 its ability to manipulate crude oil futures, by giving BP greater information about the current and
15 future amount of WTI available in Cushing, and greater control over the amount of WTI that
16

17
18 ³⁷Participants in the crude oil futures market are either speculating on oil prices generally,
19 or seeking to hedge their own crude oil production or needs elsewhere in the world. PX 307 ¶
11; see PX 328 at 3.

20 ³⁸For example, on February 2, 2000, the "open interest," representing outstanding futures
21 contracts on the March contract was 133 million barrels. Wall Street Journal, Feb. 2, 2000, at C-
22 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.

23 ³⁹The seller of a futures contract is called a "short," obligating the seller to make delivery
24 in the specified month; the buyer is called a "long," obligating the buyer to receive delivery. PX
25 301 at 8, 9; PX 310 at 6, 8.

26 ⁴⁰Under CFTC and NYMEX rules, traders are not able to take a sufficiently large long
27 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 [

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

1 reaches Cushing. PX 306 ¶ 11; PX 307 ¶¶ 14, 17. This merger would give BP control of
2 significant new facilities and access to nonpublic information about the WTI supply handled by
3 those facilities – in particular, the Seaway and Basin pipelines⁴¹ and ARCO's Cushing in-line
4 transfer business.⁴² BP would know more than others about the amount of WTI likely to be
5 available in Cushing for delivery, and therefore would be better able to know when and how hard
6 to squeeze the market.⁴³

7 ARCO operates, and owns 50% of, Seaway Pipeline, which transports up to 350 MBD of
8 crude oil, including foreign crude oil, into Cushing from the Gulf Coast. PX 302 at 3; PX 306 ¶
9 10; PX 307 ¶ 9. Because domestic onshore crude oil production is rapidly declining, the
10 incremental barrel of oil needed to satisfy the NYMEX contract will be foreign oil. PX 307 ¶ 9.
11 As an ARCO employee explained to a NYMEX official, foreign crude oil is also necessary to
12 maintain liquidity of futures and prevent price squeezes. PX 311 at 4. Therefore, Seaway will
13 increasingly become the primary source of foreign crude oil supply to Cushing. PX 70 at 12; PX
14 306 ¶ 10.⁴⁴

15
16 ⁴¹ARCO operates Seaway, which requires shippers to nominate the amount of capacity
17 they want to use up to 90 days in advance. PX 70 at 29. As operator, BP would manage the
18 nominations process. PX 312 ¶ 9. BP also would have access to information about shipping
19 volumes and types of oil coming into Cushing on ARCO's share of Basin (approximately 40
20 MBD). PX 302 at 3.

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

24 ⁴³[]
25 PX 50 at 26, 27. [
26] PX 51 at 37.

27 ⁴⁴ARCO also has an approximately [] undivided joint interest in the Basin Pipeline
28 (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...)

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

6 Storage tanks holding crude oil are also a source of supply of crude oil for delivery against
7 the NYMEX futures contract. BP is currently the largest single owner of tank storage at Cushing
8 with [] percent of total capacity, and ARCO owns about []. PX 302 at 6. BP would have a
9 post-acquisition share of 42.2% of a highly concentrated market, and the top 4 firms would have
10 92.4%. Concentration in tank capacity, would increase by 220 HHI points, in a highly
11 concentrated market to a post-acquisition HHI of 3128.

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

18 Thus, BP's increased control of pipeline and storage delivery capacity at Cushing would
19 increase BP's ability to manipulate prices in the crude oil futures market, increasing the cost of
20 using the NYMEX futures contract to hedge against adverse crude oil price movements, and
21

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

26 ⁴⁵A pipeline operator's responsibilities include scheduling of crude oil shipments; electing
27 when to use or not use drag reducing agents (DRAs), which increase capacity by up to 10%;
28 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.

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

2 **D. Defendants' Asserted Efficiencies Cannot Save This Transaction**

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

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

21 Where, as here, the Commission has demonstrated a likelihood of success on the merits, it
22 is entitled to a preliminary injunction to preserve the Commission's ability to adjudicate the merits
23 and order proper relief. The courts recognize the strong public interest in effective enforcement
24 of the antitrust laws and in preservation of competition while a transaction that poses a significant
25 competitive threat is analyzed in detail. *E.g., Warner Communications*, 742 F.2d at 1165.
26 Although private equities may be considered in the balance, courts "must afford such concerns
27

28 ⁴⁶A 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).

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

5 Potentially illegal acquisitions must be enjoined because a combined operation can seldom
6 be reconstituted as separate, viable entities after the acquisition is consummated. As the Ninth
7 Circuit has held, "denial of a preliminary injunction would preclude effective relief if the
8 Commission ultimately prevails" in a full trial. *Warner Communications*, 742 F.2d at 1165.⁴⁷ A
9 merger that threatens to reduce competition also should be enjoined to prevent the interim harm
10 to competition that would result even if a suitable divestiture remedy could be devised. "Later
11 remedies cannot remove retroactively the harm that has already occurred. Courts should,
12 therefore, prohibit consummation of a merger pursuant to Section 13(b) where serious questions
13 are raised about its legality."⁴⁸

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

19
20 ⁴⁷ See also *Marathon Oil Co. v. Mobil Corp.*, 530 F. Supp. 315, 320 (N.D. Ohio 1981)
21 ("no satisfactory method exists that would restore Marathon to its present competitive position in
22 the marketplace. The disruption of a business the size of Marathon cannot be ignored even in
light of the remedy of divestiture").

23 ⁴⁸ *FTC v. Bass Bros. Enters.*, 1984-1 Trade Cas. (CCH) ¶ 66,041 at 68,622 (N.D. Ohio
24 1984).

25 ⁴⁹ *Consolidated Gold Fields, PLC v. Anglo American Corp.*, 698 F. Supp. 487, 502
26 (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*
27 *in part and rev'd in part on other grounds*, 871 F.2d 252 (2d Cir. 1989); *Chemetron Corp. v.*
28 *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").

1 316, 329 (1961) (holding that "the undoing of the acquisition is a natural remedy"). The Charter
2 proposes a divestiture of only half the assets giving rise to competitive problems, and permits BP
3 to add to its existing dominant share of ANS crude oil supply. The Commission has the statutory
4 right and authority to conduct a plenary review of the transaction and, if appropriate, to order BP
5 not to acquire any part of ARCO in the relevant markets.⁵⁰ A preliminary injunction is the proper
6 route to protecting that authority.⁵¹

7 CONCLUSION

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

10
11 Respectfully submitted,

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21 Dated: February 4, 2000

22
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25
26 ⁵⁰The Commission has been given considerable discretion in crafting remedies for illegal
27 mergers, and such orders are affirmed on appeal when supported by "substantial evidence." See
28 *Olin Corp. v. FTC*, 986 F.2d 1295, 1307 (9th Cir. 1993).

⁵¹See *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 North 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)

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

¹On 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.

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

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

SUMMARY OF ARGUMENT AND EVIDENCE RE DEFS.' OPPOSITION TO PLFTS.' MOTION
FOR PRELIMINARY INJUNCTION - 00-00416 (SI)

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10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13 **FEDERAL TRADE COMMISSION,**

14 **Plaintiff,**

15 **v.**

16 **BP AMOCO, P.L.C.,**

17 **and**

18 **ATLANTIC RICHFIELD COMPANY,**

19 **Defendants.**
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[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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28	ALASKA'S OPPOSITION TO FTC'S MOTION FOR A PRELIMINARY INJUNCTION	
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1 **I. INTRODUCTION**

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

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

15 Moreover, in asserting these claims, the FTC ignores the "Charter for Development of the
16 Alaskan North Slope" (the "Charter") (attached hereto as Exhibit 1), a contract executed among
17 Alaska, BP Amoco, and ARCO, that substantially modifies the original Agreement and Plan of
18 Merger between BP Amoco and ARCO. The Charter cannot, however, be disregarded. It is essential
19 to the analysis. The Charter lowers barriers to entry and ensures enhanced competition such that the
20 FTC cannot succeed on the merits of its Section 7 claims. The Charter also ensures increased
21 efficiencies in the production and distribution of crude oil, maintains BP Amoco's presence in
22 Alaska, and bolsters the Alaskan economy and the social welfare of its citizens. Consequently, in
23 addition to the increased competition which the proposed merger will provide, the equities decidedly
24 weigh against blocking the merger. Given that the FTC cannot succeed on the merits and that the
25 equities heavily favor denying injunctive relief, the FTC can raise no "substantial question"
26 warranting a preliminary injunction. *See FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1160
27 (9th Cir. 1984). On the other hand, a preliminary injunction will likely end BP Amoco's acquisition

28 ALASKA'S OPPOSITION TO FTC'S MOTION FOR A PRELIMINARY INJUNCTION
CASE NO. C 00 0416 (SI) ..

1 efforts. *See, e.g., Federal Trade Commission v. Staples, Inc.*, 970 F. Supp. 1066, 1093 (D.D.C.
2 1997).

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

6 **II. ALASKA'S PERTINENT BACKGROUND FACTS**

7 **A. ALASKA'S EXPERIENCE WITH OIL PRODUCTION AND** 8 **DEVELOPMENT**

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

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

23
24
25 ¹ Alaska reserves a royalty share of the oil that is produced from State lands. AS
26 §§ 38.05.135-38.05.181 (1999). It also levies a production tax, AS § 43.55.011 (1999), and corporate
27 income tax, AS § 43.20.072 (1999), on the petroleum industry. One measure of the State's
28 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.

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

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

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

17 Alaska — unlike the FTC or the other States involved in this
18 proceeding — is fighting for its survival, and the single most critical
19 factor in this fight is the health and competitiveness of Alaska's oil
20 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.

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

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

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1 The Governor's primary emphasis on maintaining and invigorating
2 competition on the North Slope was the lodestar of our negotiations
3 with BP and ARCO. We understood that the basic framework of the
4 international oil industry had changed, that ARCO was not likely to
5 stay independent and thus could not be counted on to be the
6 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.

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

9 Condon Decl. at 13

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

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

23
24 ² The State's investigatory team was composed of cabinet-level officials, including the
25 Commissioner of the Department of Natural Resources, the Commissioner of the Department of
Revenue, the Special Counsel to the Governor and the Attorney General.

26 ³ The State also coordinated, as appropriate, its eight month long independent investigation
27 with the parallel investigations of the FTC, California, Oregon and Washington. Attorney General's
28 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.

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

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

11 **B. THE CHARTER FOR THE DEVELOPMENT OF THE** 12 **ALASKAN NORTH SLOPE**

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

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

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

26
27 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

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.

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1 acceptable if one company seeks both the A and B assets. Financial
2 qualifications are established for each asset set to ensure that the
companies have the size and experience to be vigorous competitors.

3 Company A will be the competitor with the larger share of BP/ARCO
4 assets. It receives at least 125,000 barrels per day of gross working
interest production. In simple dollar terms, at current prices, this is
5 more than one billion dollars per year of oil. In addition, the merging
6 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
7 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
8 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
9 divested lands must fall within identified "play fairways" so that the
buyer receives a rationally integrated assemblage of lands.

10
11 For federal lands, a similar requirement is established. Two hundred
and twenty thousand acres of lands in the National Petroleum Reserve
12 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
13 merging parties' combined interests in one of three identified sections
of the NPRA. In addition, BP/ARCO must work to ensure that the
14 company is the exploration operator of that section. Similar
requirements are established with respect to the exploration
15 operatorships of state lands.

16 Condon Decl. at 11-12.

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

1 **III. ARGUMENT**

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

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

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

16 First, this case does not concern the FTC's authority to challenge the proposed merger of BP
17 Amoco and ARCO. Alaska has never questioned the FTC's statutory right to seek a preliminary
18 injunction in this case under § 13(b) of the FTC Act. Rather, Alaska responds on the merits to the
19 FTC's antitrust allegations and request for equitable relief. Alaska's position is simple: the proposed
20

21
22 ⁷ For example, in its Opposition to Alaska's Motion to Intervene, the FTC mischaracterized
23 the State's position as contending that the Charter: "preclude[s] the Commission from enforcing the
24 antitrust laws" FTC's Opposition to Alaska's Motion to Intervene at 5, "preempts action by the
25 Commission" *id.*, "trump[s] the federal antitrust laws, or otherwise justif[ies] an anticompetitive
26 merger" *id.* at 6, or "constitutes a defense to the Commission's claims against them." *Id.* at 10.

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

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

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

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

21
22 ⁹ Federal courts consistently held that it is proper to consider evidence of divestiture
23 agreements or other actions taken to increase the pro-competitive effects of a proposed merger. See
24 *Procter & Gamble Co. v. Federal Trade Comm'n*, 358 F.2d 74, 82-3 (6th Cir. 1966) ("where the
25 evidence [of post-merger conditions] is obtained, it should not be ignored"), *rev'd on other grounds*,
26 *Federal Trade Comm'n v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *United States v. Connecticut*
27 *Nat'l Bank*, 362 F. Supp. 240, 282 (D. Conn. 1973) (the court "must view the proposed consolidation
28 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
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1 As described above, the Charter has modified significantly the original Plan and Agreement
2 of Merger between BP Amoco and ARCO. The Charter-mandated divestitures and other remedies
3 modify the very holdings to be acquired in this transaction. Post-merger, BP Amoco will not own the
4 same property and rights that it would have owned if its merger agreement with ARCO had
5 proceeded without the Charter. The rights and obligations specified in the Charter are now "part and
6 parcel of the merger agreement" between BP Amoco and ARCO. *United States v. Connecticut Nat'l*
7 *Bank*, 362 F.Supp. 240, 283 (D. Conn. 1973), *vacated on other grounds*, 418 U.S. 656 (1974)
8 (defendant's divestiture agreements were "an inseparable and relevant element of the entire proof on
9 likely competitive effects").

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

18 **B. THE FTC CANNOT SHOW THAT IT IS LIKELY TO SUCCEED** 19 **ON THE MERITS**

20 Section 13(b) of the FTC Act "was not enacted to authorize automatic preliminary
21 injunctions." *FTC v. Great Lakes Chemical Co.*, 528 F.Supp. 84, 99 (N.D.Ill. 1981). To prevail
22 under § 13(b), the FTC must make a "proper showing" that a preliminary injunction is in the public
23 interest. 15 U.S.C. § 53 (1998). The FTC must demonstrate: (1) a likelihood of success on the
24 merits in its case under Section 7 of the Clayton Act; and (2) that the equities tip in favor of
25 injunctive relief. *See FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984); *see*
26

27 Court should review all evidence available "at the time of suit," *see United States v. E.I. DuPont de*
28 *Nemours & Co.*, 353 U.S. 586, 607 (1957), and measure the effect on competition on that basis.
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1 also, *FTC v. Staples, Inc.*, 970 F.Supp. 1066, 1071 (D.D.C. 1997). The Commission meets its burden
2 only if it "raise[s] questions going to the merits *so serious, substantial, difficult and doubtful* as to
3 make them fair ground for thorough investigation, study, deliberation and determination by the FTC
4 in the first instance and ultimately by the Court of Appeals." *Warner Communications*, 742 F.2d at
5 1162 (emphasis added).

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

13
14 **1. Because of the Charter, the Proposed Merger Will Not
15 Lessen Competition in the Production and Distribution of
16 Crude Oil**

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

22 First, the FTC's proposed market definition — crude oil used by "targeted" West Coast
23 refiners — is not based on accurate facts and is not relevant for purposes of analyzing this
24 transaction. FTC Mem. at 7, 1.8-10. The FTC bases its purported market definition on the fact that
25 BP Amoco charges different prices to different buyers of its ANS crude oil. To be sure, BP Amoco
26 sells to about [] different customers on the West Coast, and there is currently a range of about
27

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

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

14 Second, the FTC's conclusion that BP Amoco's acquisition of ARCO would eliminate
15 constraints on BP Amoco's alleged market power is without foundation. FTC Mem. at 11. The
16 FTC's analysis is misguided. BP Amoco's acquisition of ARCO is not likely to reduce competition
17 in the sale of crude oil to West Coast refiners because BP Amoco and ARCO have never been
18

19
20 ¹⁰ This range of prices is largely unremarkable. For example, a comparison of price variation
21 for the benchmark crude WTI performed by Dr. Leitzinger reveals that prices vary by \$.50 -
22 \$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.*

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

24 ¹² The behavior of prices on the West Coast for ANS crude confirm that ANS is part of a
25 worldwide market. Leitzinger Report at 7, 10. Over the past four years, ANS prices on the West
26 Coast have been at worldwide parity with West Texas Intermediate Crude ("WTI"), a widely
27 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.

1 competitors in sales of ANS crude oil to the West Coast. Leitzinger Report at 11. BP Amoco is a
2 producer of ANS crude oil and has no refineries on the West Coast. All of the production it ships to
3 the West Coast is sold to third parties, known as "merchant sales." *Id.* at 6. ARCO, by contrast, is an
4 integrated producer/refiner/marketer that uses its ANS production to supply its own refineries. Since
5 1996, ARCO has been a net merchant buyer, not a merchant seller, of ANS. Moreover, it is not
6 reasonable to expect that, in the absence of the merger, ARCO would have become a surplus crude
7 owner, and therefore, a significant merchant seller of surplus. It is also unreasonable to expect that,
8 but for the proposed merger, ARCO would become a competitor to BP Amoco by selling ANS.
9 Thus, BP Amoco's acquisition of a non-merchant producer makes no impact whatsoever on merchant
10 production and sales.

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

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

23 The Charter also ameliorates the FTC's concern — albeit unfounded — that new entry into
24 the production and distribution of ANS crude oil to targeted refiners is unlikely to occur. FTC Mem.
25 at 13. To be sure, ease of entry is critical to a prospective new player's ability to compete
26 meaningfully on the North Slope. The Charter has identified and addressed this very concern. The
27

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

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

8
9 **2. Because of the Charter, the Proposed Merger Will Not
Lessen Competition in Bidding for ANS Exploration Leases**

10 Alaska, which clearly has the most at stake in this case, also can find no support for the FTC's
11 allegations in Count II that the merger would negatively impact competition in bidding for leases on
12 the North Slope. FTC Complaint ¶¶ 32-37; see Condon Decl. at 2. Specifically, the FTC contends
13 that the merger will reduce (i) "the amount of money received in future lease sales, to the detriment
14 of the State of Alaska and the Federal government" and (ii) "long-term exploration, development, and
15 production on the North Slope." FTC Mem. at 14, 1.17-18. Having identified and resolved these
16 very concerns, Alaska disagrees.

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

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

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

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

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

20 However, Alaska did not want the purchasers of producing assets to be mere harvesters of that
21 production. Rather, the State wanted the purchasers to be committed to the future of the State
22 through exploration. To that end, the Charter requires release of BP Amoco's and ARCO's
23 proprietary seismic data within three months of the merger. Charter at 4, I.E. The importance of
24 seismic data in oil and gas exploration simply cannot be overstated. Here, the release of such data
25 will provide bidders with the critical information necessary to understand the complex geology, and
26

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

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

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

- 14 (1) Divestiture of production capacity and leased acreage (compare
15 Charter at 2, I.A-H);
16 (2) Access to facilities (compare Charter at 4, I.F);
17 (3) Reduction in pipeline tariffs (compare Charter at 5. I.H).

18 PX 158-2. Indeed, DOI explicitly urged the FTC to "give serious consideration to such remedies,"
19 which would allow consummation of the merger and "reduce barriers to entry and promote
20 competition in the Alaska oil industry." PX 158-4. There is no question that the proposed merger of
21 BP Amoco and ARCO, as modified by the Charter, provides for these pro-competitive remedies and
22 much more. The Charter ensures that post-merger entrants will have the requisite "information,
23 infrastructure, and interest" to compete in bidding for ANS exploration leases. FTC Mem. at 16, l.
24 16-17. There can be no serious dispute that the merger, as modified by the Charter, is pro-

25
26
27 ¹³ The FTC mistakenly refers to this exhibit as "PX 157." FTC Brief at 14.
28 ALASKA'S OPPOSITION TO FTC'S MOTION FOR A PRELIMINARY INJUNCTION
CASE NO. C 00 0416 (SI) ..

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

3 C. THE EQUITIES REQUIRE DENIAL OF A PRELIMINARY 4 INJUNCTION

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

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

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

26
27 ¹⁴ The potential private benefits of the proposed merger to BP Amoco and ARCO will not be
addressed by Alaska.

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

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

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

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

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

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

11
12 There is also a national interest, recognized by Congress, in lifting the export ban, to
13 providing incentives upstream aimed at increasing supply of a major source of domestic oil. Alaska
14 believes there is no equity in casting its oil industry into another long period of uncertainty and
15 decline while the FTC takes a year or more, after nearly a year of investigation already, to decide
16 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

Respectfully submitted,

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

12 **FEDERAL TRADE COMMISSION,**

13 **Plaintiff,**

14 **v.**

15 **BP AMOCO, P.L.C.,**

16 **and**

17 **ATLANTIC RICHFIELD COMPANY,**

18 **Defendants.**
19

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

20 Pursuant to the Court's standing order of May 21, 1996, the State of Alaska submits this
21 Summary of Argument and Evidence regarding the State of Alaska's Motion to Intervene under
22 Federal Rule of Civil Procedure 24.
23

24 The Federal Trade Commission of the United States ("FTC") alleges that the proposed
25 merger of BP and ARCO will violate Section 7 of the Clayton Act. FTC Complaint ¶ 12.
26 Specifically, the Plaintiff alleges that the merger is likely to lessen competition in bidding for
27

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

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

9
10 The Charter-mandated divestitures together with other provisions of the Charter, eliminate
11 the anticompetitive risks of the BP-ARCO merger in Alaska. *See id.* The Charter also will
12 alleviate any concerns about the merger's potential impact on refiners in the states of California
13 and Washington — even though it is unlikely that the proposed merger would have had an adverse
14 impact on those refiners. At the same time, the Charter protects and enhances competitive oil
15 development in Alaska. Report of Alaska Attorney General Bruce Botelho to Governor Tony
16 Knowles dated Nov. 30, 1999 and attached as Exh. B. to the Declaration of Robert H. Loeffler
17 (hereinafter, "AG Report"). Because the Court must determine the likely state of competition in a
18 post-merger world, the Court will inevitably examine the terms of the Charter itself. Notably, the
19 FTC's complaint does not address how the Charter has altered the original Agreement and Plan of
20 Merger between ARCO and BP.² *See* FTC Complaint.

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

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

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

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

18 Alaska's interests, moreover, cannot be adequately represented by the existing parties.
19 Alaska has inherently different perspectives from either the FTC or BP and ARCO. The FTC's
20 interests are directly opposed to Alaska's because it seeks to block a merger that Alaska supports
21 under the terms of Charter. *Forest Conservation Council*, 66 F.3d at 1499. BP and ARCO have
22 different private economic interests. Unlike the merging parties, Alaska's merger analysis required
23 a delicate balancing of the competitive benefits and risks to the State from the merger — a balance
24 which is reflected in the Charter. *United States v. Oregon*, 835 F.2d 635, 638 (9th Cir. 1988);
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26
27

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

3 Even assuming Alaska were not entitled to intervene as of right, Alaska is entitled to
4 permissive intervention under Rule 24(b)(2). The text of Rule 24(b)(2) explicitly endorses
5 intervention where, as here, BP and ARCO inevitably will rely upon the Charter as part of their
6 defense to the FTC's Complaint which was entered into by Alaska's Attorney General pursuant to
7 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
8 to an action relies for ground of . . . defense upon any . . . agreement issued or made pursuant to the
9 statute or executive order, the officer or agency upon timely application may be permitted to
10 intervene in the action"); *Nuesse v. Camp*, 385 F.2d 694, 705 (D.C. Cir. 1967); *see, e.g., Blowers v.*
11 *Lawyers Coop. Publishing Co.*, 527 F.2d 333, 334 (2d Cir. 1975) (district courts should apply a
12 "hospitable" approach to intervention motions by government agencies). As a party to the Charter,
13 Alaska has relevant knowledge, interest, and evidence on its provisions. The core issue in this
14 case — whether competition is likely to be lessened substantially in relevant markets post-
15 merger — will be decided within the framework of the Charter.

16 The allegations of the FTC's complaint underscore Alaska's central interest. Count I
17 concerns the merger's impact on the refiners of ANS oil. Complaint at ¶ 18-31. Alaska has
18 relevant knowledge, interest, and experience on the sale of ANS oil, which is the State's largest
19 unrestricted revenue source. Count II of the Complaint concerns the impact of the merger upon
20 Alaska's leasing revenues. Complaint at ¶ 32-37. Again, Alaska has the best knowledge, interest,
21 and evidence on this subject. In addition, with more than a quarter century of oil industry
22 experience and having conducted its own antitrust investigation and subsequently negotiated the
23

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

3 In sum, intervention is wholly warranted here. Oil production is the foundation of Alaska's
4 economy. The future of that economy, as embodied in the Charter, is at risk in this action. Alaska
5 should not be forced to sit on the sidelines while vital state interests are litigated, and possibly
6 irreversibly injured, by others. This is particularly true when Rule 24 favors intervention even
7 under substantially less compelling circumstances and no delay or prejudice will be caused by
8 Alaska's intervention. Accordingly, for all these reasons, Alaska's motion should be granted and
9 Alaska should be permitted to participate fully in these proceedings.
10

11
12 Dated: February 7, 2000

13 Respectfully submitted,
14

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26
27 ³ At this time, Alaska takes no position on Count III which it believes not to be central to this
28 suit.

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10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13 **FEDERAL TRADE COMMISSION,**

14 **Plaintiff,**

15 **v.**

16 **BP AMOCO, P.L.C.,**

17 **and**

18 **ATLANTIC RICHFIELD COMPANY,**

19 **Defendants.**
20

Civil No. C 00 0416 (SI)

21
22 **MEMORANDUM OF POINTS AND**
23 **AUTHORITIES IN SUPPORT OF**
24 **THE STATE OF ALASKA'S**
25 **MOTION TO INTERVENE UNDER**
26 **FEDERAL RULE OF CIVIL**
27 **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”).

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

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

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

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

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

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

1 Charter itself to conduct their defense to the FTC's Complaint. Indeed, the plain language of Rule
2 24(b) permits a State to intervene where, as here, a party in the case relies for its defense on an
3 agreement made pursuant to a state statute. *See* Fed. R. Civ. P. 24(b).

4 The Charter is an agreement entered into by the Attorney General pursuant to
5 A.S. §§ 44.23.020, 45.50.568, 45.50.576 and 45.50.480; *see also* AG Report. As a party to the
6 Charter, Alaska has relevant knowledge, interest, and evidence on its provisions. The allegations of
7 the FTC's Complaint underscore Alaska's central interest. Count I concerns the merger's impact on
8 the refiners of ANS oil. Complaint at ¶¶ 18-31. Alaska has relevant knowledge, interest, and
9 experience on the sale of ANS oil, which is the State's largest unrestricted revenue source. Count II
10 of the Complaint concerns the impact of the merger upon Alaska's leasing revenues. Complaint at
11 ¶¶ 32-37. Again, Alaska has the best knowledge, interest, and evidence on this subject. In addition,
12 with more than a quarter century of oil industry experience and having conducted its own antitrust
13 investigation and subsequently negotiated the Charter, Alaska is in a unique position to offer
14 guidance and input to the Court on both the State's and the national interest in ANS oil leasing and
15 production issues.²

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

23 **I. BACKGROUND AND INTEREST OF PROPOSED INTERVENOR**

24 **A. Alaska's Experience with Oil Production and Development**

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

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

1 nation's two largest oil fields, the Prudhoe Bay and Kuparuk River fields, operate under leases from
2 the State. Charter at 1. Alaska's Commissioner of Natural Resources also has leased hundreds of
3 thousands of acres of other state land to spur future oil exploration and development. Not only does
4 the State lease land, but also it regulates oil exploration and production and receives compensation for
5 the exploitation of its resources from royalties and taxes.³ Alaska's economy is petroleum dependent:
6 70 % of unrestricted state revenues come from the petroleum industry. Last year, Alaska received
7 over a billion dollars in revenues from the disposition of its royalty oil and taxes on its oil industry.

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

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

22
23 ³ Alaska reserves a royalty share of the oil that is produced from State lands. AS
24 §§ 38.05.135-38.05.181 (1999). It also levies a production tax, AS § 43.55.011 (1999), and corporate
25 income tax, AS § 43.20.072 (1999), on the petroleum industry. One measure of the State's
26 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.

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

1 **C. Scope of Alaska's Proposed Intervention**

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

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

21 **STATEMENT OF ISSUE**

22 Has Alaska satisfied the standards for intervention under Fed. R. Civ. P. 24?
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28 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.

1 **ARGUMENT**

2 **I. ALASKA IS ENTITLED TO INTERVENE AS OF RIGHT UNDER RULE**
3 **24(A)(2)**

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

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

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

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

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

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

18 The Ninth Circuit has repeatedly held, moreover, that "interests" less obviously protectable
19 than Alaska's rights in the Charter suffice to allow intervention as of right. *Yniguez v. Arizona*, 939
20 F.2d 727, 735 (9th Cir. 1991) (granting intervention as of right for sponsors of ballot initiative
21 declaring official language in litigation challenging constitutionality of that statute); *Sagebrush*
22 *Rebellion v. Watt*, 713 F.2d 525, 527-28 (9th Cir. 1983) (granting intervention as of right to National
23 Audubon Society in suit challenging creation of conservation area); *Washington State Bldg. &*
24 *Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir.) (granting intervention as of right to
25 advocacy group which had sponsored antinuclear statute in suit challenging that statute), *cert. denied*,
26 461 U.S. 913 (1982).

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

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

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

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

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

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

3 The applicant-intervenor's burden of showing inadequate representation is minimal: it is
4 sufficient to show that representation may be inadequate. *Trbovich v. United Mine Workers*, 404 U.S.
5 528, 538 n.10 (1972); *Forest Conservation Council*, 66 F.3d at 1499. In making this determination,
6 the Court may consider: (1) whether the interest of a present party is such that it will undoubtedly
7 make all of the intervenor's arguments; (2) whether the present party is capable and willing to make
8 such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the
9 proceedings that other parties would neglect. *Northwest Forest Resource Council v. Glickman*,
10 82 F.3d 825, 838 (9th Cir. 1996).

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

16 Nor can BP and ARCO adequately represent the interests of Alaska in this case. The Charter
17 was designed to remedy Alaska's concerns with the transaction under Alaska law. ARCO and BP are
18 certainly not in a position to adequately represent Alaska's concerns with the proposed transaction or
19 how the Charter satisfies those concerns. *Sagebrush Rebellion*, 713 F.2d at 528 (granting
20 intervention as of right where "intervenor offers a perspective which differs materially from that of
21 the present parties"). In addition, the State recognized that the merger had certain fiscal benefits to
22 Alaska. Charter at 1-2. Again, neither BP nor ARCO are in as good a position to describe the
23 benefits of the proposed merger to Alaska and the absence of negative consequences on consumers as
24

25 ⁷ The Ninth Circuit has recognized, moreover, that states should be allowed to intervene
26 where a federal agency does not adequately represent state interests. In *Forest Conservation*, for
27 example, the Court found that the United States Forest Service was charged to represent broader
28 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.*

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

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

11 **II. ALASKA IS ENTITLED TO PERMISSIVE INTERVENTION UNDER RULE**
12 **24(B)**

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

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

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24 ⁸ Rule 24 "is to be construed liberally and not technically." *Fierro v. Gomez*, 1993 WL
25 414673 at *2 (N.D.Cal. 1993) (Patel, D.J.) (citing *Beckham Indus. Inc. v. International Ins. Co.*,
26 966 F.2d 470, 474 (9th Cir. 1992)); *accord E.E.O.C. v. National Children's Center, Inc.*, 146 F.3d
27 1042, 1046 (D.C.Cir. 1998) (the "force of precedent compels a flexible reading of Rule 24(b)"). At
28 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.