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

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

Preliminary Statement 1

ARGUMENT 3

I. Alaska is Not Entitled to Intervention as of Right Under Rule 24(a)(2) 3

A. Alaska Does Not Have An Interest In The Transaction That Is The Subject Of This Proceeding. 3

B. Alaska Has Not Shown That It Has Any Other Cognizable Legal Interest In The Transaction That Is The Subject of This Proceeding 4

C. Alaska's Interests Are Adequately Represented In This Proceeding 8

II. Alaska Is Not Entitled To Permissive Intervention Under Rule 24(b)(2) 9

III. Should The Court Allow Alaska To Participate In This Proceeding, Either As An Intervenor Or As An Amicus, That Participation Should Be Limited. 11

Conclusion 12

TABLE OF AUTHORITIES

FEDERAL CASES

American Maritime Transport, Inc. v. United States, 870 F.2d 1559 (Fed. Cir. 1989) ... 7

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 7-8

Beckman Industrial, Inc. v. International Insurance Co., 966 F.2d 470 (9th Cir. 1992) 10

Blake v. Pallan, 554 F.2d 947 (9th Cir. 1977) 10, 11

British Airways Board v. Port Authority, 71 F.R.D. 583 (SDNY), *aff'd*, 556 F.2d 554 .. 11

Bush v. Viterna, 740 F.2d 350 (5th Cir. 1984) 11

California v. American Stores Co., 495 U.S. 271 (1990) 5, 6, 10

California v. Tahoe Regional Planning Agency, 792 F.2d 775 (9th Circ. 1986) 11

Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc., 51 F.Supp. 97 (D. Mass. 1943) 11

Diamond v. Charles, 476 U.S. 54 (1986) 9

Donaldson v. United States, 400 U.S. 517 (1970) 8

Donnelly v. Glickman, 159 F.3d 405 (9th Cir. 1998) 8

EEOC v. Nevada Resort Ass'n, 792 F.2d 882 (9th Cir. 1986) 10

EEOC v. Pan American World Airways, Inc., 897 F.2d 1499 (9th Cir. 1990) 10

FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986) 6

FTC v. PPG Industrial, Inc., 798 F.2d 1500 (D.C. Cir. 1986) 5

FTC v. University Health, Inc., 938 F.2d 1206, 742 F.2d at 1165 (11th Cir. 1991) 5

FTC v. Warner Communications, Inc., 742 F.2d 1156 (9th Cir. 1984) 1

Greene v. United States, 996 F.2d 973 (9th Cir. 1993) 8

League of United Latin American Citizens ("LULAC") v. Wilson, 131 F.3d 1297 (9th Cir. 1998) 7, 8, 9

Northern Securities Co. v. United States, 193 U.S. 197 (1904) 4, 5

Northwest Forest Resource v. Glickman, 82 F.3d 825 (9th Cir. 1996) 8, 10

Philadelphia Electric Co. v. Westinghouse Electric Corp., 308 F.2d 856 (3rd Cir. 1962)11

Planned Parenthood of Mid-Missouri & Eastern Kansas, Inc. v. Ehlmann,

137 F.3d 573 (8th Cir. 1998) 7

Rio Grande Pipeline Co. v. FERC, 178 F.3d 533 (D.C. Cir. 1999) 7

Silver v. Babbitt, 166 F.R.D. 418, (D. Ariz. 1994) *aff'd*, 1995 U.S.App. LEXIS 29739 (9th Cir. 1995) 8

Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers, 101 F.3d 503 (7th Cir. 1996) 7

States v. ITT Continental Baking Co., 420 U.S. 223 6

Texas v. United States Department of Energy, 754 F.2d 550 (5th Cir. 1985) 11

United States v. Armour and Co., 402 U.S. 673 (1971) 2, 6

United States v. Borden Co., 347 U.S. 514 (1954) 2, 5

United States v. Philadelphia National Bank, 374 U.S. 321 (1963) 2

OTHER AUTHORITIES

FTC Act
Section 5, 15 U.S.C § 45 ..... 4, 8

Section 13 (b), 15 U.S.C. § 56(b) 4, 8

Clayton Act
Section 7, 15 U.S.C. § 7 4

Section 11, 15 U.S.C. § 21 ..... 4, 18

Fed. R. Civ. P. 24 ..... passim

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

Preliminary Statement

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

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

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

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

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

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

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

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

ARGUMENT

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

A person may intervene in an action as of right:

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

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

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

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

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

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

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

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

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

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

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

they are, as we show below, simply wrong.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(continued...)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

Respectfully submitted,

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Dated: February 16, 2000

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